

# ANOMALOUS ANATOMIES: HOW THE TSA SHOULD SCREEN FOR TRANSGENDER PEOPLE

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*A transgender person faces obstacles trying to negotiate a gender-binary world. Going through a TSA checkpoint is no different. A substantial number of transgender persons have reported that they were detained and examined because they were transgender.<sup>1</sup> Why this situation persists and what policy reforms should be implemented to alleviate it are the subjects of this Essay. This Essay is devoted mainly to the theme of transgender rights, rather than race, a central theme of the symposium in which this Essay appears. Given the relatively small pool of transgender individuals for whom data is available, this Essay is unable to make meaningful conclusions about whether and, to what extent, race plays a role in this analysis. This Essay does, however, conclude by sharing some brief reflections about how race, if explored in future scholarship, could figure in the treatment of transgender persons at TSA check points. This Essay will make suggestions about the role of disparate impact analysis and racial stereotypes to that end.*

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<sup>1</sup> SANDY E. JAMES ET AL., NAT'L CTR FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY (2016) 1, 221, <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [perma.cc/HDU2-VD2L].

## I. THE PROBLEM: BINARY TECHNOLOGY FOR A NONBINARY WORLD

A chief reason why transgender people are frequently detained is owing to the TSA's policy governing full-body scanners.<sup>2</sup> "Before a person steps into the full-body scanner at an airport," the TSA officer first must make a visual determination about the person's gender.<sup>3</sup> After making the determination, the TSA officer will press the button on his console to indicate whether the person is female or male.<sup>4</sup> Making the right call is crucial.<sup>5</sup> The body scanner is programmed to look for penises on passengers whom the TSA officer has identified as male and breasts on passengers whom the officer has identified as female.<sup>6</sup>

Thus programmed, the body scanner poses unique problems for a transgender person whose genitalia does not correspond to the gender that the TSA officer has ascribed to that person.<sup>7</sup> Suppose the TSA officer selects the female button for a transgender person whom the TSA officer regards as female. Unbeknownst to the TSA officer, however, the transgender person has a penis. But since the scanner was never programmed to detect a penis on a person whom the TSA officer has tagged as female, the scanner will misidentify the male appendage on the transgender person as a suspicious object meriting further investigation.<sup>8</sup> Once the scanner alerts the TSA officer about the anomalous object, the TSA officer is obliged to begin a series of physical examinations of the transgender person.<sup>9</sup> The TSA officer must initially pat-down the transgender person, and, if warranted, the TSA officer may lead the transgender person to a private room for a more extensive review.<sup>10</sup> In the private room, the TSA officer might require the transgender person to remove the latter's clothing and expose the person's genitalia.<sup>11</sup> Despite reports that such searches occur, Jenny Burke, the TSA press secretary, has said that "the agency does not

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<sup>2</sup> *Id.* at 223 n.4.

<sup>3</sup> Lucas Waldron & Brenda Medina, *When Transgender Travelers Walk into Scanners, Invasive Searches Sometimes Wait on the Other Side*, PROPUBLICA (Aug. 26, 2019, 5:00 AM), <https://www.propublica.org/article/tsa-transgender-travelers-scanners-invasive-searches-often-wait-on-the-other-side> [perma.cc/42LG-TGHL].

<sup>4</sup> *Id.*; Complaint & Demand for Jury Trial at 4, *Erway v. U.S. Transp. Sec. Admin.*, No. 5:20-CV-141 (E.D.N.C. 2020) <https://tsaoutofourpants.files.wordpress.com/2020/04/erway-v.-tsa-complaint-filed.pdf> [perma.cc/WB5V-T9DG].

<sup>5</sup> See Waldron & Medina, *supra* note 3.

<sup>6</sup> *Id.*; Complaint & Demand for Jury Trial, *supra* note 4, at 4.

<sup>7</sup> See Complaint & Demand for Jury Trial, *supra* note 4, at 4; Waldron & Medina, *supra* note 3.

<sup>8</sup> Complaint & Demand for Jury Trial, *supra* note 4; Waldron & Medina, *supra* note 3.

<sup>9</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 5; *Transgender Passengers*, TRANSP. SEC. ADMIN., <https://www.tsa.gov/transgender-passengers> [perma.cc/HB8M-4MSR].

<sup>10</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 5; Waldron & Medina, *supra* note 3.

<sup>11</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 5; Waldron & Medina, *supra* note 3.

conduct strip searches, but that travelers may be required to ‘adjust clothing’ during the pat-downs.”<sup>12</sup>

In 2019, ProPublica published a story describing the experiences of several transgender people who have undergone such searches.<sup>13</sup> One person interviewed by ProPublica was Olivia, a thirty-six-year-old who declined to provide her full name for fear of outing herself.<sup>14</sup> Olivia entered a body scanner at the Ft. Lauderdale-Hollywood International Airport on September 15, 2017.<sup>15</sup> A TSA officer informed Olivia that the scanner had detected an anomaly, and a pat-down was required.<sup>16</sup> Because she appeared female but possessed a penis, Olivia was accustomed to pat-downs at TSA checkpoints.<sup>17</sup> But this time her experience would be different. The TSA officer patted down Olivia and tested her hands for explosive residue.<sup>18</sup> Instead of ending the search at that point, the officer told Olivia that she must go to a private room for further examination.<sup>19</sup> There, a TSA officer again patted her down, “running her hands down Olivia’s legs and over her groin.”<sup>20</sup> “I told her,” Olivia explained, “If the issue is what you are feeling, let me tell you what this is. It is my penis.”<sup>21</sup> Three additional TSA officers entered the room.<sup>22</sup> All of the officers were women, but they would not be permitted to examine Olivia.<sup>23</sup> Federal law requires TSA to have an officer of the same gender search the passenger.<sup>24</sup> Because Olivia’s anatomy was seen as male by the TSA, she would have to be searched by a male officer.<sup>25</sup> Olivia refused to be searched by a male officer, and she was denied permission to board her flight.<sup>26</sup> She “started crying and pleaded with the officers. ‘Can I just show you?’ she recalled asking them.”<sup>27</sup> According to ProPublica, “TSA officers aren’t supposed to allow passengers to remove undergarments. But Olivia said the officers in the room with her did not object when Olivia pulled her ruffled, black and white skirt and underwear down to her ankles.”<sup>28</sup> TSA then permitted her to continue to her gate.<sup>29</sup> Olivia is not

