"I AM CAIT," BUT IT'S NONE OF YOUR BUSINESS: THE PROBLEM OF INVASIVE TRANSGENDER POLICIES AND A FOURTH AMENDMENT SOLUTION

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Abstract

Transgender people constitute a distinct minority with unique legal battles. There is a widespread societal misunderstanding of what it means to be transgender that results in treating the transgender community the same as their lesbian, gay, and members of bisexual counterparts. This misunderstanding is even more prevalent in the legal context, resulting in a serious failure of courts to protect transgender individuals' constitutional rights. This Note explores why the current legal treatment of transgender rights is inadequate. This Note then argues that the Fourth Amendment right to privacy should be construed outside of the criminal context and should be utilized to protect transgender civil rights. Lastly, this Note will illustrate application of the Fourth Amendment right to privacy in contexts where transgender individuals face exceptional challenges.

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* J.D., University of Florida 2017; B.A., University of Maryland College Park 2014. Thank you to the faculty members at the University of Florida Levin College of Law, my Note advisors, and the editors and staff at the *Florida Law Review* for their guidance throughout this writing and publishing process. I also wish to thank my loving family and friends who supported me throughout this process, and the transgender community for their fearlessness and resilience. Finally, I wish to dedicate this Note to Susan O'Mahoney Holtzman and Bunny Holtzman.

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INTRODUCTION

Imagine that you are a child going to school for the first time. Now, imagine that you are left-handed. When it comes time for arts and crafts, you begin to color with your left hand. Suddenly, your teacher walks over and takes the crayon out of your left hand and places it into your right. She explains that right-handedness is better, that it is correct. You continue to color, fumble with the crayon, and attempt to complete the artwork but fail because your right hand will not work. You are trying to fit into the box the teacher said is correct. You know you are left-handed, but if someone were to ask how you knew, could you come up with a better response than "I just know"?[1]

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1. Hannah Simpson, *Hannah S.: "I Didn't Change My Gender; My Gender Changed Me,"* REFINERY29 (June 2, 2015, 1:00 PM), http://www.refinery29.com/hannah-simpson-transgender-medical-student-interview.

When Caitlyn Jenner came out to the world as a transgender[2] woman, interest in transgender lives spiked.[3] Caitlyn Jenner's public transition, along with many others', has brought the issue of transgender rights to the forefront of popular culture. Laverne Cox, a star of the popular series *Orange is the New Black*, was the first openly transgender actress to be nominated for an Emmy Award.[4] *Transparent*, a series revolving around a family's struggle through a father's transition from a man to a woman, has won numerous Golden Globe and Emmy Awards.[5] Also, it was only recently that the Miss Universe Pageant ended its ban on transgender contestants and allowed Jenna Talackova, the first transgender competitor, to participate in the competition.[6] These people represent a few of the many who feel as if they are forced to be right-handed when they know they are left-handed.[7]

The transgender presence has also become stronger in civic activism. There are numerous organizations, separate from their lesbian, gay, and bisexual minority counterparts, fighting for transgender equality.[8] These activists have seen victories. For example, the International Olympic Committee just removed the sexual-reassignment-surgery requirement

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2. This Note will use "transgender" to mean any person who identifies as a gender that does not correspond to the biological sex assigned at birth. AM. PSYCHOLOGY ASS'N, DEFINITIONS RELATED TO SEXUAL ORIENTATION AND GENDER DIVERSITY IN APA GUIDELINES AND POLICY DOCUMENTS (2011), https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf. This Note will use "sex" to mean the assignment of male or female to people at birth based on the reproductive organs with which they were born. *Id.* This Note will use "gender" to mean the attitudes or behaviors that society typically associates with a certain biological sex. *Id.* This Note will use "gender identity" to mean an individual's sense of oneself as male, female, or neither, regardless of the biological sex with which one is born. *Id.*

3. Lisa Respers France, *Caitlyn Jenner One Year Later: A Lot Has Changed*, CNN (June 8, 2016, 4:53 AM), http://www.cnn.com/2016/06/01/entertainment/caitlyn-jenner-anniversary/.

4. Noah Michelson, *Laverne Cox Makes History with Emmy Nomination*, HUFFINGTON POST (July 10, 2014, 12:29 PM), http://www.huffingtonpost.com/2014/07/10/laverne-cox-emmy-nomination_n_5574608.html.

5. *Transparent Awards*, IMDB, http://www.imdb.com/title/tt3502262/awards (last visited Nov. 4, 2016).

6. Alan Duke, *Miss Universe Pageant Ends Ban on Transgender Contestants*, CNN (Apr. 10, 2012, 10:40 AM), http://www.cnn.com/2012/04/10/showbiz/miss-universe-transgender/index .html.

7. One article estimates that 0.3% of the American adult population identifies as transgender. GARY J. GATES, WILLIAMS INST., HOW MANY PEOPLE ARE LESBIAN, GAY, BISEXUAL, AND TRANSGENDER? 1 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. However, the Census Bureau does not explicitly ask whether an individual identifies as transgender, so there is little concrete data on the transgender community. Benjamin Cerf Harris, *Likely Transgender Individuals in U.S. Federal Administrative Records and the 2010 Census* 2 (U.S. Census Bureau, Working Paper No. 2015-03, 2015).

8. *E.g.*, NAT'L CTR. TRANSGENDER EQUALITY, www.transequality.org (last visited Nov. 4, 2016); TRANSGENDER L. CTR., www.transgenderlawcenter.org (last visited Nov. 4, 2016).

from its transgender participation policy.[9] Transgender activists fighting these battles have made some of their most significant efforts in the courtroom. While a transgender discrimination case has yet to reach the U.S. Supreme Court, lower courts have dealt with the issue by treating transgender discrimination claims as sex discrimination claims under Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment.[10]

In 1890, future Supreme Court Justice Louis Brandeis and attorney Samuel D. Warren published *The Right to Privacy*, an article that detailed the protection the right to privacy afforded at the time, emphasizing one principle that has since been frequently mentioned in privacy jurisprudence[11]—the right to be left alone.[12] The authors argued that this right, in which the right to privacy is implicit, must develop alongside changes in society.[13] In explaining the evolution of the right to privacy, they stated, "The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only part of the pain, pleasure, and profit of life lay in physical things."[14] This concept of interpreting the law to accommodate transformations in society is certainly applicable today, and the right to be left alone can play a central role in analyzing transgender rights in the legal context.[15]

This Note argues that current legal treatment of transgender issues fails to fully protect transgender rights and achieve transgender equality. This Note further asserts that courts should look to the right to privacy, specifically under the Fourth Amendment to the U.S. Constitution, to better address transgender rights. Part I explains the approach courts have taken up to this point and explains how this approach has been ineffective. Part II explains the fundamental right to privacy under current Supreme Court precedent. Part III shows that the Fourth Amendment was intended to protect a right to privacy focused more on individual liberty than the Court currently provides. Lastly, Part IV demonstrates how the

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9. *See IOC Consensus Meeting on Sex Reassignment and Hyperandrogenism*, INT'L OLYMPIC COMMITTEE (Nov. 2015), http://www.olympic.org/Documents/Commissions_PDFfiles/Medical_commission/2015-11_ioc_consensus_meeting_on_sex_reassignment_and_hyperandrogenism-en.pdf. The Committee also removed any hormone-level requirements for female-to-male competitors. *Id.*

10. *See infra* Section I.A.

11. *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357, 383 (1997); Katz v. United States, 389 U.S. 347, 350–51 (1967); Sidis v. F-R Pub. Corp., 113 F.2d 806, 808 (2d Cir. 1940).

12. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 205 (1890) ("[T]he protection afforded to thoughts, sentiments, and emotions . . . is merely an instance of the enforcement of the more general right . . . to be let alone.").

13. *Id.* at 195.

14. *Id.*

15. *See infra* Part IV.

right to privacy under the Fourth Amendment could better protect transgender rights and serve as a basis for greater equality.

I. THE CURRENT TREATMENT OF TRANSGENDER DISCRIMINATION IS INADEQUATE TO PROTECT TRANSGENDER RIGHTS

With the growing visibility and discussion of transgender rights, courts have increasingly had to fashion remedies for violations of these rights. This Part explains and analyzes the way in which courts have treated transgender discrimination primarily as gender discrimination. Further, this Part will illustrate how this approach is insufficient to address transgender equality.

A. *Transgender Discrimination and the Equal Protection Clause*

The Supreme Court has a long history of sex discrimination jurisprudence. This jurisprudence has established legal classifications based on sex as quasi-suspect under the Equal Protection Clause of the Fourteenth Amendment.[16] The Court has repeatedly invalidated sex-based classifications based on stereotypical notions of male and female roles. For example, the Court invalidated an Alabama law that allowed women, but not men, to receive alimony on the grounds that the classification's distribution of benefits based on sex "carr[ied] the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection."[17] Later, the Court ruled unconstitutional a policy that excluded men from a state nursing school for "perpetuat[ing] the stereotyped view of nursing as an exclusively woman's job."[18]

The notion that classifications are invalid when based on traditional ideas of what men and women should or should not do came to its climax in *United States v. Virginia*.[19] There, the Virginia Military Academy refused to admit female students.[20] Writing for the majority, Justice Ruth Bader Ginsburg ruled that such an admission policy violated the Equal Protection Clause of the Fourteenth Amendment because it was based on stereotypes about the differences between men and women.[21]

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16. Miss. Univ. for Women v. Hogan, 458 U.S. 718, 723 (1982). The Fourteenth Amendment provides in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

17. Orr v. Orr, 440 U.S. 268, 283 (1979).

18. *Miss. Univ. for Women*, 458 U.S. at 729, 733.

