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A growing number of American jurisdictions have considered laws that prohibit trans individuals from using bathroom facilities consistent with their gender identities. Several scholars have criticized these so-called "bathroom laws" as a form of discrimination in violation of federal law. Few scholars, though, have considered the criminal justice implications of these proposals.

By analyzing dozens of proposed bathroom laws, this Article explores how many laws do more than stigmatize the trans community—they effectively criminalize them. Some of these proposed laws would establish new categories of criminal offenses for trans individuals who use bathrooms consistent with their gender identity. Others would transform bathroom use by trans individuals into an unlawful trespass. The existing literature suggests that the criminal justice system is unprepared to handle this newfound responsibility.

This Article concludes that, by effectively criminalizing noncriminal conduct so inextricably linked to the status of being trans, some proposed bathroom laws may violate the Eighth Amendment's bar on cruel and unusual punishment.

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INTRODUCTION

In January of 2017, "[o]ver loud boos" from protesters outside the Senate Chamber, Texas Lieutenant Governor Dan Patrick and State Senator Louis Kolkhorst introduced the "Women's Privacy Act."[1] The bill would overturn local municipal ordinances that permit trans[2] individuals to use bathroom facilities consistent with their gender identities and would designate bathrooms in public buildings "for use by people 'according to their biological sex.'"[3] According to Patrick, the legislation is designed not to harm the trans community, but to protect women and children from "abuse[,] attack[s], and assault[s] . . . by sexual predators."[4]

In response, LGBTQ advocates in Texas and across the country have sounded the alarm. They have argued that the bill is yet another attempt to

1. *See* Chuck Lindell, *Dan Patrick Unveils Texas Transgender Bathroom Bill*, AUSTIN AM.-STATESMAN (Jan. 5, 2017, 3:03 PM), http://www.statesman.com/news/dan-patrick-unveils-texas-trans-bathroom-bill/aC1uoDoDysOLYW0MwVFWQO (explaining how the law would overturn local ordinances and leave it to each individual business to decide who can use which bathroom, while also limiting trans bathroom use in public universities, schools, and government buildings) [https://perma.cc/6MN6-9HSM]; Jason Whitely, *Lt. Governor Rebrands Texas' 'Bathroom Bill*,*'* KHOU (Oct. 21, 2016, 5:35 AM), http://www.khou.com/news/politics/lt-gov-patrick-rebrands-texas-bathroom-bill/339659250 (describing the Act as the "Women's Privacy Act") [https://perma.cc/5YUZ-3KBJ]. *See generally* Privacy Protection Act, S.B. 6, 85th Leg., Reg. Sess. (Tex. 2017).

2. This Article uses the term "trans" as shorthand for "transgender" to be more inclusive to the wide variety of gender identities that fall under the broader umbrella of the term transgender. The term transgender itself is meant to describe a wide range of "people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." *Glossary of Terms—Transgender*, GLAAD MEDIA REFERENCE GUIDE, http://www.glaad.org/reference/transgender (last visited June 19, 2017) [https://perma.cc/37E3-ZP44]. The term transgender itself is often a "contested term that is defined differently by medical professionals, advocates, social scientists, and . . . transgender people." Rebecca L. Stotzer, *Law Enforcement and Criminal Justice Personnel Interactions with Transgender People in the United States: A Literature Review*, 19 AGGRESSION & VIOLENT BEHAV. 263, 264 (2014). The term sometimes includes other subgroups of people, including "people with intersex conditions or some disorders of sexual development, dragkings/queens, cross-dressers, genderqueers, [and] gender non-conforming people," and it may "include people who may or may not identify themselves as transgender but may present in ways that are not consistent with their gender." *See id.*

3. *See* Lindell, *supra* note 1.

4. *See* Lauren McGaughy, *Texas Small Businesses to Dan Patrick: Back Off Promise to Pass Transgender Bathroom Bill*, DALL. MORNING NEWS (Oct. 25, 2016), https://www.dallasnews.com/news/lgbt/2016/10/25/texas-small-businesses-dan-patrick-back-promise-pass-transgender-bathroom-bill [https://perma.cc/Q3EV-L472].

stigmatize the LGBTQ community in violation of federal law.[5] Texas is hardly alone in proposing such a controversial measure. With Patrick and Kolkhorst's announcement, Texas joined a growing list of jurisdictions that have considered or enacted so-called "bathroom bills" since 2013,[6] including Alabama,[7] Arizona,[8] Colorado,[9] Florida,[10] Illinois,[11] Indiana,[12] Kansas,[13]

5. *Id.* (noting that Chuck Smith, the CEO of LGBTQ-rights group Equality Texas, called this measure "legislation to discriminate against LGBT Texans."). LGBTQ advocates also point to the joint "Dear Colleague" letter sent out by the Obama administration's Department of Justice and Department of Education, explaining that these sorts of measures constitute a violation of Title IX of the Education Amendments of 1972. *See* Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & Vanita Gupta, Principal Deputy Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf [https://perma.cc/3Q2J-L8YP]. It is also worth noting that Lieutenant Governor Patrick is no stranger to this sort of controversy, as he has a long history of taking anti-LGBTQ positions. For instance, after reality television star Phil Robertson of A&E's *Duck Dynasty* compared homosexuality to bestiality, Patrick claimed that God was speaking through Robertson. *See* Eric Nicholson, *Lt. Guv Hopeful Dan Patrick on "Duck Dynasty" Star's Anti-Gay Rant: "God is Speaking to Us,"* DALL. OBSERVER (Dec. 19, 2013, 3:59 PM), http://www.dallasobserver.com/news/lt-guv-hopeful-dan-patrick-on-duck-dynasty-stars-anti-gay-rant-god-is-speaking-to-us-7114812 [https://perma.cc/G9L2-J9HZ].

6. *See* Joellen Kralik, NAT'L CONFERENCE OF STATE LEGISLATURES, *"Bathroom Bill" Legislative Tracking* (Apr. 12, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx (providing a detailed list of "bathroom bills" from 2013 through January 2017) [https://perma.cc/5QYC-QDPM]. A full list of all states that have proposed bathroom bills is available in the Appendix at the end of this Article.

7. *See* S. 1, 2017 Leg., Reg. Sess. (Ala. 2017) (requiring bathrooms open to the public to be segregated by "gender" or be manned by an attendant and establishing criminal and civil penalties).

8. *See* S. 1045, 51st Leg., 1st Reg. Sess. (Ariz. 2013) (voiding local ordinances that may protect trans bathroom use and preventing any state subdivision from enacting laws that may penalize persons who deny trans individuals access to bathrooms consistent with their gender identity).

9. *See* H.R. 1081, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015) (permitting restriction of access to sex-segregated locker rooms based on biological sex).

10. *See* H.R. 583, 2015 Leg., Reg. Sess. (Fla. 2015) (requiring individuals to use public restrooms based on biological sex and providing both criminal penalties and a private cause of action).

11. *See* H.R. 4474, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (requiring sex-segregated bathrooms, overnight facilities, and changing rooms in school facilities and requiring students to use facilities based on sex "determined by an individual's chromosomes and identified at birth by that individual's anatomy").

12. *See* S. 35, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016) (requiring single-sex bathroom facilities in schools and providing criminal penalties for trans individuals who use bathrooms inconsistent with their gender identities).

13. *See* H.R. 2737, 2016 Leg., Reg. Sess. (Kan. 2016) (requiring sex-segregated bathroom and locker room facilities in public schools and giving students a private cause of action to collect up to $2500 from opposite-sex individuals they encounter in bathroom or locker room facilities); S. 513, 2016 Leg., Reg Sess. (Kan. 2016).

Kentucky,[14] Louisiana,[15] Michigan,[16] Minnesota,[17] Mississippi,[18] Missouri,[19] Nevada,[20] New York,[21] North Carolina,[22] Oklahoma,[23] South

14. *See* S. 76, 2015 Gen. Assemb., Reg. Sess. (Ky. 2015) (mandating the use of sex-segregated restrooms, locker rooms, and shower facilities in public schools and providing for "best available accommodation" for trans students).

15. *See* S. 3895, 2016 Leg., Reg. Sess. (La. 2016) (requesting that the State of Louisiana take no action to comply with the Dear Colleague letter issued by the Department of Education and the U.S. Department of Justice in May 2016).

16. *See* S. 993, 2016 Leg., Reg. Sess. (Mich. 2016) (requiring restrooms, locker rooms, and shower rooms in public schools to be designated for use based on students' biological sex).

17. *See* H.R. 3396, 89th Leg., Reg. Sess. (Minn. 2016) (stating that "[n]o claim of nontraditional identity or 'sexual orientation' may override another person's right of privacy based on biological sex in such facilities as restrooms, locker rooms, dressing rooms, and other similar places, which shall remain reserved for males or females as they are biologically defined" and applying this mandate to employers and public schools).

18. *See* H.R. 1523, 2016 Leg., Reg. Sess. (Miss. 2016) (mandating that the state government will not take any "discriminatory action" against a person for establishing "sex-specific standards or policies concerning employee or student dress or grooming, or concerning access to restrooms, spas, baths, showers, dressing rooms, locker rooms, or other intimate facilities or settings").

19. *See* H.R. 1338, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015) (requiring all public restrooms, except single-occupancy restrooms, to be designed as "gender-divided"); H.R. 1339, 98th Gen. Assemb., 1st Reg. Sess. (Mo. 2015) (prohibiting state revenues from being used to "create a gender-neutral environment in a previously gender-divided environment" except in cases of federal or state court order); S. 720, 98th Gen. Assemb., 2d Reg. Sess. (Mo. 2016) (establishing that in all settings where a "student may be in a state of undress in the presence of other students," distinct areas must be designated for students to use according to their "biological sex" and also applying this same standard to restrooms, locker rooms, shower rooms, and other similar accommodations).

20. *See* Assemb. 375, 78th Gen. Assemb., Reg. Sess. (Nev. 2015) (requiring public schools to designate restrooms, locker rooms, showers, and areas where students may undress for use by students according to their biological sex, as determined at birth).

21. *See* Assemb. 10127, 2016 Leg., Reg. Sess. (N.Y. 2016) (establishing that restrooms and changing facilities at educational institutions be segregated by "biological sex" as identified on a person's birth certificate).

22. *See* H.R. 2, 2016 Gen. Assemb., 2d Extra Sess. (N.C. 2016) (requiring that all multiple-occupancy bathrooms in public schools and public buildings be sex-segregated and designated for use by individuals according to their biological sex).

23. *See* S. 1619, 55th Leg., 2d Sess. (Okla. 2016) (defining "sex" as the "physical condition of being male or female, as identified at birth by that individual's anatomy," and providing students with a right to religious accommodation and a private right of action in cases where a school or district permits individuals of the opposite sex to use the same restrooms, changing facilities, or showers).