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<sup>12</sup> Waldron & Medina, *supra* note 3.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

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

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Transgender Passengers, supra* note 9.

<sup>25</sup> Waldron & Medina, *supra* note 3.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

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

alone in experiencing difficulties at the airport. From January 2016 to April 2019, the TSA received 298 complaints relating to the screening of transgender people.<sup>30</sup> The number amounted to 5 percent of all complaints during that time, an especially significant number considering that transgender persons are only 1 percent of the population.<sup>31</sup> Yet this number may not reflect the extent of the problem. Among the 174 respondents who replied to ProPublica, just fourteen filed a complaint with TSA.<sup>32</sup> “Many of those who did not file complaints said they didn’t know how, were afraid of outing themselves or didn’t want to relive the experience.”<sup>33</sup>

The results of the 2015 U.S. Transgender Survey, the largest survey examining the experiences of transgender people in the United States, are relevant in this context.<sup>34</sup> The survey included responses by 27,715 transgender people from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas.<sup>35</sup> The survey revealed that “[o]ne in ten (10%) of those who were out to their immediate family reported that a family member was violent towards them because they were transgender, and 8% were kicked out of the house because they were transgender.”<sup>36</sup> Further, “[t]he majority of respondents who were out or perceived as transgender while in school (K-12) experienced some form of mistreatment, including being verbally harassed (54%), physically attacked (24%), and sexually assaulted (13%) because they were transgender.”<sup>37</sup> One more statistic deserves mention: “[i]n the year prior to completing the survey, 30% of respondents who had a job reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or expression, such as being verbally harassed or physically or sexually assaulted at work.”<sup>38</sup> Of the respondents who had gone through airport security in the past year, 43 percent, protected by the survey’s anonymity, reported having “at least one problem related to their gender identity or expression.”<sup>39</sup>

Alex Marzano-Lesnevich, a professor at Bowdoin College, provides a poignant description of their ordeal. Identifying as “genderqueer,” Marzano-Lesnevich describes themselves in these terms:<sup>40</sup> “[m]y hair is clipped to a fade.

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

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> JAMES ET AL., *supra* note 1, at 4.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 221.

<sup>40</sup> In their article, Marzano-Lesnevich refers to themselves using a gender-neutral plural pronoun. The Essay honors this preference. Alex Marzano-Lesnevich, *Flying While Trans*, N.Y. TIMES (Apr. 17, 2019), <https://www.nytimes.com/2019/04/17/opinion/tsa-transgender.html> [perma.cc/P855-J5ME].

My shoulders have started to thicken from barbell presses. Even without a binder, my chest is flat. I am often called ‘sir,’ particularly in airports . . . . But I am more often called ‘ma’am.’ I have a soft jawline and curved hips.”<sup>41</sup> Given their anatomy, Marzano-Lesnevich was detained at the TSA checkpoint in Boston Logan International Airport in 2019.<sup>42</sup> Here is Marzano-Lesnevich’s account: “. . . I heard the T.S.A. agent shout, ‘I think we pressed the wrong button!’ He had shouted so loudly, I assumed he was talking about someone else. But then he spoke again, directly to me, avoiding my gaze. ‘Go through again,’ he said.”<sup>43</sup>

Marzano-Lesnevich continued: “The long line behind me halted as I walked back into the scanner and assumed the position: arms up, legs spread. I waited, painfully aware that the others [sic] passengers were staring at me. Did they know what was happening? Did they know what the agent meant by ‘the button?’”<sup>44</sup>

That Marzano-Lesnevich felt acute embarrassment was nearly inevitable: “When the machine had finished its second scan, I stepped out and waited” and “I found myself looking more closely at my fellow passengers.”<sup>45</sup>

Such experiences indicate how the procedures adopted by the TSA fail to accommodate transgender individuals. Indeed, the screening process poses problems not only for transgender passengers but for TSA officers themselves. ProPublica reports that a TSA employee, who has worked for the agency for over a decade and spoke on the condition of anonymity, said that the gender buttons are stressful for both passengers and officers: “‘A lot of the traveling public already hate us,’ she said. ‘We don’t want to offend people by [scanning them] wrong.’”<sup>46</sup>

Thus, it is in the interest of everyone involved in the TSA screening process that the process is reformed. As Marzano-Lesnevich remarked of their own experience: I noticed how “the agent[] . . . looked as miserable and uncomfortable as I felt.”<sup>47</sup>

Until reforms are implemented, one would imagine that lawsuits will be filed against the TSA. Tellingly, however, almost no such suits exist. The absence may very well be a tacit admission by transgender people that they fear being outed or having to endure the torment of recounting in court what they had already suffered at the airport. One exception is the suit filed by the sixteen-year-old Jamii Erway. Jamii was born male but identifies as female.<sup>48</sup> In 2019, Jamii, along with her mother, Kimberly, checked into Raleigh-Durham

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

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

<sup>46</sup> Waldron & Medina, *supra* note 3.