19. 518 U.S. 515 (1996).

20. *Id.* at 523.

21. *Id.* at 550, 558.

The Supreme Court and other courts have extended this rationale to sex discrimination claims brought under Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits sex-based discrimination in employment.[22] These violations are also often held to be violations of the Equal Protection Clause of the Fourteenth Amendment.[23] In a landmark Title VII decision, *Price Waterhouse v. Hopkins*,[24] the Supreme Court held that an employer engaged in sex discrimination when it refused to promote a female employee to partner, because there was adequate proof that the company's decision was based on her failure to behave like a "woman."[25]

State and federal courts use the Supreme Court's rationale in these sex discrimination cases for transgender discrimination claims under Title VII and the Equal Protection Clause of the Fourteenth Amendment.[26] Specifically, the courts have utilized the holding in *Price Waterhouse*.[27] The courts have interpreted *Price Waterhouse* to only offer protection when the transgender individuals are discriminated against, "not because they are transgendered, but because their appearance and conduct does not conform to traditional male or female stereotypes."[28] This means that a transgender discrimination claim is not viable when the discrimination was simply based on the fact that the person is transgender, regardless of behavior. In other words, if a person discriminates based on dislike for expression of a gender identity opposite from the sex of which the

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22. 42 U.S.C. § 2000e (2012).

23. 42 U.S.C. § 1983 allows individuals deprived of rights or privileges protected by the Constitution to bring a civil action against those acting under state law. 42 U.S.C. § 1983.

24. 490 U.S. 228 (1989).

25. *Id.* at 272–73 (O'Connor, J., concurring). The Court examines the district court's findings that the employer told the employee that if she acted more feminine, wore more makeup and jewelry, and did her hair, she may have been promoted. *Id.*

26. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 32 (2011).

27. *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737, 741 (6th Cir. 2005) (holding that a police department's demotion of a male-to-female transgender officer because he failed to conform to generally accepted notions of how a man should dress and behave was invalid under *Price Waterhouse*); Smith v. City of Salem, 378 F.3d 566, 568–69, 577 (6th Cir. 2004) (holding that an employer's attempted firing and suspension of a male-to-female transgender firefighter was unconstitutional gender discrimination under *Price Waterhouse*); *see also* Krista D. Brown, Comment, *The Transgender Student-Athlete: Is There a Fourteenth Amendment Right to Participate on the Gender-Specific Team of Your Choice?*, 25 MARQ. SPORTS L. REV. 311, 322 (2014) ("[A] majority of courts have found that 'discrimination against a transgendered individual because of [his or her] failure to conform to gender stereotypes constitutes discrimination on the basis of sex.'" (second alteration in original) (quoting Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010))).

28. Lopez v. River Oaks Imaging & Diagnostic Grp. Inc., 542 F. Supp. 2d 653, 659–60 (S.D. Tex. 2008).

individual was born, there is no viable Title VII or Equal Protection Clause claim under current jurisprudence. There must be a showing that the discrimination was based on specific instances of the individual's failure to outwardly behave as a member of the sex in which he was born.[29]

This narrow interpretation leaves courts with two choices: find unlawful discrimination only when there is evidence of outward behavior inconsistent with conventional ideas of the individual's known anatomical sex, or expand the reasoning to find unlawful discrimination based on an individual's expression of a gender identity different from his or her anatomical sex. However, only one court has adopted the latter choice,[30] in what activists see as a transgender rights victory.[31] In *Schroer v. Billington*,[32] the Library of Congress rescinded a job offer from Diane Schroer after she informed a representative that she was in the process of transitioning from a man to a woman.[33] The U.S. District Court for the District of Columbia held that the Library of Congress discriminated against her because of her gender identity, not because of her failure to conform to stereotypes, and that this was enough to constitute illegal discrimination under Title VII and the Equal Protection Clause.[34] However, most courts have not followed the D.C. Circuit's lead.[35] For example, the Tenth Circuit held that discrimination against an individual based on his or her identity as transgender is not discrimination because of sex.[36] The court based this holding on the assertion that the term "sex" is strictly binary, and "protection extends to transsexual employees only if they are discriminated against because they are male or because they are female."[37] This reasoning implies that protection does not extend to transgender employees because they are transgender.

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29. *See* Schroer v. Billington, 424 F. Supp. 2d 203, 211 (D.C. Cir. 2006) (explaining the distinction between discrimination against men who exhibit traditionally feminine qualities and discrimination against people who express a gender identity different from their anatomical sex).

30. Heather L. Mckay, Note, *Fighting for Victoria: Federal Equal Protection Claims Available to American Transgender Schoolchildren*, 29 QUINNIPIAC L. REV. 493, 531 (2011).

31. *See, e.g.*, *Schroer v. Library of Congress*, AM. C.L. UNION, https://www.aclu.org/cases/schroer-v-library-congress (last updated Nov. 19, 2009).

32. 424 F. Supp. 2d at 203.

33. *Id.* at 206.

34. *Id.* at 212–13.

35. *See supra* notes 27–28; *see also* Glenn v. Brumby, 663 F.3d 1312, 1320 (11th Cir. 2011) (holding that the Equal Protection Clause is violated only when discrimination is based upon nonconformity with gender stereotypes); Creed v. Family Express Corp., No. 3:06-CV-465 RM, 2007 WL 2265630, at *4 (N.D. Ind. 2007) (rejecting a transgender woman's cause of action for discrimination based on transgender statutes but accepting a cause of action for discrimination based on gender stereotyping).

36. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007).

37. *Id.* at 1222.

As this Section illustrates, there has been one dominant approach to transgender discrimination—equal protection analysis of sex discrimination. Only one court has found illegal discrimination when discrimination was based on the person's status as transgender.[38] While it is clear that sex discrimination based on stereotypes is not constitutional,[39] the question of whether discrimination based on an individual's status as transgender alone is constitutionally permissible remains largely unanswered.

B. *The Inadequacy of the Fourteenth Amendment*

Current Fourteenth Amendment jurisprudence assumes that transgender discrimination is the same as sex discrimination. As a result, the Equal Protection Clause provides inadequate protection for transgender individuals for two reasons: (1) transgender individuals comprise a unique class of people who have distinct legal needs and (2) Fourteenth Amendment sex discrimination is based on a binary concept of sex and gender.

1. The Unique Transgender Community

Right now, courts are failing to recognize the transgender community as a distinct classification of people because there is a societal misunderstanding of what it means to be transgender. First, transgender people are often grouped together with lesbians, gays, and bisexuals in fights for civil rights.[40] However, transgender people are a discrete class of people that do not necessarily have the same legal needs as their lesbian, gay, and bisexual counterparts. In fact, as evidenced by the burgeoning transgender civil rights movement, it is clear that transgender people are still fighting battles that the gay community has already won.[41] The most comprehensive survey of transgender individuals to date was conducted by the National Center for Transgender Equality and National

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38. *Schroer*, 424 F. Supp. 2d at 212.

39. *See* Mckay, *supra* note 30, at 531 ("[D]uring the nineteen years following *Price Waterhouse*, every district court across the country recognized the sex-stereotyping approach, and the 'automatic rejection' approach was dead.").

40. The LGBT community has engaged in numerous social movements that advocate for full acceptance and social equality for LGBT individuals. In decisions regarding gay people, the Supreme Court often refers to the entire LGBT community.

41. *See* Tyler Curry, *Why Gay Rights and Trans Rights Should Be Separated*, HUFFINGTON POST (Feb. 17, 2014, 7:44 PM), http://www.huffingtonpost.com/tyler-curry/gay-rights-and-trans-rights_b_4763380.html; Danielle Paquette, *8 Critical Facts About the State of Transgender America*, WASH. POST (Jan. 22, 2015), http://www.washingtonpost.com/news/wonkblog/wp/2015/01/22/the-state-of-transgender-america-massive-discrimination-little-data/ (finding that 41% of transgender people surveyed had attempted suicide, a much larger portion than the 1.6% of the general population that had attempted suicide).

Gay and Lesbian Task Force in 2011.[42] Of the 6,450 transgender respondents, 23% identified as homosexual, and 23% identified as heterosexual.[43] This illustrates that sexual orientation and gender identity are two completely separate characteristics—a person is not gay by virtue of being transgender—being transgender is an issue of identity, not sexuality. An example of this distinction was Caitlyn Jenner's previous reluctance to support the legality of gay marriage.[44] As a transgender woman she does not identify as homosexual and does not see marriage equality as an issue that affects her as a transgender person.[45] This conflict is understandably puzzling. However, the fact that this confusion exists shows the lack of understanding of what it means to be transgender.

While lesbians, gays, and bisexuals experience similar discrimination, it is clear that transgender individuals face distinctive legal challenges.[46] For example, the study also shows that transgender respondents experienced twice the unemployment rate of the general population,[47] as well as "much higher rates of HIV infection, smoking, drug and alcohol use, and suicide attempts than the general population."[48] Because these issues are especially pronounced among the transgender community, this community needs remedies that lesbians, gays, and bisexuals may not. Furthermore, while many states have included a prohibition of discrimination against sexual orientation in their statutes, only few have included discrimination based on gender identity or gender non-conformity.[49] The issue of discrimination against changing gender and name information on identification documents is unique to transgender individuals.[50] For example, in Florida, transgender individuals have to

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42. JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL. & NAT'L LGBTQ TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

43. *Id.* at 2, 28.

44. *See* The Ellen Show, *Exclusive! Caitlyn Jenner Talks About Marriage*, YOUTUBE (Sept. 5, 2015), https://www.youtube.com/watch?v=_n8QskfvUfg.