Carolina,[24] South Dakota,[25] Tennessee,[26] Virginia,[27] Washington,[28] and Wisconsin.[29] Even individual cities like Oxford, Alabama[30] have passed bathroom ordinances targeting trans individuals, while others, like Lufkin and Rockwall, Texas, have considered similar measures.[31]

The issue of trans bathroom access grew in prominence after the Obama administration issued an administrative finding that trans students are entitled under Title IX of the Education Amendments of 1972[32] to use bathrooms consistent with their gender identities.[33] Failure to provide such access to bathroom facilities, the Obama administration argued, constituted a form of

24. *See* H.R. 3012, 122d Sess., Reg. Sess. (S.C. 2017) (barring local governments from enacting any laws that would permit trans individuals from using bathroom or changing room facilities inconsistent with their biological sex as stated on their birth certificate in any "public accommodation or a private club or other establishment").

25. *See* H.R. 1008, 91st Assemb., Reg. Sess. (S.D. 2017) (requiring "[e]very restroom, locker room, and shower room located in a public elementary or secondary school that is designated for" multiple occupancy to be used "only by students of the same biological sex" and providing that trans students are entitled to "reasonable accommodation[s]" like the use of a single-occupancy bathroom so long as it does not pose an undue hardship on the district).

26. *See* S. 2387, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016) (requiring students to use bathrooms and locker facilities consistent with their sex as indicated on their "original birth certificate"); H.R. 2414, 109th Gen. Assemb., Reg. Sess. (Tenn. 2016).

27. *See* H.D. 1612, 2017 Leg., Reg. Sess. (Va. 2017) (mandating that all government buildings will restrict access to bathrooms based on sex as defined by "an individual's original birth certificate"; requiring parental notification by schools in cases where a minor requests "to be recognized or treated as the opposite sex, to use a name or pronouns inconsistent with the child's sex, or to use a restroom or changing facility designated for the opposite sex"; and providing a civil cause of action against the government in cases where a trans person is found to have accessed a bathroom inconsistent with their biological sex at birth).

28. *See* H.R. 1011, 65th Leg., Reg. Sess. (Wash. 2017) (altering existing nondiscrimination law to remove protections for trans individuals using bathrooms, locker rooms, showers, saunas, and other comparable facilities in accordance with their gender identities).

29. *See* Assemb. 469, 2015 Leg., Reg. Sess. (Wis. 2015) (requiring school boards to designate restrooms and changing rooms in public school buildings for the exclusive use of only one sex as defined "by an individual's chromosomes and identified at birth by that individual's anatomy" and further establishing a process for students to receive declaratory relief, injunctive relief, or civil damages in cases of schools failing to follow this law).

30. *See* Zach Tyler, *Oxford Council Rebukes Target Bathroom Policy with New Ordinance*, ANNISTON STAR (April 27, 2016), http://www.annistonstar.com/news/oxford-council-rebukes-target-bathroom-policy-with-new-ordinance/article_e52d109e-0c13-11e6-b99a-135eb2794347.html (explaining how the city of Oxford, Alabama unanimously approved a municipal ordinance that requires individuals to use public restrooms that correspond to the gender listed on their birth certificates and established criminal and civil penalties for violation of the statute) [https://perma.cc/WLN3-5JRD].

31. *See* Nico Lang, *Could Texas Become the Next Trans Bathroom Battleground?*, ADVOC. (May 2, 2016), http://www.advocate.com/transgender/2016/5/02/could-texas-become-next-trans-bathroom-battleground (detailing the contemplated ordinances in each city) [https://perma.cc/FQ9R-BHHX]; *see also* Ray Leszcynski, *Update: Rockwall Ordinance on Bathroom Use by Person's Sex at Birth Fails in City Council*, DALL. MORNING NEWS (Apr. 29, 2016), https://www.dallasnews.com/news/news/2016/04/29/rockwall-enters-national-debate-on-transgender-bathroom-use-with-monday-vote (describing how the measures in Lufkin and Rockwall ultimately failed) [https://perma.cc/BTA7-73AB].

32. 20 U.S.C. § 1681 (2012).

33. *See generally* Lhamon & Gupta, *supra* note 5.

sex discrimination.[34] In response, thirteen states filed suit against the federal government arguing that the Obama administration overstepped its authority in issuing such an administrative ruling.[35] The U.S. Supreme Court granted certiorari in one such case: *Gloucester County School Board v. G.G.*[36] In *Gloucester*, the Fourth Circuit Court of Appeals deferred to the Department of Education's interpretation of Title IX on trans bathroom use.[37] The Gloucester School Board's decision to appeal the ruling was met by condemnation by civil rights groups.[38] On March 6, 2017, in light of the Trump administration's decision to rescind this Obama-era guidance letter, the Court vacated the judgment and remanded the case to the Fourth Circuit for further consideration—leaving for another day the fate of trans student bathroom rights under Title IX.[39]

It is safe to say that, in only a few short years, trans bathroom use has emerged as a divisive political issue. Thus far, the literature on bathroom bills has focused on three major topics. One strand of the debate has focused on whether these measures violate existing federal law.[40] Another strand of research has attempted to evaluate whether bathroom bills are actually necessary to protect public safety as supporters contend.[41] A final strand of research and reporting has evaluated the financial ramifications of bathroom bills.[42]

34. *See id.* at 2 ("A School's Title IX obligation to ensure nondiscrimination on the basis of sex requires schools to provide transgender students equal access to educational programs and activities . . . .").

35. *See* Erik Eckholm & Alan Blinder, *Federal Transgender Bathroom Access Guidelines Blocked by Judge*, N.Y. TIMES (Aug. 22, 2016), https://nyti.ms/2k9q8qA (clarifying that the states challenged the Obama administration guidance on both Title IX compliance and compliance with Title VII, which governs civil rights in the workplace) [https://perma.cc/7AX3-5UGC].

36. 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016).

37. *See id.* at 721; Jonathan H. Adler, *Supreme Court to Hear Transgender Bathroom Case*, WASH. POST (Oct. 28, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/10/28/supreme-court-to-hear-transgender-bathroom-case/ [https://perma.cc/YU8D-BV25].

38. *See* Louis Llovio, *Gloucester County School Board Requests Full Appeals Court Review of Transgender Ruling*, RICHMOND TIMES-DISPATCH (Apr. 22, 2016), http://www.richmond.com/news/virginia/article_fffed187-0d52-58db-9ee1-1414a6414b93.html (describing the unanimous decision by the school board to appeal the Fourth Circuit's decision) [https://perma.cc/Q77V-CN2Q].

39. *See* Ed Whelan, *Supreme Court Vacates Fourth Circuit Transgender Ruling*, NAT'L REV. (Mar. 6, 2017, 10:00 AM), http://www.nationalreview.com/bench-memos/445519/supreme-court-vacate-remand-transgender [https://perma.cc/LVK3-JT6R].

40. *See infra* Part I.

41. Whelan, *supra* note 39 (explaining that, contrary to claims made by supporters of bathroom bills, there exists virtually no evidence to suggest that sexual predators have taken advantage of nondiscrimination ordinances to commit crimes in public restrooms).

42. *Id.* (discussing preliminary estimates of the economic impact of North Carolina House Bill 2—the state law that strictly limited trans bathroom use, stripped the state nondiscrimination ordinance, and barred localities from enacting nondiscrimination ordinances protecting LGBTQ residents—and discussing the estimated economic impact of a similar proposed bill in Texas).

This Article interjects into this rapidly evolving debate to explore an undertheorized issue related to bathroom laws—their criminal justice implications. This Article argues that some proposed measures have the potential to do more than stigmatize the trans community. Bathroom laws could effectively criminalize the trans community. Some of these proposed laws create new categories of criminal offenses for trans individuals who use bathrooms inconsistent with their gender identities. Those proposals that do not establish new crime categories may nevertheless open the door for local police and prosecutors to classify trans bathroom use under existing criminal statutes such as criminal trespass. In the process, they invite law enforcement officers to use the tools of the criminal justice system to enforce these measures.

This criminalization of the trans community creates multiple dilemmas in the criminal justice arena. First, bathroom laws saddle local law enforcement with the unfamiliar responsibility of identifying and policing members of the trans community. The existing literature suggests that American police are largely untrained and poorly equipped to enforce bathroom laws.[43] Few departments appear to have clearly articulated policies for identifying, booking, searching, or properly housing trans suspects—and those that do tend to be in jurisdictions without bathroom laws. [44] Second, even in cases where police officers choose not to enforce bathroom laws, the mere existence of bathroom laws could create a sort of moral panic that may empower members of the public to engage in dangerous attempts at private enforcement. [45]

Apart from their potentially discriminatory motivations and stigmatizing effect, these measures may expose the trans community to serious physical and emotional harm as unprepared law enforcement and private citizens are thrust into the role of policing public bathroom use. By encouraging police officers and the public to police the trans community, bathroom laws increase the probability of police misconduct and private violence directed at an already disadvantaged minority group.

Finally, this Article argues that criminalizing bathroom use, whether by the creation of new statutes or the use of existing ones, effectively criminalizes the status of being trans. By criminalizing innocent, life-sustaining conduct so inextricably linked to the status of being trans, some proposed bathroom laws may violate the Eighth Amendment's bar on cruel and unusual punishment.

In *Robinson v. California*,[46] the Supreme Court held that while states may regulate behavior through criminal law, the Eighth Amendment prevents states from criminalizing one's mere status.[47] Six years later, in *Powell v.*

43. *See infra* Part II.B.
44. *See infra* Part II.B.2.
45. *See infra* Part II.D.
46. 370 U.S. 660 (1962).
47. *See infra* Part III.A.

Texas,[48] the Court seemed to back away from *Robinson*, declining to hold that it was unconstitutional to criminalize acts linked to a particular status.[49] Nonetheless, at least five of the Justices appeared sympathetic to the notion that the Constitution may impose limits on the ability of states to punish conduct rendered effectively involuntary by a defendant's circumstances or status.[50]

In the years since *Robinson* and *Powell*, scholars have debated whether any conduct can be so inextricably linked to a person's status as to make the punishment of that conduct impermissible under the Eighth Amendment.[51] Regulation of bathroom use by trans individuals brings this debate to a head. When states seek to regulate the biological and necessary bodily functions of trans individuals through bathroom laws, this Article argues, it seeks to regulate their very existence.[52]

This Article proceeds in three parts. Part I discusses the emergence of the modern bathroom bill. This Part describes the Obama administration's executive guidance on trans students' use of bathrooms in public schools. It then tracks the thirteen state attorneys general that have filed suit against the federal government to overturn President Obama's executive guidance on this issue. Next, it surveys a number of proposed state measures that would regulate public bathroom use by trans individuals. Part II addresses the criminal justice implications of bathroom laws. This part demonstrates how some bathroom proposals would explicitly or implicitly criminalize bathroom use by trans individuals and how many bathroom provisions would grant largely untrained police officers the discretion to enforce these new mandates, thereby increasing the chances of physical and emotional abuse of trans individuals. Part III then considers avenues for future legal challenges to these proposed bathroom bills, focusing specifically on the theory that some of these measures violate the Eighth Amendment's bar on cruel and unusual punishment.