<sup>47</sup> Marzano-Lesnevich, *supra* note 40.

<sup>48</sup> Complaint & Demand for Jury Trial, *supra* note 4.

International Airport in North Carolina.<sup>49</sup> As Jamii approached the TSA body scanner, the TSA officer, upon initial visual inspection, had identified her as female.<sup>50</sup> The officer accordingly pressed the button for a female scan.<sup>51</sup> Because the officer had scanned for a female, the scanner alerted the officer that Jamii's anatomy did not correspond to a typical female.<sup>52</sup> The officer told Jamii that she would have to "submit to a strip search in a private room whereby [the officer] would inspect the child's genitals."<sup>53</sup> According to the officer, the TSA body scanner found something anomalous in Jamii's anatomy.<sup>54</sup> When Jamii entered a TSA body scanner, "a 'false positive' alert indicated that the scanner detected an anomaly on her groin."<sup>55</sup> The "anomaly" on Jamii's groin was neither a concealed weapon nor any other item forbidden by TSA guidelines; rather, it was Jamii's penis.<sup>56</sup> Although, as the lawsuit claims, "TSA procedure for resolving such anomalies is to conduct a brief pat-down search," the TSA officer screening Jamii asked her to submit to a strip search.<sup>57</sup> The TSA officer reportedly told Jamii "that she was not free to leave until she submitted to such a search."<sup>58</sup>

As one can imagine, such intrusion could cause the transgender person, especially a sixteen-year-old, abundant humiliation and anguish. Jamii claimed that she had suffered a psychological injury, "including symptoms of panic, anxiety, fear, racing heart, shortness of breath, uncontrollable shaking, and nausea."<sup>59</sup> Owing to her emotional distress, she states that she has been unable to fly even though she had flown "several times per year" in the past.<sup>60</sup> In addition to the civil suit for intentional infliction of emotional distress against the TSA, Jamii also sued TSA's officer for violating her Fourth Amendment right against unreasonable search and seizure.<sup>61</sup> The lawsuit states that, in doing so, the TSA officer acted "in violation of TSA policy, the Fourth Amendment, and state law rights of [Jamii], and the boundaries of civil and decent society."<sup>62</sup>

An argument that was omitted from Jamii's complaint was whether the TSA's policy has the effect of violating her right to define who she wants to

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<sup>49</sup> *Id.* at 1.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 3, 4.

<sup>53</sup> *Id.* at 1 (emphasis omitted).

<sup>54</sup> *Id.* at 3.

<sup>55</sup> *Id.* at 1.

<sup>56</sup> *Id.* at 3.

<sup>57</sup> *Id.* at 1.

<sup>58</sup> *Id.* at 1–2.

<sup>59</sup> *Id.* at 6.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 7, 8.

<sup>62</sup> *Id.* at 2.

be—what some might call her right of privacy or personhood.<sup>63</sup> The next section will examine this alternative claim and why it matters.

## II. CONSTITUTIONAL CONCERNS

The narratives told by Jamii, Olivia, and Marzano-Lesnevich involve issues related to the Fourth Amendment. Namely, the TSA may not violate the Fourth Amendment right against unreasonable search and seizure. Under the Fourth Amendment, the government must generally show that there was a warrant for the search or that there existed individualized suspicion.<sup>64</sup> However, the Supreme Court has created an exception for administrative searches.<sup>65</sup> The Court explained that “where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as ‘reasonable’—for example, searches now routine at airports and at entrances to courts and other official buildings.”<sup>66</sup> In Part IV, this Essay will examine what the administrative search entails and how the unique circumstances of transgender people relate to it. Presently, what will be discussed is the larger normative principle that is at stake in the TSA’s policy toward transgender people. The searches conducted by the TSA implicate not only the Fourth Amendment but a right that is more directly relevant to a transgender person’s life as a whole: the right to be able to define her gender. It is probably not the intent of the TSA to implement policies that are meant to deter transgender people from adopting the gender of their choice. However, the effect of the TSA’s procedures can amount to the same. Suppose Andie, a person contemplating transitioning into her true gender, travels several times on airlines for business and to visit family. Andie obtains information like that supplied by Olivia, Jamii, and Marzano-Lesnevich. Andie reads about how transgender people face the prospect that an invasive body search—with all its attendant psychological torment—can occur regularly. She reads about how a transgender person is patted down in her most intimate parts and then taken to a private room for questioning, further pat-downs, and then possibly a strip search. For Andie, the prospect of such governmental intrusion may be enough to dissuade her from transitioning to a gender that is authentic to her.

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<sup>63</sup> See *infra* Part II.

<sup>64</sup> U.S. CONST. amend. IV; *City of Indianapolis v. Edmond*, 531 U.S. 32, 37 (2000); *Petersen v. City of Mesa*, 83 P.3d 35, 38 (Ariz. 2004); *Skinner v. Ry. Lab. Execs.’ Ass’n*, 489 U.S. 602, 624 (1989).

<sup>65</sup> *Chandler v. Miller*, 520 U.S. 305, 323 (1997); see also *Edmond*, 531 U.S. at 47–48 (“Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute.”); *Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (approving of lower court decisions upholding airport screening searches where there was no reason for suspicion).

<sup>66</sup> *Chandler*, 520 U.S. at 323.