45. *See id.*

46. Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 718 (2005) ("Gender nonconforming people frequently need to access basic legal services that are sensitive to their particular concerns in order to receive public benefits to which they are entitled . . . .").

47. GRANT ET AL., *supra* note 42, at 3.

48. *Id.* at 6.

49. *See* NAT'L CTR. FOR TRANSGENDER EQUAL., STATE NONDISCRIMINATION LAWS, http://www.transequality.org/sites/default/files/docs/resources/State-Nondiscrimination-Map%20.pdf (last visited Nov. 4, 2016).

50. GRANT ET AL., *supra* note 42, at 5; Romeo, *supra* note 46, at 717–18 ("Due to bias within the legal system, even matters as simple as a name change can be unexpectedly problematic."); *see, e.g.*, Marilyn S. Anglade, *A Study of Sexual and Gender Identity Theories and the Legal Implications of the Departure from the Traditional Binary Understanding of Sex and Gender*, 317

provide documentation from a physician proving they are undergoing a transition and must obtain a court order to change their gender on their driver's license.[51] In other states, these changes are even more difficult to obtain.[52] A person does not have to fill in "sexual orientation" on identification documents or job applications—treating two groups that only sometimes overlap as a group with the same characteristics misses the underlying issue and puts transgender individuals at a disadvantage.

This prevalent misunderstanding of what being transgender is and the unique legal battles transgender people face show the shortcomings of treating discrimination against them as sex discrimination in the courtroom. Transgender people are not discriminated against in the same way a woman is discriminated against for being a woman; they are discriminated against solely for being transgender—for having a gender identity different from the anatomical sex with which they were born. Treating discrimination against transgender individuals solely as if they were discriminated against based on sex ignores that the transgender community is unique in its characteristics, progress, and legal concerns.

2. Courts View Sex as a Binary Concept

Another fallacy in this Fourteenth Amendment jurisprudence is that it is based on an assumption that the relationship between sex and gender is purely binary. The notion of gender stereotypes relied on by courts is rooted in the belief that sex, or whether someone is anatomically male or female, is a fixed trait.[53] To be successful in an equal protection claim, a transgender individual has no choice but to concede the binary nature of sex and gender: that the anatomical sex he was born with is different from his expression of gender identity, like behavior or dress, which therefore does not conform to generally held expectations of that sex.[54] This legal rigidity is inadequate to really understand, and thus protect, transgender individuals under the Fourteenth Amendment.[55]

EDUC. L. REP. 15, 25 (2015) (discussing Texas requiring a court order regarding an individual's sex change proof of identity).

51. FLA. HIGHWAY & SAFETY PATROL, DIV. OF MOTORIST SERVS., GENDER REASSIGNMENT REQUIREMENTS (2011).

52. For example, in Texas people must first amend their birth certificate, which costs money and requires a court order. *See Change Information on Your Driver License or ID Card*, TEX. DEP'T PUB. SAFETY, http://www.txdps.state.tx.us/DriverLicense/changes.htm (last visited Nov. 4, 2016). After this, they must obtain another court order to amend the driver's license and a separate court order certifying the gender change. *Id.* To obtain a court order certifying the gender change, they must provide medical records. *Id.*

53. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & C.R. L. REV. 651, 665 (2008).

54. *See supra* Section I.A.

55. *See* Anglade, *supra* note 50, at 20.

One reason this lack of flexibility could be harmful to transgender rights is that it provides no remedy for transgender individuals that do not express their gender identity according to society's expectations of typical men *or* women.[56] In an article arguing for a better legal remedy for transgender discrimination, Professors Elizabeth M. Glazer and Zachary Kramer said: "Transgender individuals are sometimes men in dresses. They are sometimes women in tuxedos. They are sometimes men who used to be women and are sometimes women who used to be men. They are sometimes men, and they are sometimes women."[57] A binary perception of sex and gender precludes protection of transgender people who occupy the gray areas that exist in the transgender community.[58] Under current jurisprudence, transgender people have to show that they express a gender identity opposite their anatomical birth sex. For example, if the person was born a man and now identifies as a transgender woman, she must show evidence that her outward behavior was that of a woman and that this outward behavior was the basis for discrimination.[59] How then, is a transgender woman who does not act like a typical woman, and instead just identifies as one, afforded protection under the Equal Protection Clause? As long as courts adhere to this binary view of gender and sex, there is likely no remedy for such a person. Requiring transgender people to prove they fit certain stereotypes to be protected from discrimination based on those stereotypes creates a burden that transgender people are unlikely to meet, precisely because they are transgender.

Therefore, treating transgender discrimination as sex discrimination for purposes of the Equal Protection Clause of the Fourteenth Amendment fails to offer adequate protection. That analysis does not recognize transgender people as a distinct class of individuals, and it presumes a binary idea of sex and gender that undermines evolved understandings and possible remedies for transgender discrimination. Offering a remedy only for transgender individuals who can prove they were discriminated against for failing to conform to gender stereotypes ignores the complexity of gender identity and provides a surface solution to distinct discrimination. Therefore, courts should consider other constitutional rights as possible frames for analysis of transgender civil rights.

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56. Stevie V. Tran & Elizabeth M. Glazer, *Transgenderless*, 35 HARV. J.L. & GENDER 399, 401 (2012).

57. Glazer & Kramer, *supra* note 53, at 671–72.

58. Stephen B. Thomas & Valerie Riedthaler, *Gender Identity Disorder, Colleges, & Federal Employment Law*, 212 EDUC. L. REP. 575, 575 (2006) ("[T]he courts have used [transgendered] as an umbrella to include cross dressers or transvestites, male-to-female and female-to-male transsexuals, transgenderists . . . , bigender persons . . . , drag queens and kings, and female and male impersonators." (emphasis omitted)).

59. *See supra* Section I.A.

II. THE RIGHT TO PRIVACY IN CURRENT JURISPRUDENCE

The Supreme Court has construed the right to privacy under the Fourteenth and Fourth Amendments to the Constitution. Each interpretation provides a different perspective of the right to privacy; however, both analyses consider the importance of protecting personal autonomy and human dignity.

A. *The Fourteenth Amendment Fundamental Right to Privacy*

The right to privacy is arguably one of the most significant fundamental rights held by U.S. citizens. While this right is not mentioned explicitly in the U.S. Constitution,[60] it has permeated American jurisprudence.[61] The Supreme Court first recognized a fundamental right to privacy in *Griswold v. Connecticut*.[62] The Court invalidated a Connecticut law that prohibited any person from giving information about contraception, or providing contraception, to married couples.[63] In writing for the majority, Justice William Douglas found that this statute violated a fundamental right to privacy found in the "penumbras" of the First, Third, Fourth, Fifth, and Ninth Amendments to the Constitution.[64]

However, in the cases that followed, the Court rooted this fundamental right to privacy in the liberty prong of the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. Not long after *Griswold*, Justice William Brennan invalidated a law prohibiting distribution of contraceptives to single persons under the Equal Protection Clause.[65] In the opinion he stated, "if the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[66] Furthermore, in *Roe v. Wade*,[67] the Court held that the fundamental right to privacy is "founded in the Fourteenth Amendment's concept of personal liberty" and extends to a woman's decision to terminate her pregnancy.[68]

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60. Roe v. Wade, 410 U.S. 113, 152 (1973).

61. Anita L. Allen, *Coercing Privacy*, 40 WM. & MARY L. REV. 723, 733 (1999) ("Privacy as a legal norm is especially pervasive in the United States.").

62. 381 U.S. 479, 485–86 (1965).

63. *Id.*

64. *Id.* at 484.

65. Eisenstadt v. Baird, 405 U.S. 438, 454–55 (1972).

66. *Id.* at 453.

67. 410 U.S. 113 (1973).

68. *Id.* at 153 ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

The Court has also emphasized the importance of privacy in protecting the fundamental right to make personal decisions about marriage, child rearing, and education.[69] In *Zablocki v. Redhail*,[70] the Court invalidated a law that barred fathers who had not paid child support from marrying, stating that "it would make little sense to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society."[71] The Court has also addressed the fundamental right to privacy with regard to the right to refuse medical treatment. In *Cruzan v. Director, Missouri Department of Health*,[72] the Court held that under the Due Process Clause an individual has a right to refuse medical treatment,[73] and even the dissent noted that "[t]he sanctity, and individual privacy, of the human body is obviously fundamental to liberty."[74]

More recently, the Court has not explicitly used the fundamental right to privacy to invalidate state laws, but has referred to the cases concerning marriage and family[75] as creating a constitutionally protected zone of autonomy under the Due Process Clause of the Fourteenth Amendment. In *Lawrence v. Texas*,[76] the Court extended this fundamental right to intimate sexual conduct between two consenting adults.[77] The Supreme Court invalidated a Texas statute criminalizing intimate sexual conduct between two persons of the same sex as a violation of the Due Process Clause.[78] Writing for the majority, Justice Anthony Kennedy did not base the invalidation on a fundamental right to privacy but referred to the discussion of privacy in the aforementioned cases as proof "that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"—ultimately finding that intimate sexual conduct is within a zone of autonomy provided by the Fourteenth Amendment.[79] Justice Kennedy also referenced this concept of autonomy

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69. Zablocki v. Redhail, 434 U.S. 374, 386 (1978); *e.g.*, Troxel v. Granville, 530 U.S. 57, 68–69 (2000) ("[T]here will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of [the] parent to make the best decisions concerning the rearing of [the] parent's children.").

70. 434 U.S. at 374.

71. *Id.* at 375–77, 386.

72. 497 U.S. 261 (1990).

73. *Id.* at 280.