I. THE EMERGENCE OF THE BATHROOM BILL

Bathroom bills are a relatively recent legislative priority. There are few records of state legislators proposing bathroom bills before 2013. Since then, the popularity of such measures has progressively picked up steam. What started as a single proposal in 2013 ballooned into nine in 2015, nineteen in

48. 392 U.S. 514 (1968).
49. *Id.*
50. *Id.*
51. *See infra* Part III.B.
52. At least some courts have found that states and localities may not criminalize innocent, life-sustaining conduct that is only made criminal by a person's status. For example, as discussed in Part III.B, in *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007), the Ninth Circuit found that a municipal ordinance that criminalized behaviors like sitting or sleeping in public effectively punished the status of being homeless in violation of the Eighth Amendment. Using similar logic, this Article illustrates how litigants could challenge criminal penalties imposed on bathroom use by trans individuals under the Eighth Amendment. *See infra* Part III.

2016, and many more in 2017.[53] The emergence of the bathroom bill at the state level roughly coincided with a handful of cases in which trans students secured the right to use bathroom facilities consistent with their gender identities.[54] That same year, "educators in Massachusetts, Maine and Portland, Oregon issued guidelines to accommodate trans students, allowing them to use bathrooms and play on sports teams corresponding to the gender with which they identify."[55]

The emergence of bathroom bills also roughly coincided with the proliferation of local nondiscrimination ordinances protecting trans individuals.[56] Opponents have argued that nondiscrimination protections that include the trans community would open the door for "predators" to sneak into women's restrooms under the guise of being trans.[57]

The Obama administration's "Dear Colleague" letter, issued jointly by the Department of Justice and the Department of Education, may have accelerated the rise of bathroom legislation.[58] That administrative guidance,[59] issued on May 13, 2016, stated that Title IX requires schools to treat trans students the same as "other students of the same gender identity."[60]

53. *See* Kralik, *supra* note 6; *see infra* Appendix.

54. In particular, bathroom bills seemed to coincide with a landmark case in Colorado in which a six-year-old trans girl won the right to use the girls' restroom at her public school. *See* Dan Frosch, *Dispute on Transgender Rights Unfolds at a Colorado School*, N.Y. TIMES (March 18, 2013), http://www.nytimes.com/2013/03/18/us/in-colorado-a-legal-dispute-over-transgender-rights.html (describing the backstory of the case and other less publicized but factually similar cases) [https://perma.cc/KDF9-NQUF]; *New Documentary Highlights Landmark Trans Bathroom Fight*, WNYC (Jan. 13, 2017), http://www.wnyc.org/story/growing-coy-documents-landmark-transgender-bathroom-fight/ (describing the case as "one of the first in the U.S. to specifically address transgender bathroom rights" and describing Mathis's victory as a "landmark win" that "continues to resonate today") [https://perma.cc/6SXG-D955].

55. Sabrina Rubin Erdely, *About a Girl: Coy Mathis' Fight to Change Gender*, ROLLING STONE (Oct. 28, 2013), http://www.rollingstone.com/culture/news/about-a-girl-coy-mathis-fight-to-change-change-gender-20131028 [https://perma.cc/Z2UG-9KHY].

56. According to the Human Rights Campaign, at least 225 cities have local ordinances that prohibit discrimination based on gender identity. *See Cities and Counties with Non-Discrimination Ordinances That Include Gender Identity*, HUMAN RIGHTS CAMPAIGN (Jan. 28, 2016), http://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender [https://perma.cc/4MFM-C3Q4].

57. One of the most egregious examples of this was the response to the Houston Equal Rights Ordinance. While the ordinance prohibited discrimination on the basis of fifteen different traits, including being trans, the opposition attacked the bill's protection of trans individuals. The opponents, who went by the name Campaign for Houston, ran a highly transphobic ad that warned voters of how predators could use the statute to lawfully prey on women and girls in public restrooms. *See* J. Bryan Lowder, *This Anti-HERO Ad Is the Definition of Transphobia*, SLATE (Oct. 19, 2015, 4:01 PM), http://www.slate.com/blogs/outward/2015/10/19/hero_trans_bathroom_battle_campaign_for_houston_ad_is_most_transphobic_yet.html [https://perma.cc/LSF4-R8MN].

58. *See* Lhamon & Gupta, *supra* note 5, at 1.

59. It is worth mentioning that the Department of Education and the Department of Justice "determined that this letter [was] *significant guidance*" meaning that it "provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations." *Id.*

60. *Id.* at 2 (explaining the scope of Title IX).

Specifically, the Obama administration interpreted the prohibition on discrimination "on the basis of sex" in "any education program or activity receiving Federal financial assistance" under Title IX[61] to "encompass discrimination based on a student's gender identity, including discrimination based on a student's transgender status."[62] This finding had implications for a number of school-related policies. In addition to ensuring trans students' equal access to bathroom facilities consistent with their gender identities, the agencies advised schools that they had a responsibility to "provide a safe and nondiscriminatory environment for all students, including transgender students";[63] to treat students consistent with their gender identities regardless of whether they have been able to obtain identification documents reflecting their gender identities;[64] and to permit trans students to participate in sex-segregated activities and to access facilities consistent with their gender identities.[65]

The Obama administration's broad interpretation of Title IX's prohibition on sex discrimination is consistent with the interpretation of statutory terms like "sex" and "gender" by previous federal courts.[66] It is also consistent with the interpretation of other federal agencies during that administration.[67]

61. *See* 20 U.S.C. § 1681 (2012).

62. *See* Lhamon & Gupta, *supra* note 5, at 1.

63. *Id.* at 2 (explaining that schools were under an obligation to respond to harassment that might create a hostile educational environment).

64. *Id.* at 3.

65. *Id.* at 3–4 (listing restrooms, locker rooms, athletics, single-sex classes, single-sex schools, social fraternities or sororities, and housing and other overnight accommodations as examples of areas where schools were obligated to treat trans students the same as cisgender students).

66. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and [that] it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements." (alterations in original) (quoting 20 U.S.C. § 2000e (2012))); Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (explaining that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender"); Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior"); Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215–16 (1st Cir. 2000) (interpreting federal law defining "sex" to bar discrimination based on sex stereotyping); Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) (finding an actionable claim for sex discrimination under the Gender Motivated Violence Act when a perpetrator's actions stemmed from the belief that a victim was a man but failed to act like one).

67. *See* U.S. DEP'T OF LABOR, EMP'T & TRAINING ADMIN., TRAINING AND EMPLOYMENT GUIDANCE LETTER NO. 37-14, UPDATE ON COMPLYING WITH NONDISCRIMINATION REQUIREMENTS: DISCRIMINATION BASED ON GENDER IDENTITY, GENDER EXPRESSION AND SEX STEREOTYPING ARE PROHIBITED FORMS OF SEX DISCRIMINATION IN THE WORKFORCE DEVELOPMENT SYSTEM (2015) (interpreting Title I of the Workforce Innovation and

Conservative legislators across the country reacted angrily to the Obama administration's guidance on trans bathroom access.[68] At least thirteen states filed suit against the federal government claiming that the Obama administration overstepped its authority in issuing such an administrative ruling.[69]

Not long after the Obama administration published its guidance letter, the Supreme Court granted certiorari in *Gloucester County School Board v. G.G.*[70] There, G.G, a trans boy, sought to use the boys restroom at his high school.[71] The local school board then passed a local policy banning G.G. from using the boys restroom.[72] G.G. filed suit against the school district alleging a violation of Title IX and the Equal Protection Clause of the Constitution.[73] The district court dismissed G.G.'s suit and denied a preliminary injunction before the Fourth Circuit reversed.[74]

The Fourth Circuit ultimately deferred to the Department of Education's interpretation of Title IX on trans bathroom use.[75] The Gloucester School Board's decision to appeal the ruling was met by condemnation by civil rights groups.[76] On March 6, 2017, in light of the Trump administration's decision to rescind this Obama-era guidance letter, the Court ultimately vacated the judgment and remanded the case to the Fourth Circuit for further consideration.[77] Some may reasonably argue that the *Gloucester* case was more about deference to agency interpretations of the law than trans rights. Nevertheless, the case further ignited the heated national debate over the proper regulation of trans bathroom use.

Regardless of the origins of the bathroom bill, it is clear that these potentially discriminatory proposals have grown in popularity in recent years. Between 2013 and 2016, at least twenty-four states considered laws that would restrict trans "access to multiuser restrooms, locker rooms, and other

Opportunity Act to prohibit discrimination on the basis of gender identity, gender expression, and sex stereotyping); U.S. DEP'T OF LABOR, OFFICE OF JOB CORPS, JOB CORPS PROGRAM INSTRUCTION NOTICE NO. 14-31, ENSURING EQUAL ACCESS FOR TRANSGENDER APPLICANTS AND STUDENTS TO THE JOB CORPS PROGRAM 1 (2015) ("[S]taff at Job Corps centers should treat transgender individuals with the same respect as any other applicant or student, provide equal opportunity, and ensure a safe and productive environment for all Job Corps youth."); Memorandum from Eric Holder, U.S. Attorney Gen. to U.S. Attorneys (Dec. 15, 2014), https://www.justice.gov/file/188671/download [https://perma.cc/CU3W-SPXL].

68. *See* Emanuella Grinberg, *Feds Issue Guidance on Transgender Access to School Bathrooms*, CNN (May 14, 2016, 3:48 AM) (quoting former North Carolina Governor Patrick McCrory, Tennessee Senator Lamar Alexander, Mississippi Governor Phil Bryant, and Texas Senator Ted Cruz expressing various degrees of disagreement with and outrage over the Obama administration's order), http://www.cnn.com/2016/05/12/politics/transgender-bathrooms-obama-administration/ [https://perma.cc/Q575-LLAK].

69. *See* Eckholm & Blinder, *supra* note 35.

70. 822 F.3d 709 (4th Cir. 2016), *cert. granted*, 137 S. Ct. 369 (2016).

71. *Id.* at 715–16.

72. *Id.* at 714–15.

73. *Id.*

74. *Id.* at 715.

75. *Id.*; Adler, *supra* note 37.

76. *See* Llovio, *supra* note 38.

77. *See* Whelan, *supra* note 39.

sex-segregated facilities."[78] At least nine of these recent proposals have focused specifically on limiting trans bathroom access in public schools.[79] The rest have included some generally applicable limitations on bathroom use in government buildings or public businesses.[80]

The Department of Education and the Department of Justice under the Trump administration rescinded the Obama administration's guidance on trans bathroom use in public schools,[81] effectively leaving it up to individual states to decide whether to permit trans students to use facilities consistent with their gender identities. This act has not appeared to stem the growing push by state legislators to regulate trans bathroom use. In the 2017 legislative session alone, legislators in seven states—Alabama, Kansas, Minnesota, South Carolina, Texas, Virginia, and Washington—have proposed bills that would restrict trans access to bathrooms.[82]

Limited scholarship on bathroom bills exists, and there is virtually no literature on the criminal justice implications of bathroom bills. A handful of scholars have argued that existing laws protect the ability of trans individuals to use bathrooms consistent with their gender identities. For example, advocates have argued for the use of existing disability law[83] or employment law[84] to protect trans individuals from discrimination. Others have crafted constitutional and statutory objections to laws that deny trans individuals equal access to bathroom facilities.[85]

78. *See* Kralik, *supra* note 6; *see infra* Appendix.