Given the vital role of gender in one's identity, one can argue that the Supreme Court should recognize a fundamental right to choose one's gender without fear of government coercion.<sup>67</sup> The issue of Fourth Amendment search and seizure presented by the TSA's policies is therefore bound up with the issue of substantive due process.<sup>68</sup> In 1928, Justice Brandeis penned a famous dissent in *Olmstead v. United States*. He stated that the right of privacy, as applied against the government, is "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>69</sup> As Jamii had done in her legal complaint, Justice Brandeis was referring to the Fourth Amendment.<sup>70</sup> What Justice Brandeis meant by the right of privacy is intentionally ambiguous, however, and it has assumed varied expression in the Constitution.<sup>71</sup> The word "privacy" does not appear anywhere in Jamii's legal complaint. Yet it is the right of privacy that is at the heart of her grievance. For a transgender person's chief desire is to be afforded a domain of privacy in which the government is forbidden from unduly coercing her to become someone she does not want to be. In this sense, the right of privacy that belongs to a transgender person does not differ from the same right as applied to a cultural conservative who condemns transgender people. Such a conservative, after all, also longs to be free of government coercion as he tries to define *his* identity. The conservative will likely want to exercise those constitutional rights which can be organized under the broad canopy of the right of privacy mentioned by Justice Brandeis. These include the rights to assembly,<sup>72</sup> association,<sup>73</sup> and speech<sup>74</sup> (which also encompasses the right to obtain information).<sup>75</sup> By exercising these rights, the conservative can develop and refine how he understands his identity and how he wishes to present it to others. In exercising each of these rights, the conservative is also expressing his desire "to be let alone" by the government. A person yearning to change her gender may wish for the same. However, unlike a cultural conservative, a transgender person's desire

<sup>67</sup> For further discussion of the degree to which gender is vital, see *infra* notes 86–97 and accompanying text.

<sup>68</sup> Thomas K. Clancy, *The Fourth Amendment's Concept of Reasonableness*, 2004 UTAH L. REV. 977, 1004 (2004); Laurence H. Tribe, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1896–97 (2004).

<sup>69</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967).

<sup>70</sup> *Id.*

<sup>71</sup> See the Court's opinion in *Griswold*, pointing to various places where the right of privacy is found. *Griswold v. Connecticut*, 318 U.S. 479, 483, 484–85 (1965).

<sup>72</sup> U.S. CONST. amend. I.

<sup>73</sup> *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000); *Healy v. James*, 408 U.S. 169, 181 (1972); *NAACP v. Button*, 371 U.S. 415, 430 (1963).

<sup>74</sup> U.S. CONST. amend. I.

<sup>75</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982); *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).



for transformation will often involve surgery or at least significant changes in physiognomy.<sup>76</sup> The right of privacy—the “right to be let alone”—for a transgender person thus logically entails the exercise of an additional right: the right to control one’s body.

There is a line of Supreme Court cases that have established a right to control one’s body as a means to determine one’s identity. In *Griswold v. Connecticut*, the Court struck down a law that forbade people from using contraceptives.<sup>77</sup> *Griswold* recognized a “zone of privacy” in the Constitution, one that was capacious enough to protect the right of married couples to obtain contraceptives.<sup>78</sup> Writing for the Court, Justice Douglass remarked: “Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”<sup>79</sup> Suggested in these words is an implicit connection between bodily autonomy and the right of self-definition. While marriage does not necessarily entail childbirth, the former is by convention associated with the latter. Contraceptives permit married couples to decide how to define their families by limiting when and, if, to produce children, and how many. *Griswold* argued that permitting the police “to search the sacred precincts of marital bedrooms” was “repulsive to the notions of privacy.”<sup>80</sup> Permitting TSA agents to engage in bodily searches of transgender people is no less repulsive to notions of privacy. Indeed, whereas the *Griswold* Court describes police entering the bedrooms of couples, the TSA takes the more literal approach by invading the bodies of transgender people, sometimes forcing them to strip naked to reveal their sex. The Court, moreover, made clear in its subsequent holding in *Eisenstadt v. Baird* that the right of privacy was not limited to marital couples but applied to the individual.<sup>81</sup> “If the right of privacy means anything,” the Court asserted in *Eisenstadt*, “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.”<sup>82</sup> A person, regardless of marital status, is protected by the Constitution from government control of her body so that she may make decisions about whether, when, and how often she wishes to become a parent. *Eisenstadt* held that such a decision “fundamentally affect[ed] a person,” and one can say something similar about the desire to fulfill the demands of one’s authentic gender identity.<sup>83</sup>

<sup>76</sup> JAMES ET AL., *supra* note 1, at 99–103; Jae M. Sevelius, *Gender Affirmation: A Framework for Conceptualizing Risk Behavior Among Transgender Women of Color*, 68 SEX ROLES 675, 684 (2013).

<sup>77</sup> *Griswold v. Connecticut*, 318 U.S. 479, 483, 484–85 (1965).

<sup>78</sup> *Id.* at 486.

<sup>79</sup> *Id.* at 485–86.

<sup>80</sup> *Id.*

<sup>81</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>82</sup> *Id.*

<sup>83</sup> *See id.*

In 1973, the Supreme Court rendered a philosophically consonant holding to *Eisenstadt* in *Roe v. Wade*.<sup>84</sup> The *Roe* Court asserted that a woman has a fundamental right to an abortion.<sup>85</sup> Writing the Court's opinion, Justice Blackmun emphasized the suffering that a woman would endure if the government prevented her from exercising the right to an abortion: "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent."<sup>86</sup> Most notably, a woman, against her will, would be compelled to adopt the identity of a mother. Justice Blackmun elaborated: "Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent."<sup>87</sup> The right of abortion is therefore analogous to the right of a person to determine her gender identity. The pregnant woman, if denied the right of abortion may suffer a "distressful life" and "[p]sychological harm may be imminent."<sup>88</sup> A person contemplating transitioning into a gender other than the one she was born into may also confront such harm if she is coerced by the government against transitioning. The policies employed by the TSA place transgender people between a rock and a hard place. Transgender people can either suffer the ceremony of humiliation that is frequently enacted by the TSA, or transgender people can refrain from undergoing measures to transform their given gender.