74. *Id.* at 342 (Stevens, J., dissenting).

75. *Zablocki*, 434 U.S. at 386.

76. 539 U.S. 558 (2003).

77. *Id.* at 578.

78. *Id.*

79. *Id.* at 573–74.

in *Obergefell v. Hodges*,[80] where the Court ruled that prohibiting same-sex couples from getting married violates the Fourteenth Amendment.[81] The Court stated: "A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy."[82] Again, Justice Kennedy referenced *Zablocki*, which found the right to marry inherent in the fundamental right to privacy.[83]

It is clear that there is a fundamental right to privacy derived, in some instances, from the Fourteenth Amendment. However, the cases illustrate that in more recent years the Court has abandoned language centered on privacy and focused on autonomy, dignity, and individual liberty, which suggests these interests may be privacy interests that can be independently afforded protection by the Constitution.

B. *The Fourth Amendment Right to Privacy*

The Supreme Court has also found a constitutionally protected right to privacy under the Fourth Amendment.[84] However, Fourth Amendment treatment of the right to privacy is conceptually and textually different from that of the Fourteenth Amendment.[85] According to Supreme Court case law, the primary purpose of the Fourth Amendment is to protect an individual from warrantless searches and seizures by the government. The standard set forth and upheld by the Supreme Court was articulated in Justice John Harlan's concurrence in *Katz v. United States*,[86] which said a warrantless search and seizure was unconstitutional if the individual had a reasonable expectation of privacy.[87] People have a reasonable expectation of privacy when they exhibit a subjective

80. 135 S. Ct. 2584 (2015).

81. *Id.* at 2597, 2627.

82. *Id.* at 2599.

83. *Id.* (citing Loving v. Virginia, 388 U.S. 1 (1967) and Zablocki v. Redhail, 434 U.S. 374 (1978)).

84. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

85. *See* Thomas P. Crocker, *The Political Fourth Amendment*, 88 WASH. U. L. REV. 303, 308 (2010) ("Privacy is no doubt an important constitutional value, protected not only by the Fourth Amendment, but also by the due process clauses of the Fifth and Fourteenth Amendments.").

86. 389 U.S. 347 (1967).

87. *Id.* at 361 (Harlan, J., concurring); *see also* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 STAN. L. REV. 503, 526–27 (2007) ("The Fourth Amendment prohibits unreasonable searches and seizures, and in the *Katz* era it has been understood as an essential tool for requiring reasonable police practices . . . .").

expectation of privacy that is objectively reasonable.[88] However, case law after *Katz* is not dominated by a discussion of the importance of this privacy right, but rather whether a state agent's action was "reasonable."[89]

As a result of this focus on reasonableness rather than privacy, Fourth Amendment claims arise when the government gathers evidence for a crime.[90] Professor David E. Steinberg describes the typical process:

> In search and seizure cases, after determining that the Fourth Amendment applies to an investigation, the Supreme Court then specifies the Fourth Amendment standard that governs the law enforcement activity. In some cases, law enforcement officers must obtain a warrant. In other cases, officers must possess "probable cause," or a "reasonable suspicion."[91]

Often, the *Katz* standard is applied, and the conclusion of that analysis decides the case.[92] This typical Fourth Amendment jurisprudence is limited to police-practice regulation, but it has the potential to be expanded to better protect the privacy rights that the Court constantly mentions as significant.[93]

Unlike Fourteenth Amendment jurisprudence, the Fourth Amendment right to privacy focuses on the reasonableness of state action rather than individual liberties. This has disconnected the Fourth Amendment from the more generalized and primary constitutional themes, which is discussed below.[94]

III. THE INTENDED SCOPE OF THE FOURTH AMENDMENT

As explained above, the Fourth Amendment has predominately been read as a police-practice regulation.[95] This stifles the potential for the Fourth Amendment notion of privacy to evolve into a broader conception of liberty that includes a heightened protection of dignity, autonomy, and self-identification.

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88. *Katz*, 389 U.S. at 361.

89. *See* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 202 (1993); *see also* Kerr, *supra* note 87, at 506 (discussing four models of the Supreme Court's interpretation of the reasonable expectation of privacy test).

90. David E. Steinberg, *The Original Understanding of Unreasonable Searches and Seizures*, 56 FLA. L. REV. 1051, 1052 (2004).

91. *Id.* (footnotes omitted).

92. *Id.* at 1054.

93. *See infra* Section III.B.

94. *See infra* Part III.

95. Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 200 (1993).

A. *Importance of Fourth Amendment Placement in the Bill of Rights*

The Bill of Rights is the most explicit and exhaustive list of protections of individual liberties in the U.S. Constitution. The ten amendments that comprise it were drafted by James Madison and ratified by the states in an attempt to protect their citizens' most important rights from intrusion by the federal government.[96] Some scholars argue it is significant that in drafting the Fourth Amendment Madison chose to use the terms "the right of the people," which he also used in the First and Second Amendments but refrained from using in the other amendments regarding criminal procedure.[97] Professor Thomas P. Crocker argues that this language indicates a collective right rather than an individual right:

> The political right of "the People" may be manifest as an individual right to be secure in "their persons," but the collective political right transcends the interests of private individuals. Focusing on privacy alone misses the broader political implications of the "right of the people to be secure" through the protections afforded by the Fourth Amendment.[98]

This view of the Fourth Amendment provides a more historically accurate context for its interpretation—a context where the Fourteenth Amendment did not yet exist to serve as the almost default basis for substantive protection of individual rights.[99] It allows analysis of the Fourth Amendment strictly in light of contemporary amendments.

Upon a basic reading of the Fourth Amendment, the physicality of its language stands in contrast to the rest of the Bill of Rights. The terms

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96. *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1136 (1991) (describing the Bill of Rights as "[o]riginally a set of largely structural guarantees applying only against the federal government").

97. U.S. CONST. amends. I, II, IV; *see* Amar, *supra* note 96, at 1175 (asserting that the First and Second Amendments' use of the phrase "implied a core collective right, echoing the Preamble's commitment to the ultimate sovereignty of 'We the People of the United States'" (emphasis omitted)); Cloud, *supra* note 95, at 295 ("The [F]ourth [A]mendment exists for the very purpose of enhancing individual liberty by constraining government power."); Crocker, *supra* note 85, at 363 ("Overlooked is the idea that a plurality free from widespread misuse of search or seizure is important to the constitution of a vibrant deliberative polity.").

98. *See* Crocker, *supra* note 85, at 314, 360 ("The accepted narrative of how privacy came to dominate Fourth Amendment jurisprudence begins with Justice Brandeis's dissent in *Olmstead v. United States* . . . .").

99. Amar, *supra* note 96, at 1136 ("[T]he process of incorporation has had the unfortunate effect of blinding us to the ways in which the Bill has thereby been transformed."); Cloud, *supra* note 95, at 200 ("[S]cholars who teach and write about broader jurisprudential themes in the context of the first or fourteenth amendments . . . and other topics commonly associated with the rubric of 'constitutional law,' are unlikely to apply these same concepts to the [F]ourth [A]mendment . . . .").

"persons, houses, papers, and effects" emphasize the physical sphere the amendment seeks to protect.[100] Looking at it this way, the Fourth Amendment is arguably a method of protection for First Amendment liberties: it offers the constitutional standards to be applied when the person or material searched or seized implicates First Amendment liberties.[101] For example, the Fourth Amendment could be interpreted to protect against a search of a newspaper office that would be so intrusive as to result in delaying publication or forcing the journalists to resort to severe self-censorship to avoid sparking the interest of the police.[102]

This broad, liberty-centered conception of the Fourth Amendment is also seen in Supreme Court analysis of search and seizure cases. In a famous dissenting opinion, Justice Brandeis articulated the breadth of the Fourth Amendment as a part of the Bill of Rights:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the *right to be let alone*—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.[103]

Following his lead, other Supreme Court Justices have suggested that the Fourth Amendment's place in the Bill of Rights gives it broader meaning than it is currently granted.[104] For example, in holding that a search was unconstitutional under the Fourth Amendment, Justice Thomas Clark stated, "[W]e are aware of no restraint . . . conditioning the enforcement of any other basic constitutional right. The right to privacy,

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100. U.S. CONST. amend. IV.

101. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 806 (1994); *see also* Samuel C. Rickless, *The Coherence of Orthodox Fourth Amendment Jurisprudence*, 15 GEO. MASON U. C.R. L.J. 261, 275 (2005) (referring to the Fourth Amendment, "the Bill of Rights would have no teeth, and the fundamental rights established therein would remain unprotected, in the absence of a judicially imposed enforcement mechanism").

102. *See* Zurcher v. Stanford Daily, 436 U.S. 547, 563–64 (1978).

103. Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) (emphasis added).

104. *See* Maclin, *supra* note 89, at 200 ("Justices have attempted to bolster this view of the central meaning of the Fourth Amendment by pointing to the text of the amendment, as well as the history surrounding its adoption.").

no less important than any other right carefully and particularly reserved to the people, would stand in marked contrast to all other rights . . . ."[105] Likewise, in a dissenting opinion, Justice John Paul Stevens articulated "a more majestic conception" of the Fourth Amendment that grants more credence to its constitutional history and text.[106] Indeed, he said that the majority's "[assumption] that the Fourth Amendment . . . has the limited purpose of deterring police misconduct" was invalid.[107] More recently, Justice Ruth Bader Ginsburg expressed her agreement with Justice Stevens's view that the Fourth Amendment "is a constraint on the power of the sovereign, not merely some of its agents."[108]

These broader interpretations of the Fourth Amendment are not limited to the regulation of police activity, as they involve a more fundamental conception of individual liberty.[109] To broaden the focus of the Fourth Amendment from criminal procedure to protection of the fundamental right to privacy as an individual liberty would be to afford the full intended strength of the Bill of Rights's protection to the Fourth Amendment's already broad allowance for government interference.[110] Thus, the Fourth Amendment has the potential, if analyzed in light of its place in the original framework of the Bill of Rights, to offer more protection for the fundamental right to privacy.