79. *See infra* Appendix (showing that Illinois, Kansas, Kentucky, Michigan, Nevada, South Dakota, Tennessee, and Wisconsin appear to limit their bathroom bills only to public school facilities).

80. *See infra* Appendix (showing the wide range of laws that exist, with some explicitly criminalizing trans bathroom use as discussed in Part II, and others giving private individuals a civil right of action to enforce limitations on trans access to bathroom facilities. For example, legislators in Florida, Kansas, Virginia, and Wisconsin have proposed measures that would give private individuals the right to pursue private causes of action in cases where a trans person is allowed to use a bathroom facility consistent with their gender identity).

81. Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. & T.E. Wheeler II, Acting Assistant Attorney Gen. for Civil Rights, U.S. Dep't of Justice (Feb. 22, 2017), http://www.employmentandlaborinsider.com/wp-content/uploads/sites/328/2017/06/BLOG.Dear-Colleague-Letter-2017.pdf ("[T]he Department of Education and the Department of Justice have decided to withdraw and rescind the above-referenced guidance documents in order to further and more completely consider the legal issues involved.") [https://perma.cc/C4Q9-MRDC].

82. *See infra* Appendix.

83. *See generally* Daniella A. Schmidt, *Bathroom Bias: Making the Case for Trans Rights Under Disability Law*, 20 MICH. J. GENDER & L. 155 (2013).

84. *See generally* Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001).

85. *See, e.g.*, 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 (2007) (showing how trans rights may be the next frontier for equal protection cases); Vincent J. Samar, *The Right to Privacy and the Right to Use the Bathroom Consistent with One's Gender Identity*, 24 DUKE J. GENDER L. & POL'Y 33, 42–58 (2016) (arguing that bathroom bills constitute sex discrimination in violation of the Equal Protection Clause of the U.S. Constitution, Title VII, and Title IX).

Another group of scholars and media outlets have challenged claims that trans bathroom use poses a safety risk. Some scholars, like Robin Fretwell Wilson, have persuasively argued that trans individuals pose no safety threat when using bathroom facilities consistent with their gender identities.[86] Reports by a number of media sources have reiterated Professor Wilson's assertion.[87]

A few researchers have sought to situate trans bathroom bills within the broader historical context of other civil rights cases. Jennifer Levi and Daniel Redman have drawn historical parallels between "a little-known series of cases in which courts declined to enforce cross-dressing laws against transgender defendants" and modern laws limiting trans bathroom access.[88] Jill Weinberg has compared trans bathroom usage to other historical examples of segregation and discrimination.[89]

Academics and advocacy groups have argued that bathroom bills stigmatize trans individuals in a way that may impact their health and their ability to participate fully in public life.[90] These studies build on existing

86. *See generally* Robin Fetwell Wilson, *The Nonsense About Bathrooms: How Purported Concerns Over Safety Block LGBT Nondiscrimination Laws and Obscure Real Religious Liberty Concerns*, 20 LEWIS & CLARK L. REV. 1373 (2017) (arguing that the discussion over bathroom access and safety unfairly obscures more pressing and legitimate issues about how to best balance the need for nondiscrimination for LGBTQ persons with the need for religious liberty for houses of worship and other places where religious individuals may have good reason to expect protection for their beliefs).

87. *See, e.g.*, Stevie Borrello, *Sexual Assault and Domestic Violence Organizations Debunk 'Bathroom Predator Myth,'* ABC NEWS (Apr. 22, 2016), http://abcnews.go.com/US/sexual-assault-domestic-violence-organizations-debunk-bathroom-predator/story?id=38604019 (explaining how a coalition of over 200 national, state, and local organizations who work with sexual assault and domestic violence survivors argued that there has been no uptick in sexual assaults in the 200 municipalities and eighteen states where nondiscrimination laws protect trans bathroom use) [https://perma.cc/MR69-QM9J]; Katy Steinmetz, *Why LGBT Advocates Say Bathroom 'Predator' Argument Is a Red Herring*, TIME (May 2, 2016), http://time.com/4314896/transgender-bathroom-bill-male-predators-argument (citing a lack of evidence of any such harm in the dozens of locations that have adopted comprehensive nondiscrimination laws and ordinances) [https://perma.cc/VQ6H-MQXN].

88. *See* Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 133 (2010).

89. *See* Jill D. Weinberg, *Trans Bathroom Usage: A Privileging of Biology and Physical Difference in the Law*, 18 BUFF. J. GENDER L. & SOC. POL'Y 147, 151 (2010) (comparing the restrictions on trans bathroom use to Jim Crow segregation laws of the South).

90. *See, e.g.*, TIMOTHY WANG ET AL., CTR. FOR AM. PROGRESS, STATE ANTI-TRANSGENDER BATHROOM BILLS THREATEN TRANSGENDER PEOPLE'S HEALTH AND PARTICIPATION IN PUBLIC LIFE 1 (2016), http://fenwayhealth.org/wp-content/uploads/2015/12/COM-2485-Transgender-Bathroom-Bill-Brief_v8-pages.pdf [https://perma.cc/9PKA-FNTN]; Kristie L. Seelman, *Transgender Adults' Access to College Bathrooms and Housing and the Relationship to Suicidality*, 63 J. HOMOSEXUALITY 1378, 1379 (2016) (finding a statistical relationship between the denial of bathroom access and suicide attempts); Shoshana Goldberg & Andrew Reynolds, *The North Carolina Bathroom Bill Could Trigger a Health Crisis Among Transgender Youth, Research Shows*, WASH. POST (Apr. 18, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/04/18/the-north-carolina-bathroom-bill-could-trigger-a-health-crisis-among-transgender-youth-research-shows (relying in part on the results of national surveys of school climates for LGBTQ youth in high schools and middle schools, as well as other survey data) https://perma.cc/DCY3-VBLS; Max

research that suggests more generally that harassment and marginalization of the trans community adversely affects psychological well-being.[91]

Outside of academia, advocates and policymakers have argued about the economic cost of implementing highly controversial bathroom laws,[92] as well as the obvious enforcement challenges of excluding individuals from public spaces based on their birth certificates.[93]

Overall, while the existing literature explores a wide range of topics related to trans bathroom use,[94] virtually no scholarship discusses its criminal justice implications. This is a problematic oversight for several reasons. First, not only have some states acted to exclude trans individuals from using bathrooms consistent with their gender identities, but some state legislators are now proposing the criminalization of such bathroom use.[95] This means that police, jails, prisons, and criminal courts could now be thrust onto the

Kutner, *Denying Transgender People Bathroom Access Is Linked to Suicide*, NEWSWEEK (May 1, 2016), http://www.newsweek.com/transgender-bathroom-law-study-suicide-454185 (relying on a study from the Journal of Homosexuality that finds increased suicide risks for respondents who have been denied access to a bathroom because of their gender identity) [https://perma.cc/3Y8Z-VS2W].

91. *See* Seelman, *supra* note 90, at 1378–79 (citing multiple studies on how discrimination and marginalization of trans and gender nonconforming people may negatively impact their psychological well-being).

92. *See, e.g.*, Kimberly Adams, *The High Price of North Carolina's Transgender Bathroom Bill*, MARKETPLACE (May 9, 2016), https://www.marketplace.org/2016/05/09/business/north-carolina-transgender-bathroom-bill-comes-cost (describing how the Charlotte Regional Visitors Authority estimated that the North Carolina bathroom bill cost the city more than $80 million in lost business as of May 2016) [https://perma.cc/H92K-KBWJ]; Corinne Jurney, *North Carolina's Bathroom Bill Flushes Away $630 Million in Lost Business*, FORBES (NOV. 3, 2016), https://www.forbes.com/sites/corinnejurney/2016/11/03/north-carolinas-bathroom-bill-flushes-away-750-million-in-lost-business [https://perma.cc/AZG3-3ZRC]; David Saleh Rauf, *Study: Transgender Bathroom Bill Could Cost Texas Economy $8.5 Billion Annually*, HOUS. CHRON. (Dec. 6, 2016), http://www.houstonchronicle.com/news/politics/texas_legislature/article/Study-transgender-bathroom-bill-could-cost-the-10761390.php [https://perma.cc/7UTT-D382].

93. *See, e.g.*, Samantha Michaels, *We Asked Cops How They Plan to Enforce North Carolina's Bathroom Law*, MOTHER JONES (Apr. 7, 2016), http://www.motherjones.com/politics/2016/04/north-carolina-lgbt-bathrooms-hb2-enforcement (describing the challenges that law enforcement officers face in enforcing restrictions on bathroom access based on designations on individuals' birth certificates) [https://perma.cc/CNV4-V6MS].

94. Although not specifically discussed in the text above, it is worth mentioning a few other relevant studies. Dylan Vade has argued for a reconceptualization of legal terminology to be more inclusive of trans people. *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 311 (2005). Others have emphasized the need for protections for trans students. *See* Lindsay Hart, *With Inadequate Protection Under the Law, Transgender Students Fight to Access Restrooms in Public Schools Based on Their Gender Identity*, 41 N. KY. L. REV. 315, 317 (2014). Others have wondered whether the discussion of bathroom rights is simply a diversion from more serious subjects on the path to full inclusion for trans individuals. *See* Lisa Mottet, *Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 GEO. J. GENDER & L. 739, 744–46 (2002).

95. *See infra* Part II.

frontlines of this emerging cultural battle. Though there is a robust literature on the consequences of criminalization, it has not adequately considered the impacts of such criminalization on the trans community. This is an important consideration that legislators and civil rights advocates ought to consider as states begin wading into this controversial subject.

Second, attempts to criminalize trans bathroom use may open up new opportunities for advocates to challenge these measures using an alternative legal avenue: the Eighth Amendment. Such a constitutional challenge could help advocates undercut the criminal enforcement of these prohibitions on trans bathroom use. Thus, the parts that follow make two separate contributions to the existing literature. Part II explores the criminal justice implications of bathroom laws. Part III then argues that the proposed state laws that criminalize trans bathroom use effectively establish status crimes in violation of the Eighth Amendment's bar on cruel and unusual punishment.

II. BATHROOM LAWS AND THE CRIMINAL JUSTICE SYSTEM

There is a long history of limiting the application of the criminal justice system to conduct worthy of punishment. As the Supreme Court suggested in *Lawrence v. Texas*,[96] it may be unreasonable to utilize the blunt instrument of the criminal justice system "absent injury to a person or abuse of an institution the law protects."[97] When the law designates conduct as criminal, it has real consequences for both criminal defendants and actors within the criminal justice system. The criminalization of conduct comes with real

96. 539 U.S. 558 (2003).