The latter option is more than an inconvenience. There is empirical evidence to suggest that individuals who elect to transform their gender do so because they experience gender dysphoria.<sup>89</sup> This is a medical condition that, according to the *American Psychiatric Association*, "involves a conflict between a person's physical or assigned gender and the gender with which he/she/they identify."<sup>90</sup> Transgender people who are unable to adopt the gender with which they identify "may often experience significant distress and/or problems functioning associated with this conflict between the way they feel and think of themselves . . . and their physical or assigned gender."<sup>91</sup> A study published in the *American Academy of Pediatrics* demonstrates the toll that untreated gender dysphoria can have on transgender individuals and, in particular, transgender youth.<sup>92</sup> The study addresses how "puberty suppression," a treatment for gender dysphoria, affects suicidality in transgender people, and it establishes that "[t]here is a significant inverse association between treatment with pubertal

<sup>84</sup> *Roe v. Wade*, 410 U.S. 113, 159, 164–66 (1973).

<sup>85</sup> *Id.* at 153.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Tim C. van de Grift et al., *Effects of Medical Interventions on Gender Dysphoria and Body Image: A Follow-Up Study*, 79 *PSYCHOSOMATIC MED.* 815, 815, 817 (2017).

<sup>90</sup> *What Is Gender Dysphoria?*, AM. PSYCHIATRIC ASS'N, <https://www.psychiatry.org/patient-s-families/gender-dysphoria/what-is-gender-dysphoria> [perma.cc/H9UM-AUY3].

<sup>91</sup> *Id.*

<sup>92</sup> Jack L. Turban et al., *Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation*, 145 *PEDIATRICS*, Mar. 2020 at 1, 2, 8.

suppression during adolescence and lifetime suicidal ideation among transgender adults who ever wanted this treatment.”<sup>93</sup> It is possible that the profound distress that transgender people derive from gender dysphoria can be so severe as to develop into suicidal ideation.<sup>94</sup> Another study, published in the *American Journal of Psychiatry*, examines the psychological effects of “gender-affirming surgery.”<sup>95</sup> This type of surgery refers “to all surgical procedures that a patient wishes to undergo in an attempt to become as similar as possible to the desired gender” and thus reduce gender dysphoria.<sup>96</sup> The *American Journal of Psychiatry* study found that, while individuals who suffer from gender dysphoria

were about six times as likely to have had a mood and anxiety disorder health care visit, more than three times as likely to have received prescriptions for antidepressants and anxiolytics, and more than six times as likely to have been hospitalized after a suicide attempt[,] . . . increased time since last gender-affirming surgery was associated with reduced mental health treatment.<sup>97</sup>

Transgender people can mitigate the psychological harm inflicted by gender dysphoria by receiving treatments that allow them to adopt the gender with which they identify. However, if the TSA persists in unusually invasive searches, a person contemplating gender-affirming surgery may be dissuaded from choosing it or completing it, thereby rendering the person more susceptible to anguish and hopelessness.

Justice Blackmun mentioned in *Roe* that “[p]sychological harm may be imminent.”<sup>98</sup> The language of psychological harm in *Roe* highlights the injuries that a woman can suffer from being denied a fundamental right to control her body. The Court has also explained in terms other than suffering how such a right can empower a person to realize who she wishes to be. In *Casey v. Planned Parenthood*, the Court reaffirmed a woman’s right to an abortion.<sup>99</sup> A plurality opinion justified the decision in the following terms:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is

<sup>93</sup> *Id.* at 1–2, 6.

<sup>94</sup> *Id.* at 5; Claire M. Peterson et al., *Suicidality, Self-Harm, and Body Dissatisfaction in Transgender Adolescents and Emerging Adults with Gender Dysphoria*, 47 *SUICIDE & LIFE-THREATENING BEHAV.* 475, 475 (2017).

<sup>95</sup> Richard Bränström & John E. Pachankis, *Reduction in Mental Health Treatment Utilization Among Transgender Individuals After Gender-Affirming Surgeries: A Total Population Study*, 177 *AM. J. PSYCHIATRY* 727, 727–28 (2020).

<sup>96</sup> Marta R. Bizic et al., *Gender Dysphoria: Bioethical Aspects of Medical Treatment*, *BIOMED RES. INT’L*, June 2018, 1–2.

<sup>97</sup> Bränström & Pachankis, *supra* note 95, at 727.

<sup>98</sup> *Roe v. Wade*, 410 U.S. 113, 159, 164–66 (1973).

<sup>99</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992).

the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.<sup>100</sup>

Importantly, the plurality in *Casey* reiterated that “[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”<sup>101</sup> The plurality's words in *Casey* can apply to the right of transgender people as well. For, surely, the right to fulfill the demands of her true gender also “involv[es] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . .”<sup>102</sup> If the right to determine whether one wishes to become a mother involves the right to “define one's own concept of existence” and “the mystery of human life,” the right to define one's gender is no different.<sup>103</sup>