B. *Fourth Amendment Jurisprudence Encompasses a Broader Right to Privacy*

Although Fourth Amendment jurisprudence has largely focused on the reasonableness of state actors,[111] there are broader notions of privacy underlying case law. Rights of dignity, bodily integrity, and selective disclosure emanate from the search and seizure cases, allowing for an interpretation of the Fourth Amendment that protects the fundamental right to privacy in a way that is more protective of individual liberties.

1. Inherent Notions of Bodily Integrity and Dignity

The Fourth Amendment protects a broad right to privacy that must be developed to provide better protections for dignity and bodily integrity. These concepts are essential liberties that motivate the Supreme Court's

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105. Mapp v. Ohio, 367 U.S. 643, 656 (1961).

106. Arizona v. Evans, 514 U.S. 1, 18 (1995) (Stevens, J., dissenting).

107. *Id.*

108. Herring v. United States, 555 U.S. 135, 151–52 (2009) (Ginsburg, J., dissenting) (quoting *Evans*, 514 U.S. at 18 (Stevens, J., dissenting)).

109. *See id.*; Crocker, *supra* note 85, at 330.

110. Thomas P. Crocker, *From Privacy to Liberty: The Fourth Amendment After* Lawrence, 57 UCLA L. REV. 1, 56 (2009).

111. *See supra* Section II.B.

assessment of Fourth Amendment claims, but they are often dicta or in a dissenting opinion.[112] However, the Court's regular discussion of these issues in search and seizure cases, because of their centrality to the underlying idea of the Fourth Amendment, illustrates the potential expansion of the right to privacy afforded by the Fourth Amendment.

The Supreme Court has specifically dealt with Fourth Amendment protections of dignity and bodily integrity in cases involving body searches and drug tests.[113] For example, *Terry v. Ohio*,[114] perhaps the most famous stop and frisk case, presents one of the most ringing endorsements the Supreme Court has provided for the argument that dignity is implicit in the right to privacy protected by the Fourth Amendment.[115] There, the Court explained that a stop and frisk constitutes a search under the Fourth Amendment but went on to state:

> [I]t is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." *It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly*.[116]

Thus, the Court implied that the Fourth Amendment protects an individual's dignity and bodily integrity.

Similarly, in *Schmerber v. California*,[117] a case where a defendant challenged a blood sample—taken after he was taken into custody and used as evidence at trial—as the product of an unreasonable search and seizure, the Court stated, "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[118] Together, *Terry* and *Schmerber* demonstrate the importance of dignity and bodily integrity to Fourth Amendment privacy concerns, especially when government actions are physically invasive.

Supreme Court opinions also discuss the dignity and bodily integrity rights implicit in the Fourth Amendment right to privacy in cases where

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112. *See supra* Section III.A.

113. *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 207–08 (2011) ("The Court implicitly appeals to intrinsic human dignity because the dignity of privacy applies to each person equally, and furthermore, the dignity of privacy does not have an external standard for measuring what makes privacy dignified.").

114. 392 U.S. 1 (1968).

115. *Id.* at 16–17.

116. *Id.* (emphasis added) (footnote omitted).

117. 384 U.S. 757 (1966).

118. *Id.* at 767. However, the Court held in *Schmerber* that the intrusion did not violate the Fourth Amendment. *Id.* at 772.

the subject of the search or seizure under scrutiny was intangible. For example, in *Osborn v. United States*[119] the Supreme Court upheld the use of a tape recorder without a warrant as permissible under the Fourth Amendment.[120] Lamenting the Court's decision, Justice Douglas warned that this narrow interpretation of the Fourth Amendment "demonstrate[s] an alarming trend whereby the privacy and dignity of our citizens is being whittled away by sometimes imperceptible steps."[121] In stating this, Justice Douglas presupposed an inherent quality of dignity in the privacy required to converse freely. Furthermore, in a case involving the search of an automobile passenger's personal belongings, the Court based its analysis on the proposition that the legality of the search depends on "the degree of intrusiveness upon personal privacy and indeed even personal dignity."[122] These cases make it clear that Supreme Court Justices consistently incorporate notions of dignity and bodily integrity in their analysis of the Fourth Amendment right to privacy.

2. Right to Selective Disclosure

Fourth Amendment jurisprudence also suggests potential for the advanced protection of privacy rights in selective disclosure, or the right to control what information or activities one shares with another.[123] The antithesis of privacy is exposure: personal privacy is meaningless if one cannot choose whether to share or withhold information.[124] In explaining a liberal conception of privacy, Professor Anita Allen opines: "We associate privacy with certain places and things we believe we own, such as our homes, diaries, letters, names, reputations, and body parts. . . . [P]rivacy is the notion of inaccessibility."[125] In this light, exercising privacy as a fundamental liberty occurs in choosing the information one wishes to share with the world.[126]

In analyzing the Fourth Amendment, i.e. in deciding whether a person had a reasonable expectation of privacy, the Supreme Court often

119. 385 U.S. 323 (1966).

120. *Id.* at 330–31.

121. *Id.* at 343 (Douglas, J., dissenting).

122. Wyoming v. Houghton, 526 U.S. 295, 302–03 (1999).

123. *See* Whalen v. Roe, 429 U.S. 589, 598–600 (1977); Kristin M. Raffone, Note, *The Human Genome Project: Genetic Screening and the Fundamental Right of Privacy*, 26 HOFSTRA L. REV. 503, 529 & n.154 (1997).

124. Allen, *supra* note 61, at 724.

125. *Id.*

126. *Id.* ("Privacy obtains where persons and personal information are, to a degree, inaccessible to others."); Thomas P. Crocker, *Ubiquitous Privacy*, 66 OKLA. L. REV. 791, 801 (2014) ("Under the Fourth Amendment, one of the central values of privacy is that persons must retain the liberty to form their own personal identities through acts of both sharing and withholding information and spaces.").

considers whether that person disclosed or exposed information or activities to the public.[127] In *Katz*, the Court relied on the significance of nondisclosure in holding that there was a reasonable expectation of privacy in a telephone booth.[128] The Court stated, "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection."[129] This illustrates that the privacy protected by the Fourth Amendment stems from a greater liberty to choose whether or not one will share information with the public.

The Court has also emphasized that the Fourth Amendment protects the liberty inherent in the nondisclosure of private conversations that occur in one's home or office—for example, when it invalidated a New York statute that allowed officials to record conversations in a private office for an extended period of time.[130] Writing for the majority, Justice Clark said, "[The Fourth Amendment] has long been recognized as basic to the privacy of every home in America. . . . Few threats to liberty exist which are greater than that posed by the use of eavesdropping devices."[131] Although not explicitly stated, underlying the Court's rationale is the idea that the choice to conduct conversations in a known private space is a liberty inextricably connected to the privacy guaranteed by the Fourth Amendment. More recently, in a decision that declared a dog sniff to be an unconstitutional search under the Fourth Amendment,[132] Justice Elena Kagan argued that the Fourth Amendment is violated when an officer "nos[es] into intimacies you sensibly thought [were] protected from disclosure."[133] Justice Kagan's argument further connects Fourth Amendment privacy and selective disclosure.

The Court's consideration of whether a person chooses to disclose information or expose activity illustrates that the liberty of selective disclosure is implicit in the privacy protected by the Fourth Amendment. As such, courts could utilize the Fourth Amendment more forcefully and broadly to protect a fundamental right to privacy by specifically protecting the right to selectively disclose information.

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127. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 40 (1988) (holding that defendants lacked reasonable expectation of privacy in trash bags left on the street because the trash bags are exposed to the public); Oliver v. United States, 466 U.S. 170, 179 (1984) (holding that the defendant lacked a reasonable expectation of privacy in open fields that the public can easily access).

128. Katz v. United States, 389 U.S. 347, 351 (1967).

129. *Id.*

130. Berger v. New York, 388 U.S. 41, 63 (1967).

131. *Id.*

132. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).

133. *Id.* at 1418 (Kagan, J., concurring).

C. *Fourth Amendment Protection of Self-Identification and Personal Autonomy*

Today, personal identity is not straightforward. People no longer consistently identify as distinctly heterosexual or homosexual,[134] or as distinctly a man or a woman.[135] This is significant because societal norms shape the legal analysis of expectations of privacy.[136] The changes in how people self-identify and express identity warrant recognition by the legal system, and part of that recognition is protection under the Fourth Amendment right to privacy.

The Constitution and Fourth Amendment case law call for a Fourth Amendment conception of privacy that better protects privacy as an individual liberty. The Fourth Amendment needs to protect dignity, bodily integrity, and selective disclosure even in the absence of a search and seizure. With vast advancements in technology, personal information is increasingly accessible and dignity, bodily integrity, and disclosure of private information can be abused without physical intrusion. At the heart of these concepts are the basic liberties of personal autonomy and self-identification.[137] The Fourth Amendment's protection of privacy should protect autonomy in self-identification and autonomy in choosing to share that information.[138]

The Fourth Amendment protects dignity and bodily integrity because it prevents unwarranted intrusions into a person's physical space or private life. When the Fourth Amendment is violated—whether by an unlawful stop and frisk or abduction of private documents—a person can lose a sense of self-worth, safety, or wholeness. These dignitary harms can directly affect the way people identify themselves.[139] In the abstract, this explains movements such as Black Lives Matter. Instances of state violence and other dignitary harms against African-Americans spawned an entire movement where black Americans identify and encourage each

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134. *See* Noah Michelson, *What's a Skoliosexual?*, HUFFPOST GAY VOICES (Oct. 16, 2015, 9:55 AM), http://www.huffingtonpost.com/entry/skoliosexual-zucchini-and-10-other-sexual-identity-terms-you-probably-dont-know_561bf841e4b0082030a35f80.