97. *Id.* at 567. As law students often learn in their first-year criminal law courses, courts have articulated limiting principles that prevent the punishment of otherwise seemingly innocent acts. *See also* Proctor v. State, 176 P. 771, 772 (Okla. Crim. App. 1918) (preventing the State of Oklahoma from criminalizing the "keeping of a place").

costs—enforcement costs,[98] processing costs,[99] incarceration costs,[100] and other collateral consequences.[101]

As discussed in Part I, the existing literature has not considered the criminal justice implications of laws excluding trans individuals from certain sex-segregated bathroom facilities. To begin filling this gap, this Part examines legislative proposals from across the country related to trans bathroom use. It shows how many of these bathroom bills do more than merely exclude trans individuals from sex-segregated spaces.

As this Part demonstrates, many of these proposals would effectively criminalize the trans community. They do this in two ways—either by explicitly creating a new criminal offense for trans individuals who use bathrooms consistent with their gender identity or by effectively transforming such acts into criminal trespass. In each case, the effect is the same. These proposals would criminalize members of the trans community for using public restrooms. This puts local law enforcement, prison and jail officials, and courts on the frontlines in policing trans bathroom use. As the subparts below illustrate, these actors are largely unequipped to handle this newfound responsibility, thus exposing the trans community to an increased risk of physical and emotional harm.

98. *See, e.g.*, Darryl K. Brown, *Cost-Benefit Analysis in Criminal Law*, 92 CALIF. L. REV. 323, 328 (2004) (advocating for the use of cost-benefit analysis to more accurately weigh the relative costs associated with criminal justice policy); Tom Meagher, *The Costs of Crime Fighting*, MARSHALL PROJECT (Feb. 12, 2015), https://www.themarshallproject.org/2015/02/12/the-cost-of-crime-fighting (providing a detailed, historical retrospective about the costs of enforcing the federal criminal law through examining the budgets of the Department of Justice, the FBI, the U.S. Attorney's Office, the Marshals Service, the Bureau of Prisons, and the Office of Justice Programs) [https://perma.cc/5DAE-GBS4].

99. *See, e.g.*, MALCOLM FEELEY, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (1992) (arguing that for misdemeanors and lesser felonies, the most significant punishment is not the minimal fines or prison sentences, but rather the costs incurred by the defendants before the case even comes before the judge—lost wages, missed work, bail bondsmen commissions, fees paid to attorneys, and collateral consequences); Issa Kohler-Hausman, *Managerial Justice and Mass Misdemeanors*, 66 STAN. L. REV. 611, 611 (2014) (arguing that the New York City justice system is focused on overseeing people rather than handling simple adjudication).

100. *See* JONATHAN SIMON, MASS INCARCERATION ON TRIAL: A REMARKABLE COURT DECISION AND THE FUTURE OF PRISONS IN AMERICA 17–47 (2014) (providing background on the costs associated with mass incarceration in the United States from the 1970s onward); CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST., THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 1 (2012), https://shnny.org/uploads/Price-of-Prisons.pdf (finding that in the forty states participating in the study, incarceration frequently costs taxpayers more than is reflected in corrections budgets) [https://perma.cc/R3CD-ZNXG]; Brown, *supra* note 98, at 346–49 (2004) (describing the effects of incarceration on families and communities).

101. *See* Padilla v. Kentucky, 559 U.S. 356, 364–65 (2010) (distinguishing between the direct consequences of criminal convictions, like incarceration, and the "collateral" consequences of criminal convictions, like deportation or civil action that may follow from a criminal conviction).

A. Criminalizing the Trans Community: Bathroom Use as a Crime and as a Trespass

This Part first discusses laws that treat bathroom use as a crime. It then analyzes laws treating bathroom use as a trespass.

The most direct way that proposed bathroom laws criminalize the trans community is by explicitly establishing a new criminal offense category for trans individuals who use bathrooms consistent with their gender identities. For example, Indiana Senate Bill No. 35 would make it a Class A misdemeanor for a person who is of the "physical condition of being [one 'biological gender'], as determined by an individual's chromosomes and identified at birth by the individual's anatomy" to use a public restroom facility designed for the other "biological gender."[102] This broad definition of so-called "biological gender" is even more dangerous than many proposals from other states. For one thing, this definition draws no distinction between individuals who identify as trans, those who have begun to transition, those that have undergone sex reassignment procedures, and those that have had their birth certificate corrected. Under this definition, all members of the trans community would be forced to use public facilities matching their sex assigned at birth or face serious criminal penalties. Class A misdemeanors are the highest misdemeanor offense category in Indiana and can result in up to one year of incarceration and up to a $5000 fine.[103]

Similarly, Florida House Bill 583 states that "[a] person who knowingly and willfully enters a single-sex public facility designated for or restricted to persons of the other sex commits a misdemeanor of the second degree."[104] Under Florida law, a second-degree misdemeanor results in a "definite term of imprisonment not exceeding 60 days"[105] and up to a $500 fine.[106]

Other states do not clearly delineate a category of criminal offense for violations of their bathroom proposals but do explicitly encourage law enforcement to engage in policing. For example, Senate Bill 1 in Alabama states that "[e]nforcement of this act shall be authorized by any state or local law enforcement agency having jurisdiction over the person or entity providing rest rooms, bathrooms, or changing facilities to the public."[107]

While some state legislators have proposed the creation of new criminal offense categories for trans bathroom use, most existing proposals would

102. *See* S. 35, 119th Gen. Assemb., 2d Reg. Sess. (Ind. 2016). This Article uses the terminology "biological gender" because this is the language used by the Indiana bill. This does not reflect any judgment about the correctness of this terminology. This terminology is out of step with the preferred language recommended by those in the trans community, experts, and activists. *See, e.g.*, *Transgender Terminology*, NATIONAL CTR. FOR TRANSGENDER EQUAL. (Jan. 15, 2014), http://www.transequality.org/issues/resources/transgender-terminology [https://perma.cc/PC28-8YL3].

103. *See* IND. CODE ANN. § 35-50-3-2 (West 2016).

104. *See* H.R. 583, 2015 Leg., Reg. Sess. (Fla. 2015).

105. *See* FLA. STAT. ANN. § 775.082 (West 2016).

106. *See id.* § 775.083 (stating the fine shall not exceed "$500, when the conviction is of a misdemeanor of the second degree or a noncriminal violation.").

107. *See* S. 1, 2017 Leg., Reg. Sess. (Ala. 2017).

merely establish prohibitions on trans bathroom access without attaching any clear criminal penalty. This has led some commentators to conclude that, if such a law were to pass, a trans person could not be arrested for using a bathroom facility consistent with their gender identity.[108] Unfortunately, this conclusion is not entirely accurate. By announcing prohibitions regarding who can lawfully access public, sex-segregated bathroom facilities, these bathroom laws open the door for police to arrest trans individuals for criminal trespass.

Generally, states define criminal trespass as the unlawful or unlicensed entry or presence in a space.[109] It is more difficult to charge a person with trespassing on public property. In such cases,

> when property is open to the public at the time of an alleged trespass, the state has the burden of proving that a lawful order excluding the defendant from the premises [was] issued, that the order was communicated to the defendant by a person with authority to make the order, and that the defendant defied the order.[110]

These sorts of limitations on the use of trespass against individuals occupying public spaces make sense. When a particular space is open to the public at the time of an alleged trespass, we often assume that a person has a license or privilege to be present without penalty.[111] In such cases, it is common for the state to have a burden of showing that it communicated a lawful order excluding the defendant from the premises, which the defendant defied.[112] Some states have limited the use of trespass in public spaces to cases where the prosecutor can demonstrate the "additional fact" that the

108. See Michaels, *supra* note 93 (stating, in reference to the North Carolina law, that "[b]ecause it's a civil law, using the wrong bathroom wouldn't be considered a criminal violation in itself")

109. *See* 75 AM. JUR. 2D *Trespass* § 190 (2017). Like all criminal offenses, each element of trespass must be proven beyond a reasonable doubt. *Id.* Some states limit the application of criminal trespass to situations where a defendant has remained in a space after being ordered to leave by the owner of the property or by another authorized person. *See* State v. Delgado, 562 A.2d 539, 544 (Conn. App. Ct. 1989). The court found that the requisite Connecticut statute required a showing that "(1) that the defendant, knowing that he was not privileged or licensed to do so, entered or remained in a building; and (2) that the defendant committed that act after an order to leave or not to enter had been personally communicated to him by the owner or other authorized person." *Id.* (quoting State v. LoSacco, 529 A.2d 1348, 1350 (1987)).

110. *See* 75 AM. JUR. 2D *Trespass* § 191 (2017).

111. *See, e.g.*, People v. Leonard, 465 N.E.2d 831, 834 (N.Y. 1984) (explaining that "[w]hen the property is 'open to the public' at the time of the alleged trespass . . . the accused is presumed to have a license and privilege to be present" (quoting N.Y. PENAL LAW § 140.00 (McKinney 2017))).

112. *See, e.g.*, Johnson v. State, 739 P.2d 781, 783 (Alaska Ct. App. 1987) ("The jury must find that the premises were open to the public, that Johnson was personally ordered to leave the premises, that the person who gave the order was authorized by the owner of the premises to give the order, and that the order was legally effective to terminate Johnson's license or privilege to utilize the premises."); People v. Brown, 254 N.E.2d 755, 757 (N.Y. 1969) (concluding that when someone "lawfully entered the premises, a conviction could be had [for trespass] only if the prosecution established that (1) a lawful order not to remain was personally communicated to the defendant *and* (2) that he defied such a lawful order").

defendant lacked a legal right to remain thereby protecting against capricious or arbitrary enforcement.[113] The posting of signs, the announcement of regulations, or the use of fences and barricades can be sufficient to demonstrate this "additional fact."[114]

The majority of bathroom law proposals would seemingly open the door for police officers to arrest some trans individuals for criminal trespass for using bathroom facilities consistent with their gender identities. Before the consideration of modern bathroom bills, state courts had already held that it may constitute unlawful trespass for a person who identifies as a man to enter a restroom facility designated exclusively for those who identify as women.[115] In such cases, courts have held that a state may permissibly exclude individuals from public spaces and use criminal trespass to enforce such exclusion where visible signs designated a bathroom facility for the exclusive use of one gender.[116] For example, in *In re S.M.S.*,[117] the Court of Appeals of North Carolina heard a challenge by a juvenile defendant to a second-degree criminal trespass conviction.[118] There, a school coach caught the defendant going into the girls' locker room. While the Court of Appeals ultimately found that the school was more than capable of dealing with this incident without the assistance of the criminal justice system, it did conclude that a "sign marked 'Girl's Locker Room' was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room, pursuant to" the North Carolina statute.[119]

Similarly, in *Commissioner v. White*,[120] a case before the Superior Court of Pennsylvania, a man was found guilty at trial for criminal trespass for entering a "ladies' room" inside the Society Hill Club in Philadelphia.[121] The

113. *See, e.g.*, Hemmati v. United States, 564 A.2d 739, 745 (D.C. 1989) ("One who remains present in a restricted area with a bona fide belief of his legal authority to remain there is not guilty of unlawful entry."); O'Brien v. United States, 444 A.2d 946, 948 (D.C. 1982) (noting that the government must show "some additional specific factor establishing the [individual's] lack of a legal right to remain" to prove unlawful entry onto public property).