One may object that *Casey*, like *Roe*, involves the right of reproductive freedom, and thus differs from the right of self-definition sought by transgender people. The Court, however, has extended the right of self-definition to contexts that involve other examples of gender identity. In *Lawrence v. Texas*, Texas made it a crime for gays to engage in “sodomy.”<sup>104</sup> While the crime was a class C misdemeanor, and hence minor, the Court nonetheless struck it down.<sup>105</sup> Why it did so is illuminating. Justice Kennedy, writing for the plurality, quoted the language from *Casey* regarding “the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>106</sup> This language, he explained, was broad enough to recognize the right of consenting adults to engage in sexual intimacy: “Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do.”<sup>107</sup> Even if the Texas law was only a class C misdemeanor, Justice Kennedy worried that the law sent a message of “stigma” to gays.<sup>108</sup> He stated, “[t]he stigma this criminal statute imposes . . . is not trivial.”<sup>109</sup> As the *Casey* plurality had done for women denied the right to an abortion, Justice Kennedy worried about how such stigma undermined the “dignity” of gays. What was different in *Lawrence* was that Justice Kennedy melded the equal protection analysis with the substantive due process clause.<sup>110</sup>

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests. If protected conduct is

<sup>100</sup> *Id.* at 851.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); see TEX. PENAL CODE ANN. § 21.06(a).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 573–74 (quoting *Casey*, 505 U.S. at 851).

<sup>107</sup> *Id.* at 574.

<sup>108</sup> *Id.* at 575.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*; Matthew Coles, *Lawrence v. Texas & the Refinement of Substantive Due Process*, 16 STAN. L. & POL'Y REV. 23, 46–47 (2005).

made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons.<sup>111</sup>

Justice Kennedy's words are important for transgender people. The TSA's policy regarding transgender people has the effect of denying "equality of treatment" to transgender people. Like the law in *Lawrence*, if the TSA's policy is left unexamined for its substantive validity, the stigma that the policy produces on transgender people might remain as well.

### III. POLICY PROPOSAL

It is tempting to suggest that TSA should simply allow transgender passengers to instruct TSA officers to press the male/female button that corresponds with their current anatomy. In the case of Jamii Erway, for example, her penis was the anatomical anomaly that caused the scanner to issue a false alarm. Because the scanner is only programmed to associate penises with males, Jamii might have been able to avoid a false alarm if she could have told the TSA officer in advance to press the male button despite her female appearance. However, her lawsuit clearly explains why the scanner's inclusion of only two gendered buttons—one for male and the other for female—can be insufficient for transgender people like Jamii:

Could Jamii avoid these troubles by advising the scanner operator of the correct button to press? It is, unfortunately, not that simple. For one thing, body scanner operators are often unwilling to take instructions from passengers. But, even if they were, the male/female button causes other problems. For example, if the operator presses "female," the scanner will ignore a small item located in the center of the traveler's back, in order to accommodate the fact that women often have clasps for a bra strap there but men do not. Thus, if one has external genitals and is wearing a bra, there is no button that will accommodate their situation.<sup>112</sup>

The deficiency in the binary button system applies not only to transgender women but also to transgender men. Some transgender men elect to undergo double mastectomy surgeries to remove the breasts that they were born with, but some of the transgender men who have undergone double mastectomies might not have undergone phalloplasties or metoidioplasties, two surgical procedures used to construct penises. Because TSA full-body scanners associate a lack of breasts and the lack of a penis with neither the maleness nor femaleness, transgender men who possess neither breasts nor penises might trigger a false alarm.

It seems, therefore, that the most appropriate way to alleviate these problems would be to allow transgender people to circumvent the male/female button system entirely. Currently, TSA's male/female button system requires of-

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<sup>111</sup> *Lawrence*, 539 U.S. at 575.

<sup>112</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 4 n.3.

ficers and scanners to make a three-pronged set of difficult assumptions about passengers.<sup>113</sup> First, a TSA officer must use elements of a passenger's appearance (e.g. clothing, hair, and physique) to determine the passenger's biological sex.<sup>114</sup> Then, after the officer has pressed the button that corresponds to the passenger's perceived biological sex, the scanner uses the passenger's perceived biological sex to expect only certain kinds of external genitalia.<sup>115</sup> For many passengers, each element in this series of assumptions turns out to be correct, so they can enter and exit a TSA checkpoint smoothly, without false alarms. For some transgender passengers, however, one or more of these assumptions might prove to be wrong, and, if it is the final assumption—the assumption about external genitalia—that is incorrect, this imprecision can lead to embarrassing false alarms, pat-downs, and even strip searches.<sup>116</sup>

If the aim of the TSA's male/female button system is to allow full-body scanners to expect and detect certain external genitalia in certain passengers, a case can be made that transgender people should be permitted to eliminate assumptions by the TSA officer and to provide information about their anatomies directly to the body scanners. Specifically, the Essay proposes the creation of a federal-issued government identification card. This card would contain a computer chip that would allow a transgender passenger to indicate to the body scanner what genitalia the scanner should expect to detect. Because individuals with the identification card might not want TSA officers to know explicitly what genitalia they do or do not possess, the identification card will not, as does a state-issued driver's license, list the relevant genitalia that the TSA officer should expect to find. Instead, the card will display either a bar code or another encrypted code. When a TSA officer scans this encrypted code, it will program the body scanner to expect the genitalia that the owner of the identification card possesses.

Individuals may presumptively obtain the federal identification card if they can procure documentation from a doctor that fairly describes their genitalia. At the Department of Motor Vehicles, individuals can apply for the federal identification card by providing this doctor-issued documentation, as well as documents proving name, age, and Social Security number. While the application process for the federal identification card does require potential applicants to disclose and document details about their genitalia, the disclosure and documentation necessitated by this process differ fundamentally from the disclosure and documentation obtained through TSA pat-downs and strip-searches in that this application process allows individuals to choose the physicians to whom they disclose the details of their genitals, as well as the specific time of their disclosure. TSA screening procedures can be distressing for transgender pas-

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<sup>113</sup> See *supra* notes 3–6 and accompanying text.

<sup>114</sup> See *supra* note 3 and accompanying text.