135. *See supra* pp. 2–3.

136. Aubrey Burris, *Hell Hath No Fury Like a Woman Porned: Revenge Porn and the Need for a Federal Nonconsensual Pornography Statute*, 66 FLA. L. REV. 2325, 2335 (2014) ("[C]ontext and social norms influence our understanding of privacy . . . .").

137. *See supra* Section III.B.

138. Crocker, *supra* note 126, at 801–02.

139. *See* Crocker, *supra* note 85, at 331 ("Dignitary harms result from unjustified physical contact by state agents. They are experienced by particular persons and shape how persons view their own security and how they fulfill their promise of liberty. . . . Fourth Amendment violations shape how individual persons experience their everyday relations to the institutions of government.").

other to individually identify as people victimized by the government.[140] The movement consists of, among other groups, African-Americans, incarcerated citizens, victims of domestic violence, and victims of queer and transgender discrimination—groups that suffer dignitary harms at the hands of society and the government.[141] The African-Americans who have joined this movement, or identify with it, are examples of individuals who self-identify in a certain way because of dignitary harms perceived to be executed by the government.

Selective disclosure protects self-identification in a more specific sense. We self-identify by choosing what to share with the world and what to shield. Professor Anita Allen eloquently connected notions of privacy, disclosure, and self-identification, stating, "Privacy is a matter of escaping as well as embracing encumbrances of identity. Without adequate privacy, there can be no meaningful identities to embrace or escape, and no opportunities to engage in meaningful reflection, conversation, and debate about the grounds for embracing, escaping, and modifying particular identities."[142] As part of the Bill of Rights, the Fourth Amendment is meant to offer security of expression or non-disclosure and to prevent governmental intrusion in that expression or choice to withhold.[143] This translates to a protection of autonomy in disclosure and self-identification.

The Fourth Amendment right to privacy must mean more than control of police practices—it has to mean protection of self-identification and autonomy in personal decision-making through protections of dignity, bodily integrity, and selective disclosure. The jurisprudence espousing these rights allows the Fourth Amendment to serve as the constitutional vehicle for Samuel Warren and Louis Brandeis's conception of the right to privacy, the "right of the individual to be let alone."[144] Therefore, these concepts should trigger Fourth Amendment protection in the absence of a physical search or seizure and should extend beyond the realm of police regulation.

IV. THE NEW FOURTH AMENDMENT RIGHT TO PRIVACY IN THE TRANSGENDER CONTEXT

A broadened conception of the Fourth Amendment that encompasses a right to privacy that protects one from intrusions into dignity, bodily integrity, and self-identification would better protect transgender rights than the current Fourteenth Amendment framework. This Part will apply

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140. *See About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ (last visited Nov. 4, 2016).

141. *Id.*

142. Allen, *supra* note 61, at 754–55.

143. *See supra* Subsection III.B.2.

144. *See* Warren & Brandeis, *supra* note 12, at 205.

this theory to areas where transgender people have uniquely encountered discrimination.

A. *Amending Identification Documents*

One of the most challenging issues transgender people face is amending identification documents to reflect the sex that corresponds to their gender identity. In Florida, to amend a driver's license to reflect a different sex, one must obtain a medical certification by a physician that certifies the person is undergoing "appropriate" treatment for the transition to a new gender.[145] In Iowa, to change the gender on a driver's license one must show an amended birth certificate or obtain a court order, which a judge will grant or deny based on whether the appearance of the person matches the new sex that will appear on the driver's license.[146] Texas has similar requirements, requiring either a court order or an amended birth certificate that includes both a name and gender change.[147] In the many states that require a court order approving a gender change on an identification document, the petitioner must show proof of a surgical procedure.[148] Further, in some states, a judge has discretion as to whether the procedure constitutes a transition sufficient to warrant a change on the document.[149]

Some states require registration with the Social Security Administration as a prerequisite to changing state identification documents.[150] However, to change a name with the Social Security

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145. FLA. HIGHWAY & SAFETY PATROL, *supra* note 51.

146. IOWA ADMIN. CODE r. 674.2 (2014); *see* ERIC BIGLEY ET AL., THE IOWA GUIDE TO CHANGING LEGAL IDENTITY DOCUMENTS (2014), http://www.pflagcr.com/wp-content/uploads/2014/10/Iowa-Guide-To-Changing-Legal-Identity-Documents-4-30-14.pdf.

147. *ID Documents Center: Texas*, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/texas (last visited Nov. 4, 2016).

148. *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-337(A)(4) (2015) (requiring a court order for amendment of a birth certificate with proof that the individual has undergone a sex change operation or has a certain chromosomal count); VA. CODE ANN. § 32.1-269(E) (2015) ("Upon receipt of a certified copy of an order of a court of competent jurisdiction indicating that the sex of an individual has been changed by medical procedure . . . , the State Registrar shall amend such person's certificate of birth to show the change of sex . . . ."). Statutes governing these changes often do not mention gender specifically but require that the applicant submit adequate materials to convince the court that the change should be granted.

149. *See, e.g.*, OR. REV. STAT. § 432.235(4) (2015) ("[W]hen the state registrar has cause to question the validity or adequacy of the application, the state registrar, in the state registrar's discretion, may refuse to amend the vital record . . . .").

150. *See, e.g.*, *How to Change Your Legal Name/Gender Marker*, MASS. TRANSGENDER POL. COALITION, http://www.masstpc.org/get-help/identity-documents/ (last visited Nov. 4, 2016); *ID Documents Center: Delaware*, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/delaware (last visited Nov. 4, 2016); *ID Documents Center: Nevada*, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/nevada (last visited

Administration, one must obtain a court order,[151] which adds a preliminary legal process to the following round of court orders and applications required to change the state identification documents. Furthermore, to change gender with the Social Security Administration, one must provide a ten-year passport, amended birth certificate, court order, or medical certification by a licensed physician confirming the new gender.[152]

Changing information on a birth certificate is often a lengthy and expensive process. For example, Iowa requires a notarized affidavit from a surgeon stating the individual has undergone surgery to change sex, and a notarized birth certificate amendment form or certified copy of a court-ordered name change.[153] The surgical affidavit must state that the surgery is permanent and must describe the medical procedures used.[154] Submitting this package of materials to the Iowa Department of Health costs twenty dollars,[155] but there are also costs associated with obtaining each of the materials to submit: most obvious is the surgery and ensuing medical treatment, which is extremely expensive[156] and is usually not covered by insurance.[157] Texas requires a court order granting a gender

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Nov. 4, 2016); *ID Documents Center: Vermont*, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/documents/state/vermont (last visited Nov. 4, 2016). While this is required for any person changing a name (in instances of marriage or divorce) it is important to illustrate all of the procedural hurdles transgender people face in changing documents to understand how inadequately prepared the current structure is in dealing with the transgender community.

151. *Frequently Asked Questions: How Do I Change or Correct My Name on My Social Security Number Card?*, SOC. SECURITY ADMIN., https://faq.ssa.gov/link/portal/34011/34019/Article/3749/How-do-I-change-or-correct-my-name-on-my-Social-Security-number-card (last visited Nov. 4, 2016).

152. *Frequently Asked Questions: How Do I Change My Gender on Social Security's Records?*, SOC. SECURITY ADMIN., https://faq.ssa.gov/link/portal/34011/34019/Article/2856/How-do-I-change-my-gender-on-Social-Security-s-records (last visited Sept. 14, 2016).

153. IOWA CODE § 144.23 (2016).

154. BIGLEY ET AL., *supra* note 146, at 7–8.

155. *Id.* at 8.

156. According to the Philadelphia Center for Transgender Surgery, a male-to-female surgery typically costs around $140,450. *Male to Female Price List*, PHILA. CTR. TRANSGENDER SURGERY, http://www.thetransgendercenter.com/index.php/mtf-price-list.html (last visited Nov. 4, 2016). A female-to-male surgery is estimated to cost about $145,650. *Female to Male Price List*, PHILA. CTR. TRANSGENDER SURGERY, http://www.thetransgendercenter.com/index.php/femaletomale1/ftm-price-list.html (last visited Nov. 4, 2016).

157. California, Colorado, Connecticut, the District of Columbia, Oregon, and Vermont have banned most private insurance companies from categorically excluding transgender care, however, that does not mean the companies are required to cover surgeries and hormone treatments. *Health Care Rights and Transgender People*, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/sites/default/files/docs/kyr/HealthCareRight_UpdatedMar2014_FINAL.pdf (last visited Nov. 4, 2016). Medicare covers "medically necessary" sex reassignment surgery or hormone therapy, and Medicaid does the same in the few states that have mandated it.

change, which requires proof of a surgical procedure, and an application to amend a certificate of birth, which also must contain certification by a medical attendant that appropriate surgical procedures occurred.[158] Tennessee prohibits changing sex on a birth certificate regardless of whether the individual has undergone any sex reassignment surgery.[159]

Changing gender on documentation is not just a matter of affording transgender people the dignity found in recognition of one's identity by the state; there are more concrete practical concerns as well. Birth certificates are required to, among other things, register for school, obtain a driver's license, participate in sports, prove eligibility for employment, obtain a passport, and apply for numerous social services. The gender on a birth certificate is determinative of eligibility or extremely significant to the issuance and use of all of these things. Furthermore, presenting identity documents that state a sex incongruous with appearance leads to rejection from job interviews, harassment, and assault.[160]

Of course, there are legitimate government interests in requiring a demanding process for amending a birth certificate, such as preventing identity fraud and supporting the government's ability to identify and keep track of criminals. However, in the statutes that govern name and gender changes, many states include provisions directing courts to run criminal background checks and deny the change if it would result in a law enforcement officer being unable to identify a person who has a final felony conviction.[161] Thus, the solution to these legitimate concerns already exists.