114. *See, e.g.*, United States v. Powell, 563 A.2d 1086, 1089 (D.C. 1989); Carson v. United States, 419 A.2d 996, 998 (D.C. 1980) (holding that factors that can demonstrate a person's lack of a legal right to remain include "posted regulations, signs[,] or fences and barricades regulating the public's use of government property.

115. *See* Brief of Amici Curiae Anti-Sexual Assault, Domestic Violence, and Gender-Based Violence Organizations in Support of Plaintiffs-Appellants' Seeking Reversal at 8–9, Carcaño v. McCrory, No. 16-1989 (4th Cir. Oct. 25, 2016), 2016 WL 6312116 ("Charlotte's nondiscrimination ordinance would have allowed transgender men to use men's facilities and transgender women to use women's facilities. It would have remained illegal for men to trespass in women's restrooms, as well as to engage in a range of conduct in them.").

116. *See, e.g.*, *In re* S.M.S., 675 S.E.2d 44, 46 (N.C. Ct. App. 2009) (explaining that "[t]he sign marked 'Girl's Locker Room' was reasonably likely to give respondent notice that he was not authorized to go into the girls' locker room" under the statute); Comm'r v. White, 538 A.2d 887, 889 (Pa. Super. Ct. 1988) ("We hold that appellant's entry into the ladies' room violated § 3503(a)(1)(i), and therefore affirm his conviction of felonious criminal trespass.").

117. 675 S.E.2d 44 (N.C. Ct. App. 2009).

118. *Id.* at 44.

119. *Id.* at 46.

120. 538 A.2d 887, 889 (Pa. Super. Ct. 1988).

121. *Id.* at 888.

defendant challenged his conviction for criminal trespass, arguing that the ladies' room was not a "separately secured or occupied portion" of a building as required under the Pennsylvania statute.[122] In rejecting the defendant's argument, the court concluded that the ladies' room was "reserved for the exclusive use of only a subset of the total population authorized to use the larger structure."[123] Such a holding should hardly be surprising. As one court remarked, before trans bathroom use emerged as a divisive national issue, "the application of the . . . trespass laws to sex-segregated bathrooms and showers [was] straightforward and uncontroversial."[124]

Without the presence of a bathroom law on the books, trans individuals may have a reasonable argument that existing signage does not clearly communicate which bathroom they ought to use. In such cases, it may prove challenging for a prosecutor to use existing trespass statutes to penalize a trans person for using a bathroom consistent with their gender identity. After all, a trans person could simply argue that signage designating gender-segregated bathrooms does not clarify how the state defines each gender category.

But by passing a law that explicitly clarifies which public bathroom facilities a person may lawfully enter, a prosecutor may be able to argue that the state has provided trans individuals with notice. Judge Thomas D. Schroeder of the Middle District of North Carolina has agreed with this assessment. After North Carolina passed a bill limiting trans individuals' access to public bathroom facilities consistent with their gender identities, a group of civil liberties organizations, trans students, and state employees brought suit against the governor and the University of North Carolina seeking to enjoin the law.[125] While Judge Schroeder's memorandum opinion, order, and preliminary injunction covered significant ground, one particular piece of his analysis is worth reproducing here. Judge Schroeder acknowledged that limitations on access to public restroom facilities had previously been enforced through "voluntary compliance, social mores, and when necessary criminal trespassing law."[126]

While neither party was able to point to a criminal trespass case involving a trans individual in North Carolina, this was likely because "individuals who dress and otherwise present themselves in accordance with their gender identity have generally been accommodated" at least on a "case-by-case basis."[127] By changing state law to explicitly bar trans individuals from accessing bathrooms consistent with their gender identities, the court concluded that the North Carolina law now means that "any person who uses

122. *Id.*
123. *Id.* at 889.
124. Carcaño v. McCrory, 203 F. Supp. 3d 615, 629 (M.D.N.C. 2016).
125. *See id.* at 622–25.
126. *Id.* at 623.
127. *Id.* at 624.

a covered facility that does not align with his or her birth certificate commits a misdemeanor trespass."[128]

Thus, this is not an imagined or hypothetical concern. By passing a prohibition on trans bathroom access in public, North Carolina has opened up the trans community to criminal enforcement under existing trespass statutes. Furthermore, nothing about the North Carolina trespass statute makes it particularly unique. Should other states follow suit and provide limitations on trans access to public restrooms consistent with their gender identities, these states may similarly transform harmless public bathroom use by trans individuals into criminal trespass.

B. Police Enforcement

Bathroom law proposals that explicitly or effectively criminalize bathroom use by trans individuals would place police officers on the frontlines of enforcing these proposed criminal prohibitions. This Part first discusses the long and well-documented history of police officers in the United States mistreating the trans community.[129] Modern evidence suggests that transphobic cultures exist in many American police departments.[130] This may be, in part, because it appears that police rarely receive training in dealing with the trans community. This Part then identifies inherent challenges to bathroom law enforcement. Taken together, lack of training, the history of mistreatment, and evidence of a transphobic culture suggest that police enforcement of bathroom laws could increase the likelihood of misconduct directed at an already disadvantaged minority group.

1. Existing Evidence on Treatment of Trans Community by American Law Enforcement

The existing literature suggests that trans individuals already experience an unusually high level of contact with law enforcement, even without bathroom laws.[131] At least thirteen studies since 2003 have surveyed trans individuals about their experience with law enforcement abuse outside of a custodial setting.[132] These studies reveal a few important trends. First, there

128. *Id.* at 628. The court found that multiple parties to the suit appeared to be in agreement that the North Carolina bathroom law could be enforced using trespass statutes. *See id.*

129. *See* Noah Remick, *Activists Say Police Abuse of Transgender People Persists Despite Reforms*, N.Y. TIMES (Sept. 6, 2015), https://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.html?_r=0 [https://perma.cc/VB3X-W9EQ].

130. *See id*.

131. A literature review by Rebecca L. Stotzer in 2014 provides an excellent summary of many of the existing studies. *See* Stotzer, *supra* note 2, at 272.

132. *Id.* at 271 (showing a list of all thirteen studies and their respective findings). Sampling strategies for these surveys varies widely. Some use fairly reliable sampling strategies, while others rely on snowball sampling or samples of convenience. So it is not wise to rely on any one study as representative of the diverse lived experiences of trans individuals from all across the United States. *Id.* at 265–70 (describing the sample methodologies used in the existing studies).

is widespread agreement within the existing literature that trans individuals are reluctant to go to the police when they become victims of crimes. For example, a 2007 report by Jessica Xavier, Julie Honnold, and Judith Bradford found that 83 percent of trans individuals victimized by sexual assault and 70 percent of those victimized by physical assault chose not to go to police.[133] That report relied on a survey of 350 individuals identified through trans support groups and informal peer networks.[134] This roughly mirrors other studies on this same subject. A 2005 survey of 265 individuals primarily in Wisconsin found that only 9 percent of trans victims of sexual assault reported the crime to the police.[135] A 2001 survey by A. R. Sousa of forty-four trans individuals in San Francisco, recruited through agencies serving the trans community, found that among trans individuals that had been victims of criminal acts, only 25 percent reported the incidents to police.[136] A 1997 study by Emilia L. Lombardi and others of 402 trans individuals across the country found that over 41 percent of victims of harassment or violence never went to the police.[137] Of course, these surveys use a wide range of sampling methodologies—some more sophisticated than others. Some of these studies are also geographically limited, meaning that it is difficult to reach any generalizable conclusions from their results alone. But, taken together, the existing body of work suggests that trans individuals are likely more reluctant than their cisgender counterparts to turn to the criminal justice system when they have been victims of crimes.

In examining the existing literature, Rebecca Stotzer found that few studies examined the reasons why trans individuals seem reluctant to seek police assistance after being victimized. The few studies that did examined this question in more depth concluded that trans people often fear discrimination or ridicule from law enforcement or have been discouraged from contacting police because of previous negative experiences.[138]

Second, and relatedly, previous studies have found that when trans individuals do interact with police, they face a heightened risk of discrimination and abuse. Some of the best data on this subject come from a survey of 6450 trans and gender nonconforming individuals from all fifty

133. JESSICA XAVIER ET AL., THE HEALTH, HEALTH-RELATED NEEDS, AND LIFECOURSE EXPERIENCES OF TRANSGENDER VIRGINIANS 22 (Jan. 2007), http://www.vdh.virginia.gov/content/uploads/sites/10/2016/01/THISFINALREPORTVol1.pdf [https://perma.cc/2KNC-HYJW].

134. *Id.* at 10–11.

135. Stotzer, *supra* note 2, at 268, 274 (showing the number of respondents and describing the study's findings thereafter).

136. *See* A. R. Sousa, A Victimization Study of Transgendered Individuals in San Francisco, California 44 (Dec. 2001) (unpublished Masters thesis), http://scholarworks.sjsu.edu/etd_theses/2245.

137. *See generally* Emilia L. Lombard et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89, 96 (2001) (providing an overview of the study and its results).

138. *See* Stotzer, *supra* note 2, at 275 (mentioning that trans individuals often worry that police will not take their claims seriously).

U.S. states, organized by Jaime M. Grant and others.[139] That study found significant evidence of police mistreatment. Twenty-nine percent of all trans individuals and 46 percent of gender nonconforming individuals in the sample reported police officers treated them with disrespect.[140] Six percent reported being physically assaulted by police, and 2 percent reported being sexually assaulted by police.[141] Further, 22 percent of all trans individuals and 29 percent of gender nonconforming individuals in the survey reported being harassed by police.[142] All of this may explain why "[a]lmost half of the respondents reported being uncomfortable seeking police assistance."[143] Another survey of 2376 individuals conducted by Lambda Legal found that nearly one-third of trans and gender nonconforming individuals faced hostile interactions with police, nearly one-quarter of trans individuals reported being verbally assaulted by police, and a smaller but significant percentage reported being physically assaulted or sexually harassed.[144]

Unfortunately, the existing literature does not definitively identify why trans individuals appear particularly likely to become victims of police abuse. Nevertheless, there may be reason to believe that the mistreatment of the trans community by police stems in part from a transphobic culture common within U.S. law enforcement. Policing scholars agree that officer misconduct is often rooted in a department's organizational culture.[145] Research by organizational theorists has also found that socialization, on-the-job training, and internal systems of rewards or penalties can also contribute to

139. *See* JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2, 158–62 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf [https://perma.cc/8KA8-TSU3].

140. *See id.* at 159 (finding that 37 percent of female-to-male trans individuals report disrespect while 25 percent of male-to-female trans individuals report disrespect).

141. *Id.* at 160. The report also notes that the likelihood of physical or sexual assault differed based on the race of the victim. *Id.*

142. *Id.*

143. *Id.* at 162 (showing the breakdown of the levels of comfort and discomfort in seeking help from the police).