<sup>115</sup> See *supra* notes 4–6 and accompanying text.

<sup>116</sup> See *supra* Part I.

sengers because they leave transgender passengers with few choices. They cannot choose by whom they are patted down, nor can they choose when.

If Jamii Erway had enjoyed the benefits of the proposed identification card, she may never have had to endure the painful consequences of refusing to submit to a strip search by TSA officers. When the TSA officer screening Jamii Erway told her that she needed to submit to a strip-search, Jamii did not comply; she and her mother left the airport together.<sup>117</sup> However, Jamii's decision was not without its ramifications. According to the legal complaint filed by Jamii against TSA, "Jamii experienced severe emotional distress, including symptoms of panic, anxiety, fear, racing heart, shortness of breath, uncontrollable shaking, and nausea," and, after she and her mother left the airport, they "drove over 600 miles to return home."<sup>118</sup> If Jamii had obtained and used the federal identification described in this Essay, there would have been no false alarm, no pat-down, and no threat of strip-search. She and her mother could have flown home instead of driving over 600 miles. Just as Jamii was not unique in her negative experience with TSA screening, she is not unique in the value that she might have derived from the federal identification card. Many of the issues that transgender passengers face at TSA checkpoints stem from false alarms. By using the identification card during the airport security process, a transgender passenger would not be issued a false alarm for any anomalous anatomy. Therefore, the passenger need not undergo either a pat-down or a more invasive search. Further, TSA officers need not worry that they are incorrectly designating passengers as either female or male; the identification card ensures that the full-body scanner will expect the genitalia that the owner of the card possesses.

By affording a substantial measure of anonymity to the transgender traveler, the proposed card system will not run the risk of abridging what the Essay has suggested is the right of privacy by a person to define her gender. To be sure, the process of obtaining the card may prove inconvenient to some travelers, and perhaps even burdensome to others. Overall, however, the proposal offered by the Essay should be accessible for most transgender people and should prove far less intrusive than present policies used by the TSA.

#### IV. CONSTITUTIONAL VIOLATIONS?

Having proffered the proposal for an alternative identification system, this Essay will examine whether a failure by TSA might amount to a violation of the Constitution. This Essay suggests that there exists a fundamental right under the substantive due process clause to define one's gender. The TSA's present policy could be held a violation of that right. Justices have employed different tests to determine whether a law violates the substantive due process clause. In *Lawrence*, for example, a plurality of justices used what appeared to

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<sup>117</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 6.

<sup>118</sup> *Id.*

be a heightened version of rational review to strike down Texas's law.<sup>119</sup> In *Casey*, a plurality of justices introduced the undue burden test to strike down portions of Pennsylvania's law regulating abortion.<sup>120</sup> In *Roe*, the Court used strict scrutiny.<sup>121</sup> Regardless of the chosen test, the Court has suggested that a law that abridges a fundamental right bears a heavy responsibility to justify its existence. The TSA's concern for public safety is clearly valid, especially in light of 9/11. However, it is not clear whether the screening policy adopted by the TSA is equally justified given that the alternative policy limned by this Essay can in theory be implemented. Therefore, under substantive due process considerations, the TSA's present policy should probably be struck down.

A similar problem exists for the TSA when its present policy is subject to Fourth Amendment analysis. Under the Fourth Amendment, the government may not engage in unreasonable search and seizure.<sup>122</sup> According to the Supreme Court, the amendment requires the government to show that there was a warrant for the search or that there existed individualized suspicion.<sup>123</sup> The Supreme Court, however, has created an exception for searches deemed to be "administrative."<sup>124</sup> Administrative searches are those which take place "where the risk to public safety is substantial and real."<sup>125</sup> For administrative searches, "blanket suspicionless searches calibrated to the risk may rank as 'reasonable'—for example, searches now routine at airports and entrances to courts and other official buildings."<sup>126</sup> The Ninth Circuit Court of Appeals offered a useful interpretation of the Supreme Court's statement regarding administrative searches:

We have held that airport screening searches, like the one at issue here, are constitutionally reasonable administrative searches because they are "conducted as part of a general regulatory scheme in furtherance of an administrative purpose, namely, to prevent the carrying of weapons or explosives aboard aircraft, and thereby to prevent hijackings."<sup>127</sup>

<sup>119</sup> *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003).

<sup>120</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77, 901 (1992).

<sup>121</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>122</sup> U.S. CONST. amend. IV.

<sup>123</sup> *Chandler v. Miller*, 520 U.S. 305, 308 (1997); *Skinner v. Ry. Lab. Execs.' Ass'n*, 489 U.S. 602, 623–24 (1989); *Steagald v. United States*, 451 U.S. 204, 205–06 (1981).

<sup>124</sup> *Chandler*, 520 U.S. at 308; see *City of Indianapolis v. Edmond*, 531 U.S. 32, 47–48 (2000) ("Our holding also does not affect the validity of border searches or searches at places like airports and government buildings, where the need for such measures to ensure public safety can be particularly acute."); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 675 n.3 (1989) (approving of lower court decisions upholding airport screening searches where there was no reason for suspicion).

<sup>125</sup> *Chandler*, 520 U.S. at 323.

<sup>126</sup> *Id.*

<sup>127</sup> *United States v. Aukai*, 497 F.3d 955, 960 (9th Cir. 2007) (quoting *United States v. Davis*, 482 F.2d 893, 908 (9th Cir. 1973)).