If the Fourth Amendment encompasses a right to privacy that safeguards personal autonomy by protecting against intrusions into bodily integrity, requiring transgender people to provide proof of medical treatment and surgery to amend identification documents is arguably unconstitutional. First, requiring surgical procedures is itself a direct governmental intrusion into a person's dignity and bodily integrity. Many people who identify as transgender have no desire to undergo sex reassignment surgery, regardless of the cost, and few wish to have the extent of surgery necessary to fully transform their anatomical sex.[162]

Know Your Rights: Medicare, NAT'L CTR. TRANSGENDER EQUALITY, http://www.transequality.org/know-your-rights/medicare (last visited Nov. 4, 2016).

158. *See* TEX. HEALTH & SAFETY CODE ANN. § 192.010 (West 2015); TEX. DEP'T STATE HEALTH SERVS., APPLICATION TO AMEND CERTIFICATE OF BIRTH, http://dshs.texas.gov/vs/reqproc/forms/VS-170-REV-7-15-application-to-amend-birth.pdf (last updated June 21, 2016).

159. TENN. CODE ANN. § 68-3-203(d) (2016) ("The sex of an individual shall not be changed on the original certificate of birth as a result of sex change surgery.").

160. *See* GRANT ET AL., *supra* note 42, at 153.

161. *See, e.g.*, TEX. FAM. CODE ANN. § 45.103 (West 2015).

162. Samuel E. Bartos, *Letting "Privates" Be Private: Toward a Right of Gender Self-Determination*, 15 CARDOZO J.L. & GENDER 67, 79 (2008) ("Transgendered individuals include

Thus, state policies requiring medical proof of transition are forcing these people to undergo surgical procedures to legally identify themselves as the sex that matches their gender identity. Furthermore, these state policies do not give adequate guidelines to judges as to how much surgery is required.[163] This completely takes the power to choose how much to alter one's body out of the hands of the individual seeking to change identification documents. Not only is this out of touch with the realities of the transgender community, it is a direct and unwarranted intrusion by the government into the choices people make about their bodies.

Second, a court's discussion of a transgender individual's anatomy is itself a violation of privacy. This detailed inquiry into the procedures and result of surgery is a direct intrusion into a person's dignity and bodily integrity. When a court is determining whether a medical procedure is sufficient to warrant a documentary change in gender, it typically uses a "body-parts checklist," where it reviews the procedures performed to "meticulously scrutinize" the petitioner's current sexual anatomy.[164] A judge is literally reviewing a person's anatomy to determine whether that person is allowed to live his or her life as the gender, rather than sex, which he or she was born. Additionally, the judge may look at the person as he or she appears in court to determine whether the change is warranted. Subjecting people to this kind of inspection, in which they are physically deconstructed and analyzed in parts, is a dignitary harm and infringement of the body that should be prevented by the Fourth Amendment right to privacy.

Furthermore, if the Fourth Amendment right to privacy safeguards a right to self-identification through the liberty to selectively disclose information, the current extent to which transgender people who wish to change the gender on their identification documents are required to disclose medical information is arguably unconstitutional. Medical

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people who present as the other sex but take no hormones and have no surgery, people who take hormones to change their secondary sex characteristics but have no surgery, and people who have a range of surgical procedures to alter their anatomical sex. *Only a small percentage have surgery, and a still smaller percentage have all the surgery required to change all aspects of the anatomical sex*."); *see also* GRANT ET AL., *supra* note 42, at 78–79; Parker Marie Molloy, *Debunking the 'Surgery Is a Top Priority for Trans People' Myth*, ADVOCATE (Mar. 13, 2014, 9:39 AM), http://www.advocate.com/politics/transgender/2014/03/13/watch-debunking-surgery-top-priority-trans-people-myth; *Transgender Frequently Asked Questions*, HUM. RTS. CAMPAIGN, http://www.hrc.org/resources/transgender-faq#9 (last visited Nov. 4, 2016).

163. *See* Bartos, *supra* note 162, at 69 ("[F]ar too often [the courts'] obsession with anatomy leads them to require that in every case extensive, invasive surgical interventions must have been undergone. For many, this project of achieving a perfect and acceptable appearance of the 'other sex' is an ordeal that . . . takes years and is prohibitively expensive . . . .").

164. Taylor Flynn, *The Ties That (Don't) Bind: Transgender Family Law and the Unmaking of Families*, *in* TRANSGENDER RIGHTS 32, 37 (Paisley Currah et al. eds., 2006); *see* Bartos, *supra* note 162, at 71.

information is inherently private; it is the most individualized and important information people have about themselves.[165] Therefore, the importance of liberty in selective disclosure is at its height in choosing to share medical information. State requirements for amending documents that require detailed disclosure of procedures or treatments undergone infringes on the liberty of self-identification. Transgender people are forced to list the extent to which they are physically transitioned, which has nothing to do with their gender identity.[166] This results in a conflict: They are obligated to disclose information that might contradict the identity they wish to share with the world, therefore inhibiting them from living out that identity. The Fourth Amendment right to privacy should prevent this infringement on the liberty to self-identify as one chooses.

It is unlikely that states will entirely abolish medical-proof requirements for court orders granting gender changes. This Note, however, does not call for such a solution, but suggests rather that these requirements should be analyzed under a constitutional standard that prohibits intrusive infringements on bodily and personal autonomy. For example, these requirements could be much more narrowly tailored by only requiring a medical professional to certify that treatment occurred or is occurring, without detailing the kind of treatment or extent of medical procedures undergone for a judge's inspection. Some states have gone in this direction. For example, in New York, people can amend the gender on their birth certificates with a notarized affidavit from a medical provider stating they have undergone appropriate clinical treatment, which does not require sex-reassignment surgery.[167] In Maine, to change the gender on a driver's license, one must only provide a "Gender Designation Form" and a medical or social services provider's statement that the gender change sought is a result of a conflicting gender identity, and there is no medical procedure required.[168] However, these states are in the minority in enforcing less intrusive requirements. A new legal remedy is necessary.

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165. *E.g.*, Doe v. City of New York, 15 F.3d 264, 269 (2d Cir. 1994) (holding that a person "has a right to privacy (or confidentiality) in his HIV status, because his personal medical condition is a matter that he is normally entitled to keep private").

166. *See supra* pp. 25–26.

167. *See* N.Y. DEP'T OF HEALTH, NEW YORK STATE GENDER CHANGE INSTRUCTION SHEET (2015), http://www.transequality.org/documents/state/new-york.

168. ME. BUREAU OF MOTOR VEHICLES, GENDER DESIGNATION FORM, http://www.maine.gov/sos/bmv/forms/GENDER%20DESIGNATION%20FORM.pdf (last updated Jan. 2013).

B. *Gender Identity in the Educational Context*

The transgender community also endures a unique legal struggle in the school system. Many transgender discrimination cases brought under the Equal Protection Clause, and picked up by the media, are in the context of students' access to the bathroom or locker room that conforms to their gender identity.[169] The trend in courts thus far has been to deny protection to these students.[170]

State legislators have responded to these cases by introducing bills that would prohibit schools from allowing transgender students to use bathrooms that do not correspond to their anatomical sex.[171] North Carolina was the first state to pass legislation of this kind, and multiple parties, including the federal government, have sued the state claiming civil rights violations.[172] The North Carolina law requires that, in all public accommodations, transgender individuals use the bathroom or changing facility that corresponds to the anatomical sex on their birth certificate.[173] These laws have brought the issue of transgender

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169. *See* Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 922 (2007); *see also* Adam Dupuis, *Transgender Students' Use of Bathrooms vs Locker Rooms - Are They the Same Argument?*, INSTINCT MAG. (Dec. 6, 2015), http://instinctmagazine.com/post/transgender-students-use-bathrooms-vs-locker-rooms-are-they-same-argument; Emanuella Grinberg, *Bathroom Access for Transgender Teen Divides Missouri Town*, CNN (Sept. 5, 2015, 3:37 PM), http://www.cnn.com/2015/09/03/living/missouri-transgender-teen-feat/; Julie Zauzmer, *Judge Denies Transgender Student's Request to Use Boys' Bathroom*, WASH. POST. (Sept. 4, 2015), https://www.washingtonpost.com/local/education/judge-denies-transgender-students-request-to-use-boys-bathroom/2015/09/04/c3516238-534d-11e5-9812-92d5948a40f8_story.html.

170. *See* G.G. v. Gloucester Cty. Sch. Bd., 822 F.3d 709, 730–31 (4th Cir. 2016) (denying a transgender student's motion for a preliminary injunction to allow him to use the bathroom that corresponded to his gender identity rather than birth sex), *mandate recalled, stay granted by* 136 S. Ct. 2442; Johnston v. Univ. of Pittsburgh, 97 F. Supp. 3d 657, 661, 683 (W.D. Pa. 2015) (granting the university's motion to dismiss student's discrimination claim when the school expelled him for using men's restrooms and locker rooms); *cf.* Doe v. Reg'l Sch. Unit, 86 A.3d 600, 606 (Me. 2014) (holding that, under the Maine Human Rights Act, a school could not deny a student access to the bathroom corresponding to her gender identity because the school had already created a program that specifically addressed the plaintiff's gender identity issues).