144. LAMBDA LEGAL, PROTECTED AND SERVED? 4, 11 (2015) (showing that 32 percent of respondents reported hostile attitudes from police, 22 percent reported being verbally assaulted, 4 percent reported being physically assaulted, and 8 percent reported being sexually harassed), https://www.lambdalegal.org/sites/default/files/publications/downloads/ps_executive-summary.pdf [https://perma.cc/T7KT-LP8X].

145. *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 515–25 (2004) (theorizing on the organizational roots of police misconduct); Stephen Rushin, *Structural Reform Litigation in American Police Departments*, 99 MINN. L. REV. 1343, 1417 (2015) ("[S]cholars have increasingly tied misconduct within a police department to underlying trends in organizational culture."); Kami Chavis Simmons, *The Politics of Policing: Ensuring Stakeholder Collaboration in the Federal Reform of Local Law Enforcement Agencies*, 98 J. CRIM. L. & CRIMINOLOGY 489, 505–06 (2008) (discussing the organizational roots of police misconduct). Perhaps one of the most prominent examples of this phenomenon is the Los Angeles Police Department (LAPD). There, investigators connected the beating of Rodney King, in part, to "a diseased organizational culture within the LAPD that condoned violence, tolerated racism, and failed to respond to wrongdoing." *Id.* at 1345.

misconduct.[146] The link between organizational culture and misconduct is important in the case of trans bathroom laws because police have a long history of mistreating the trans community.[147]

While this survey does not suggest that police officers are incapable of policing the trans community,[148] it should give reasonable legislators some hesitation in establishing new statutes that ensure regular (and likely hostile) interactions between the trans community and law enforcement. Indeed, many law enforcement officers appear to lack adequate training in how to deal with the trans community.[149] This is important because, if a police

146. *See* Diane Vaughan, *The Dark Side of Organizations: Mistake, Misconduct, and Disaster*, 25 ANN. REV. SOC. 271, 290 (1999) (describing how the "willingness [of an organizational member] to use illegitimate means on the organization's behalf is sealed by a reinforcing system of rewards and punishments").

147. *See* CHRISTY MALLORY, AMIRA HASENBUSH, & BRAD SEARS, DISCRIMINATION AND HARASSMENT BY LAW ENFORCEMENT OFFICERS IN THE LGBT COMMUNITY 6 (2015), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Discrimination-and-Harassment-in-Law-Enforcement-March-2015.pdf (stating that "[f]or decades, the LGBT community, and particularly LGBT people of color, youth, and transgender and gender nonconforming members of the LGBT community, has been subjected to profiling, entrapment, discrimination, harassment, and violence by law enforcement" and discussing how the Stonewall raids specifically targeted trans and gender nonconforming individuals) [https://perma.cc/9NX5-PX8G]; Michelangelo Signorile, *Escalating Police Violence and Transgender People*, HUFFINGTON POST (Dec. 6, 2011, 9:45 AM), http://www.huffingtonpost.com/michelangelo-signorile/escalating-police-violenc_b_1131343.html (describing numerous accounts of police mistreatment of trans individuals) [https://perma.cc/KQR4-5FQF]. *See generally* Kristina B. Wolff & Carrie L. Cokely, *"To Protect and to Serve?": An Exploration of Police Conduct in Relation to the Gay, Lesbian, Bisexual, and Transgender Community*, 11 SEXUALITY & CULTURE 1 (2007) (using content analysis of incident reports in Minnesota to examine the prevalence of negative interactions between police and the LGBT community); Jordan Blair Woods et al., *Latina Transgender Women's Interactions with Law Enforcement in Los Angeles County*, 7 POLICING 379 (2013) (conducting semistructured interviews with low-income Latina transgender women recruited from a community-based organization to show that they are common victims of verbal harassment, physical assault, and sexual assault at the hands of local law enforcement).

148. Indeed, encouraging evidence shows that the ranks of many police departments have diversified in recent years. David Alan Sklansky, *Is the Exclusionary Rule Obsolete?*, 5 OHIO ST. J. CRIM. L. 567, 577 (2008) ("More importantly, there is a growing body of evidence that the new diversity in the ranks is having a profound effect on the occupational culture of policing itself. There is more division and disagreement in police forces today, more internal debate, more factionalism, more mutual suspicion, more discord.").

149. Abundant experiential evidence supports this notion. *See, e.g.*, *supra* note 147 and accompanying text. However, the number of police departments providing training on trans issues remains unclear. Roughly 18,000 law enforcement departments exist in the United States. BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND LOCAL LAW ENFORCEMENT AGENCIES, 2008, at 2 (2011), https://www.bjs.gov/content/pub/pdf/csllea08.pdf [https://perma.cc/EL7D-YPFL]. The federal government only keeps limited records on the conduct of these thousands of decentralized state and local agencies. *See* Stephen Rushin, *Using Data to Reduce Police Violence*, 57 B.C. L. REV. 117, 118 (2016) ("Although the federal government keeps records on everything from 'how many people were victims of unprovoked shark attacks . . . to the number of hogs and pigs living on farms in the [United States], there is no reliable data on how many people are shot by police officers each year.'" (alterations in original) (quoting Wesley Lowery, *How Many Police Shootings a Year? No One Knows*, WASH. POST (Sept. 8, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-

department "implicitly condone[s] wrongdoing through the use of 'lax supervision and inadequate investigation' techniques," then that department is "more likely to see ongoing misconduct than departments that aggressively enforce internal regulations."[150] Local law enforcement appears to have only begun to train officers in how to deal with trans suspects. Not until 2014 did the Department of Justice make trans cultural competency training available to local law enforcement through its Community Relations Service.[151] The FBI did not alter its Training Manual and Hate Crime Statistics Form to include information on trans individuals until 2012.[152] Furthermore, even though the Department of Justice has agreed to settlements related to police misconduct[153] to overhaul local police practices in at least thirty-one police departments, it has only recently begun to include antitrans-bias training in these agreements.[154] More research is needed to evaluate the extent to which local police departments provide adequate training related to the trans community. The existing evidence, though, is discouraging.

2. Inherent Enforcement Challenges

The evidence from the previous subpart illustrates that the law enforcement community is largely untrained and ill-equipped to enforce bathroom laws. Compounding this lack of preparedness are the fundamental enforcement challenges involved in identifying individuals violating bathroom laws. The majority of the proposed statutes require individuals to use bathroom facilities consistent with an individual's biological "sex."[155] These statutes vary somewhat in how they define a person's sex. Most define sex at the chromosomal level,[156] by the sex-designation given to a person at birth as memorialized on their birth certificate,[157] or by a person's sexual anatomy.[158]

The enforcement challenges of such an approach are obvious. These proposed laws put police in the unenviable position of guessing the

shootings-a-year-no-one-knows/?utm_term=.3d2955c7242f [https://perma.cc/HYE3-5AU9])).

150. Rushin, *supra* note 149 (quoting Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815, 816 (1999)).

151. HARPER JEAN TOBIN ET AL., A BLUEPRINT FOR EQUALITY: A FEDERAL AGENDA FOR TRANS PEOPLE 25 (2015).

152. *Id.* at 26.

153. *See* 42 U.S.C. § 14141 (2012).

154. *See* TOBIN ET AL., *supra* note 151 (citing the New Orleans consent decree as the first settlement of its kind "to address anti-trans bias in policing"). Notably, the President's task force on 21st Century Policing also recommended that police departments establish policies to reduce bias against the LGBTQ community. *Id.* at 25.

155. *See supra* notes 7–29 and accompanying text.

156. *See, e.g.*, H.R. 4474, 99th Gen. Assemb., Reg. Sess. (Ill. 2016) (describing sex in part as based on "an individual's chromosomes").

157. *See e.g.*, Assemb. 10127, 2016 Leg., Reg. Sess. (N.Y. 2016) (using a person's birth certificate as a distinguishing factor for sex-segregated bathrooms).

158. *See, e.g.*, Assemb. 469, 2015 Leg., Reg. Sess. (Wis. 2015) (using a person's "anatomy" as a means of distinguishing between male and female individuals for sex-segregated facilities).

chromosomal makeup or the sexual anatomy of private individuals entering a public bathroom. Under *Terry v. Ohio*,[159] a police officer would need reasonable suspicion to conduct a limited, investigatory stop against a civilian.[160] To execute an arrest in such a situation, a police officer would need to have probable cause that a person was using a bathroom facility inconsistent with their chromosomal, anatomical, or otherwise designated sex.[161] In cases where a trans individual is living their life and presenting in a manner consistent with their gender identity, it may prove practically impossible for a police officer to meet such an evidentiary standard—particularly given that no state could reasonably expect all persons to carry with them a copy of original birth certificate to present on demand to a suspicious law enforcement officer. It could also create a high risk of false positives.[162]

C. Incarceration

Once police are given a license to enforce violations of bathroom laws as crimes, the number of trans individuals who may be taken into state custody would likely increase, at least temporarily. Evidence suggests that, once incarcerated, trans individuals face a substantially higher risk of harassment and physical injury than members of other groups.[163] At least eight empirical studies since 2003 have examined the lived experience of trans individuals in custodial settings.[164] These studies indicate that trans individuals face a heightened risk of discrimination, verbal abuse, sexual harassment, physical assault, sexual assault, and violence.[165] Thirty-eight percent of trans individuals and 29 percent of gender nonconforming individuals in the Grant survey reported being harassed by other inmates at jail or prison facilities, while an even higher percentage reported harassment by staff.[166] Nineteen percent of trans individuals and 4 percent of gender nonconforming individuals also reported being physically assaulted by staff or inmates, while a comparable number reported being sexually assaulted.[167] A substantial

159. 392 U.S. 1 (1968).

160. *Id.*

161. *Id.*

162. *See* Stephen Rushin, *The Judicial Response to Mass Police Surveillance*, 2011 U. ILL. J.L. TECH. & POL'Y 281, 302 (describing how the creation of false positives in law enforcement investigations puts innocent individuals at risk); Daniel J. Solove, *Digital Dossier and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1095, 1105 (2002) (explaining how false positives "alter[] the balance of power between the government and the people, exposing individuals to a series of harms, increasing their vulnerability and decreasing the degree of power that they exercise over their lives").

163. *See* Editorial, *Prisons and Jails Put Transgender Inmates at Risk*, N.Y. TIMES (Nov. 9, 2015), https://nyti.ms/2jXQz2h [https://perma.cc/6WLK-CXG5].

164. *See* Stotzer, *supra* note 2, at 273–74.

165. *Id.*

166. GRANT ET AL., *supra* note 139, at 166 (breaking down these numbers in the figure entitled "Harassment in Jail/Prison by Gender").