While the Fourth Amendment does not require a warrant, the Ninth Circuit qualified that “the scope of such searches is not limitless.”<sup>128</sup> The Ninth Circuit elaborated: “A particular airport security screening search is constitutionally reasonable provided that it ‘is no more extensive than necessary, in light of current technology, to detect the presence of weapons or explosives [] [and] that it is confined in good faith to that purpose.’”<sup>129</sup>

Jonathan Corbett, the attorney for Jamii Erway, asserted in the latter’s legal complaint that “the administrative search doctrine allows for only extremely limited, narrowly-tailored searches in furtherance of a regulatory scheme.”<sup>130</sup> While not identical to the language used by the Ninth Circuit, Corbett’s language was quite similar. On the other hand, the First Circuit adopted a much more relaxed test:

While we will not require the government to adopt the least intrusive practicable alternative, there must be a fairly close fit between the weight of the government’s interest in searching and the intrusiveness of the search—that is, the search must be a “reasonably effective means” for furthering the important government interest.<sup>131</sup>

Unlike Corbett and the Ninth Circuit, the First Circuit has adopted a “balancing test:” “In a Fourth Amendment challenge to a search like that at issue here, we assess the search’s reasonableness by balancing ‘the public interest in the [TSA’s search] program against the privacy concerns implicated by the’ search.”<sup>132</sup> Trying to resolve which approach is better—the balancing approach or one that is “no more extensive than necessary”—is beyond the scope of this Essay.

What this Essay can do is clarify the unique ways in which a TSA body search can prove especially invasive for transgender people, regardless of whether a given court decides to light upon the balancing approach or the “no more than necessary” approach. As explained in Part III, the policies adopted by TSA can have the effect of causing great emotional injury to transgender persons to such a degree that it may engender one of the following unwelcome outcomes. One, the TSA’s policy may cause those contemplating gender transition to quash their yearning to realize their true gender. Two, the TSA’s policy may cause those who have already undertaken some form of gender transition to forego its completion. Three, the TSA’s policy, by subjecting transgender people to regular forms of public humiliation, may cause them to consider self-harm and suicide. Or, four, the TSA’s policy may cause transgender people to avoid traveling by airplane, an unrealistic alternative for many people. Any of these scenarios, standing alone, might suffice as an unjustifiable burden on what this Essay has suggested is a substantive right to determine one’s gender.

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<sup>128</sup> *Id.* at 962.

<sup>129</sup> *Id.* (quoting *Davis*, 482 F.2d at 913).

<sup>130</sup> Complaint & Demand for Jury Trial, *supra* note 4, at 7.

<sup>131</sup> *Ruskai v. Pistole*, 775 F.3d 61, 69 (1st Cir. 2014).

<sup>132</sup> *Id.* at 68 (footnote omitted).

The analysis under substantive due process would seem conceptually removed from the aims of criminal procedure in the Fourth Amendment. Yet the conclusions regarding the former can inform analysis under the latter. The Fourth Amendment seeks to protect people from an unreasonable invasion of privacy by the government. Justice Brandeis in *Olmstead* had explained that the purpose of the right of privacy was to protect “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.”<sup>133</sup> The right of privacy as valued by transgender people is meant to protect their efforts to define themselves. Given the significance of the right at stake, the analysis under the Fourth Amendment must consider whether there exists alternative means available to the TSA to promote public safety at airports. As this Essay has limned, such a means exists in the proposed card identification system. v

#### V. THE ROLE OF RACE

The theme organizing the symposium in which this Essay appears centers on the relationship between criminal law and gender and race. This Essay has not dwelt on the relationship between race and transgender in the context of TSA searches because there is insufficient data to make any meaningful conclusions. Based on publicly available data, we do not know how many transgender people, according to their race, were subject to invasive searches by the TSA. Should such data materialize, the Supreme Court has furnished a means of analyzing it in terms of the principle of equal protection. The TSA’s policy does not, on its face, discriminate against people on the basis of race. Suppose, however, that new data shows the TSA’s policy as having disproportionately affected transgender people of a particular race. In that case, a disparate impact analysis can be applied.<sup>134</sup> The Court can examine whether there is evidence that the TSA’s policy is applied in a racially-motivated manner or whether there are aspects of the policy that lend themselves to racial discrimination. If either can be proven, the TSA’s policy, as applied or on its face, will be subject to strict scrutiny under the equal protection principle of the Fifth Amendment’s due process clause. At that point, the law will likely be struck down.<sup>135</sup> Disparate impact analysis thus can have the effect of disaggregating race from gender or transgender.

The benefit of disparate impact analysis is also a defect, however. The benefit is that disparate impact analysis can isolate ascriptive elements—race from transgender—and thus enable the Court to apply an analysis to one element. However, this benefit can also serve as the problem. Disparate impact analysis

<sup>133</sup> *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

<sup>134</sup> *Washington v. Davis*, 426 U.S. 229, 241–42 (1976).

<sup>135</sup> Strict in theory but fatal in fact. See *Korematsu v. United States*, 323 U.S. 215, 216 (1944).

fails to account for instances of intersectionality.<sup>136</sup> Disparate impact analysis is meant to weed out instances where the law discriminates on the basis of race and where the law discriminates on the basis of transgender identity, but not where there is a convergence of both.<sup>137</sup> That is, while disparate impact analysis can, in theory, isolate racial discrimination from transgender discrimination, the analysis is unable to identify instances where a person is discriminated by the TSA owing to her racial identity *and* her transgender identity. How to examine discrimination that affects such convergent identities is worthy of future scholarship.

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<sup>136</sup> Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL F. 139, 145 (1989); Yvette N. A. Pappoe, *The Shortcomings of Title VII for the Black Female Plaintiff*, 22 U. PA. J.L. & SOC. CHANGE 1, 10 (2019).

<sup>137</sup> Crenshaw, *supra* note 136, at 146 n.19.

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