171. *See, e.g.*, H.R. 583, 2015 Reg. Sess. (Fla. 2015) (prohibiting the use of single-sex public bathrooms by a member of the opposite biological sex); S. 76, 15th Reg. Sess. (Ky. 2015); A.B. 375, 2015 Gen. Assemb., Reg. Sess. (Nev. 2015); H.R. 1748, 84th Reg. Sess. (Tex. 2015) (prohibiting the use of a women's restroom by a person with a Y chromosome).

172. *See* Amber Phillips, *The Legal Fight over North Carolina's Transgender Bathroom Law, in Four Questions*, WASH. POST (May 9, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/05/09/the-legal-fight-over-north-carolinas-transgender-bathroom-law-explained-in-4-questions/.

173. 2016 N.C. Sess. Laws 3. The law also prohibits local governments, school boards, and other state entities from providing exceptions to this general rule.

discrimination to the forefront and will give courts many opportunities to approach the issue.

However, the cases brought thus far have been brought under the Fourteenth Amendment or Title VII,[174] and courts have justified denying protection to transgender students on the basis that it interferes with the other students' overriding right to privacy.[175] This reasoning survives an equal protection analysis because it does not consider the privacy rights of the transgender individual. Not only are public restrooms with multiple stalls not typically places where a person has a reasonable expectation of privacy,[176] the focus on the privacy interests of the other students whose self-identification and personal choices are not being questioned is misplaced—the real intrusion into privacy is the public discussion of transgender students' birth, sex, and gender identity.

Sports participation is another area in the school system where transgender students face unique challenges. While physical differences between boys and girls may not be as relevant at a young age,[177] in high school and college transgender athletes prove controversial because sex and gender have historically served as the main organizing principle for sports.[178] Currently, only four states have a policy that allows high-school students to participate on the sports team consistent with their gender identity regardless of the gender listed on their student records.[179] Nonetheless, the student must often get permission from the local school board, which has complete discretion to grant or deny the request.[180]

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174. *See supra* Section I.A.

175. *See G.G.*, 132 F. Supp. 3d at 753 ("The School Board seeks to protect an interest in bodily privacy that the Fourth Circuit has recognized as a constitutional right while [Plaintiff] seeks to overturn a long tradition of segregating bathrooms based on biological differences between the sexes."); *Johnston*, 97 F. Supp. 3d at 669 (approving the school's policy because it is "based on the need to ensure the privacy of its students to disrobe and shower outside of the presence of members of the opposite sex").

176. *See* United States v. Hill, 393 F.3d 839, 841 (8th Cir. 2005) ("We have held that a person using a public restroom enjoys a reasonable expectation of privacy in being shielded from view by the privacy partitions in the restroom. . . . [W]e have never held that this expectation lasts indefinitely." (citation omitted)); Elkind, *supra* note 169, at 925.

177. *E.g.*, Kosuke Kojima et al., *Multi-Age-Grouping Paradigm for Young Swimmers*, 30 J. SPORTS SCI. 313, 315 (2012) ("There were no [sex-based] differences . . . in swimmers under the age of 8 . . . .").

178. *See* Buzuvis, *supra* note 26, at 3.

179. For example, the Washington Interscholastic Athletic Association was the first organization to adopt a policy for transgender athletes. *Id.* at 24–25.

180. *E.g.*, COLO. HIGH SCHOOL ACTIVITIES ASS'N CONSTITUTION art. 3 (2016), http://rcasey.wpengine.netdna-cdn.com/wp-content/uploads/bylaws/2015-2016-bylaws.pdf; CONN. ASS'N OF SCH., CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE HANDBOOK 56 (2015–2016), http://www.casciac.org/pdfs/ciachandbook_1516.pdf.

There is a proven educational and social value in sports participation, especially for transgender students.[181] In general, educational institutions' athletic programs teach sportsmanship, raise self-esteem, and build skills and character in ways that are not possible in a classroom.[182] For transgender students, sports participation can prove even more beneficial, because being on a team "may help mitigate feelings of isolation and offer some protection against harassment."[183]

California has the most liberal policies concerning student athletic participation and bathroom access.[184] California's Legislature enacted the School Success and Opportunity Act, which requires public schools to allow transgender students to use the bathrooms and play on the sports teams that are consistent with their gender identity.[185] This policy shows other students, parents, legislators, and states that transgender students are not to be feared, but rather accepted and embraced. Other states can look to the success of California's policy to support similar measures.

In both the context of bathroom access and sports participation, a more expansive Fourth Amendment right to privacy could better protect the rights of transgender students than the current equal protection framework. First, under the broadened conception of the Fourth Amendment, the general requirement that parents disclose their child's birth sex to the public school system in the first place is arguably a violation of that student's right to privacy. The most common timeframe during which people realize or communicate that they are transgender occurs prior to puberty and as early as toddlerhood.[186] So, at the time children typically express to their parents that they are transgender, they are unable to control disclosure of information that could inhibit them from expressing that identity. If school systems did not require disclosure of birth certificates or the student's birth sex, but rather allowed the parent to disclose the child's gender identity, the issues of bathroom access and sports participation might never even come up in a student's life. Furthermore, students' privacy would be fully protected because their self-identification, not their anatomy, would be the only factor that schools look at to determine what bathroom they can use or what team they can play on.

Second, and even more crucially, inquiries into students' anatomical sex to determine which bathroom or sports team they can choose violates

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181. *See* Buzuvis, *supra* note 26, at 44–48.

182. *Id.*

183. *Id.* at 48 (finding that sports can minimize feelings of isolation for children who are in disadvantaged groups).

184. *See* Brown, *supra* note 27, at 315.

185. CAL. EDUC. CODE § 221.5(e)–(f) (West 2016).

186. STEPHANIE BRILL & RACHEL PEPPER, THE TRANSGENDER CHILD 61 (2008).

the Fourth Amendment right to privacy by causing dignitary harm. The Department of Justice issued a statement of interest on the issue of transgender bathroom access stating, "Granting transgender students access to restrooms consistent with their gender identity will serve the public interest by ensuring that the [School] District treat all students within its bounds with respect and dignity."[187] Preventing transgender students from joining activities or using facilities consistent with their gender identity at school, and instead coercing them into behaving consistently with their birth sex, forces them to contradict and be ashamed of the identity they assert in all other facets of life.[188] Regardless of the justification for these policies, they are inherently exclusionary and result in isolation of transgender students, which negatively affects the way they view themselves and their sense of self-worth.[189] Furthermore, like judges inspecting medical records for a court order, school board officials inspecting medical histories or considering children's anatomy is an invasion of their bodily integrity because it reduces them to the sexual organs with which they were born and gives no credence to the identity they share with the world.

The solutions in this Note should be implemented to better protect all students and the educational environment. The concepts explained provide an illustration for the Fourth Amendment's potential role in protecting transgender rights. The right to privacy in the Fourth Amendment safeguards against government intrusions that inhibit personal autonomy and self-identification. It ensures the right to be left alone.[190] Ignoring students' gender identities and coercing them into conforming to their biological sex violates their ability to selectively disclose information, causes severe dignitary harm, and impermissibly infringes on their bodily integrity. These concepts are implicit in the Fourth Amendment's right to privacy, and thus the policies being carried out by a majority of state public-school systems need to be reexamined to better protect the fundamental liberties of transgender students.

CONCLUSION

This Note does not presume that a comprehensive solution to this issue is readily found in the Fourth Amendment. Of course, there are

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187. Statement of Interest of the United States at 14, G.G. v. Gloucester Cty. Sch. Bd., No. 4:15cv54 (E.D. Va. June 29, 2015).

188. Brown, *supra* note 27, at 321 ("Forcing a transgender athlete to play on the athletic team that conforms to the athlete's birth-sex, instead of the one consistent with the athlete's gender identity, is incompatible with the reputation the athlete has probably sought to implement in every other aspect of the athlete's life.").

189. *Chapter Two: Transgender Youth and Access to Gendered Spaces in Education*, 127 HARV. L. REV. 1722, 1737 (2014).

190. *See supra* Section III.C.

numerous practical difficulties and legitimate governmental interests that will limit the scope of protection of transgender people's right to privacy. Anatomical sex is relevant in numerous contexts, as discussed in this Note. If high-school students, irrespective of gender, were vying for a spot on a unisex team, many females could be driven out of the chance to participate in sports at all. Furthermore, if transgender people do not have to prove any kind of procedure or treatment to change the gender on their identification documents, there will be difficulties faced by law enforcement in performing body searches and eventually in designating what prison he or she should be assigned to if convicted. However real these concerns, they do not overshadow transgender people's right to be treated with dignity and integrity under the law.

As it stands, courts are not utilizing the Constitution in a way that adequately protects the rights of transgender individuals. Because of the unprecedented intrusiveness of laws concerning transgender people's bodies and personal autonomy, protection of transgender rights calls for consideration of a different constitutional framework. As the transgender activist movement grows and comes closer to the forefront of social and legal causes, the law will be compelled to remedy the infringement of transgender people's rights by lawmakers and judges who lack a fundamental understanding of what it means to be transgender. Transgender people are people. Society must move beyond a binary understanding of sex and gender, and must stop using this understanding as an excuse to ignore the rights of an entire class of people. While the Fourth Amendment protection of privacy, the inherent right to be left alone, should be used to protect the fundamental rights of the transgender community, it is but one avenue to that end.