167. *Id.* at 168 (noting that 16 percent of trans individuals and 8 percent of gender nonconforming individuals reported being sexually assaulted by either staff or other inmates).

portion of trans individuals also reported a denial of healthcare while incarcerated.[168]

In a study of the California correctional system, Valerie Jenness found that 59 percent of trans inmates in state custody reported being sexually assaulted—a rate thirteen times higher than a random sample of inmates.[169] A 2011 study by Pascal Emmer, Adrian Lowe, and R. Barrett Marshall concluded that nearly half of trans individuals "had been laughed at during the search process," had been "put on display," or had been "called names."[170] Around 12 percent of respondents in that survey also reported being physically injured on purpose.[171] These results are similar to those in a 2012 survey by Frank Galvan and Mohsen Bazargan, which found that a significant proportion of Latina trans women taken into state custody felt they were unfairly treated.[172]

D. Private Enforcement

The effective criminalization of trans bathroom use may also embolden civilians to engage in dangerous attempts at private enforcement of bathroom laws. Take, for example, the experience of Ebony Belcher, a trans woman who attempted to use a bathroom inside of a grocery store in Washington, D.C.—a district that has not even considered a ban on trans bathroom use.[173] Ms. Belcher's decision to use a bathroom facility consistent with her gender identity roused the ire of a private security guard at the store.[174] When Ms. Belcher entered the women's restroom, the security guard followed her inside before allegedly calling Ms. Belcher derogatory names, insisting that "[y]ou guys cannot keep coming in here and using our women's restroom," and

168. *See id.* at 169 (showing that 14 percent of trans individuals reported a denial of healthcare, while 20 percent reported denial of hormones).

169. *See* Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault*, UNIV. OF CAL., IRVINE CTR. FOR EVIDENCE-BASED CORR., (May 16, 2007), http://ucicorrections.seweb.uci.edu/files/2013/06/PREA_Presentation_PREA_Report_UCI_Jenness_et_al.pdf [https://perma.cc/CHP6-QMJQ]. The sample of trans individuals studied, however, was fairly small, meaning that this study should not be viewed as representative for all incarcerated trans individuals. *See id.*

170. *See* Stotzer, *supra* note 2, at 273 (quoting PASCAL EMMER ET AL., HEARTS ON A WIRE COLLECTIVE, THIS IS A PRISON, GLITTER IS NOT ALLOWED: EXPERIENCES OF TRANS AND GENDER VARIANT PEOPLE IN PENNSYLVANIA'S PRISON SYSTEMS 30 (2011), http://socialproblems.voices.wooster.edu/files/2011/08/heartsonawire.pdf [https://perma.cc/Q795-6T2S]).

171. *Id.*

172. *See id.* (citing FRANK H. GALVAN & MOHSEN BAZARGAN, BIENESTAR HUMAN SERVS., INTERACTIONS OF LATINA TRANSGENDER WOMEN WITH LAW ENFORCEMENT (2012), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Galvan-Bazargan-Interactions-April-2012.pdf) [https://perma.cc/DJB7-TU7T].

173. *See* Jackie Bensen, *Guard Charged with Assault After Confronting Transgender Woman Using Women's Restroom, Police Say*, NBC WASH. (May 18, 2016), http://www.nbcwashington.com/news/local/Guard-Charged-with-Assault-After-Confronting-Transgender-Woman-Using-Womens-Restroom-380010941.html [https://perma.cc/W8PR-UPDR].

174. *See id.*

ultimately using physical force to push Ms. Belcher—who suffers from Parkinson's Disease—out of the store.[175]

Ms. Belcher's experience mirrors a number of recent incidents where private citizens engaged in trans policing to exclude trans individuals from using the restroom of their choice. In Hercules, California, three high school boys attacked a fifteen-year-old trans boy while he used the boys' restroom at his school.[176] Two women viciously beat and spit on Chrissy Lee Polis, a trans woman, when she stopped to use a restroom at a McDonald's in Rosedale, Maryland.[177] In Danbury, Connecticut, a woman mistakenly thought another cisgender woman was trans and harassed her while she was washing her hands in a Wal-Mart bathroom.[178] While boycotting Target for permitting trans individuals to use restrooms consistent with their gender identities, Anita Staver, president of the evangelical Christian legal organization Liberty Counsel, tweeted that she would be "taking a Glock .45 to the ladies room" because the weapon "identifies as [her] bodyguard."[179] And a sheriff candidate in Denton County, Texas, threatened physical violence toward trans women who used restrooms consistent with their gender identities.[180]

These are just some of the emerging examples demonstrating how, even in the absence of enforcement by local law enforcement, bathroom bills can encourage private enforcement. Some bathroom bills, like those in

175. *Id.* It is worth noting that Washington, D.C. police ultimately arrested the security guard. *Id.*

176. *See* Ari Bloomekatz, *Transgender Student Allegedly Attacked by Boys in School Bathroom*, L.A. TIMES (Mar. 4, 2014), http://articles.latimes.com/2014/mar/04/local/la-me-ln-transgender-student-attack-bathroom-20140304 [https://perma.cc/H5AW-BTD9].

177. *See* Jill Rosen, *Victim of McDonald's Beating Speaks Out: Transgender Woman Calls Attack 'Hate Crime,' Has Been Afraid to Be Seen in Public*, BALT. SUN (April 24, 2011), http://articles.baltimoresun.com/2011-04-24/news/bs-md-mcdonalds-beating-20110423_1_chrissy-lee-polis-transgender-woman-14-year-old-girl (explaining the details of the case and also detailing how a three-minute video clip of the incident appeared on YouTube shortly thereafter) [https://perma.cc/7YVE-75YQ].

178. *See* Matt DeRienzo, *Woman Mistaken for Trans Harassed in Walmart Bathroom*, DANBURY NEWS TIMES (May 16, 2016), http://www.newstimes.com/local/article/Woman-mistaken-for-trans-harassed-in-7471666.php (noting that the harasser told the other cisgender woman that she was "disgusting" and that she did not "belong here") [https://perma.cc/5MNQ-N756].

179. Curtis M. Wong, *Liberty Counsel President Says She'll Bring a Gun into Target's Bathroom*, HUFFINGTON POST (Apr. 26, 2016), http://www.huffingtonpost.com/entry/anita-staver-target-restroom_us_571fbaf3e4b0b49df6a957ed [https://perma.cc/F9K8-4SYX].

180. *See* Christian McPhate, *Denton County GOP Sheriff Candidate Tracy Murphree Calls for Violence Against Trans People Needing to Pee*, DALL. OBSERVER (Apr. 22, 2016), http://www.dallasobserver.com/news/denton-county-gop-sheriff-candidate-tracy-murphree-calls-for-violence-against-transgender-people-needing-to-pee-8240131 ("If my little girl is in a public women's restroom and a man, regardless of how he may identify, goes into the bathroom, he will then identify as a John Doe until he wakes up in whatever hospital he may be taken to. Your identity does not trump my little girl's safety. I identify as an overprotective father that loves his kids and would do anything to protect them.") [https://perma.cc/6EMT-EXNG].

Florida,[181] Kansas,[182] and Oklahoma,[183] explicitly authorize private individuals to engage in enforcement by granting civil rights of action. But even those that do not empower individuals in such a formal way may nevertheless contribute to vigilantism. In sociological terms, these measures contribute to a sense of moral panic by ostracizing trans individuals as "folk devils."[184]

III. CHALLENGING BATHROOM LAWS AS STATUS CRIMES

Once we understand many of the proposed bathroom laws as either directly or indirectly criminalizing bathroom use by trans individuals, we can turn to the question of whether such statutes criminalize the status of being trans. In 1962, in *Robinson v. California*,[185] the Supreme Court declared the criminalization of a status to be a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.[186] Six years later, in *Powell v. Texas*,[187] a split Court limited the *Robinson* doctrine to the proposition that states can criminalize voluntary conduct—even conduct linked to a status.[188] In the years that followed, the Court has resisted efforts to further clarify the doctrine set out in *Robinson* and *Powell*. This left the lingering question whether states may criminalize conduct that is so entwined with a status as to be inseparable and so constitutionally indistinguishable.[189]

Thus, this Part argues that the Court's decisions in *Robinson* and *Powell* bar the criminalization of conduct that is integral to the existence of defendants and, as such, is tantamount to criminalization of their status. Put another way, to criminally regulate necessary biological functions is to criminalize existence. Just as the Court in *Robinson* found a California statute criminalizing drug addiction to be constitutionally objectionable

181. *See* H.R. 583, 2015 Leg., Reg. Sess. (Fla. 2015).

182. *See* H.R. 2737, 2016 Leg., Reg. Sess. (Kan. 2016).

183. *See* S. 1619, 55th Leg., 2d Sess. (Okla. 2016).

184. *See generally* STANLEY COHEN, FOLK DEVILS AND MORAL PANICS (1972). This sociological and criminological classic explained how, on occasion, societies

> appear to be subject . . . to periods of moral panic. A condition, episode, person or group of persons emerges to become defined as a threat to societal values and interests; its nature is presented in a stylized and stereotypical fashion by the mass media; the moral barricades are manned by editors, bishops, politicians and other right-thinking people; socially accredited experts pronounce their diagnoses and solutions . . . .

Id. at 1. Successful moral panics often "owe their appeal to their ability to find points of resonance with wider anxieties" within society. David Garland, *On the Concept of Moral Panic*, 4 CRIME MEDIA & CULTURE 9, 12 (2008). Folk devils are often the focus of these moral panics because they are "cultural scapegoats whose deviant conduct appalls onlookers so powerfully precisely because it relates to personal fears and unconscious wishes." *Id.* at 15.

185. 370 U.S. 660 (1962).

186. *See id.* at 677.

187. 392 U.S. 514 (1968).

188. *See id.* at 535.

189. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacating as moot* 505 F.3d 1006 (9th Cir. 2007) (holding that the enforcement of anticamping ordinances against the homeless could qualify as an Eighth Amendment violation when there is no alternative shelter space available).

because it criminalized the defendant's mere existence (as opposed to his actions), laws that criminally regulate bathroom use unconstitutionally criminalize the existence of trans individuals.

On the most basic level, the act of going to the bathroom is "universal and unavoidable."[190] It is both "necessary for human survival"[191] and "innocent."[192] Several of the proposed statutes offer trans individuals no means to safely use a public bathroom. Use of a bathroom consistent with their gender identity becomes a crime[193] and use of a bathroom consistent with their "biological sex"[194] creates a risk of private violence. This risk is particularly high in cases where a trans individual's outward appearance is more traditionally consistent with their gender identity than their sex assigned at birth.

This Part considers the history of Eighth Amendment jurisprudence with regard to status crimes. It then evaluates the divergent perspectives taken by appellate courts in distinguishing between statuses and acts. Finally, it draws on the language of the Ninth Circuit in *Jones v. City of Los Angeles*[195] to argue that the criminalization of trans bathroom use may qualify as a violation of the Eighth Amendment. [196]

A. Status Crimes

Any first year law student can attest that, as a general principle, conviction requires proof of an act or, in rare cases, an omission.[197] In 1962, the Supreme Court in *Robinson* considered a California statute that made it unlawful for a person to "be addicted to the use of narcotics."[198] The Court

190. *Id.*

191. Statement of Interest of the United States at 12, Bell v. City of Boise, 993 F. Supp. 2d 1237 (D. Idaho 2014) (No. 1:09-cv-00540-REB).

192. *See* Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the* Robinson *Doctrine to Homelessness and Other Contextual "Crimes*,*"* 96 J. CRIM. L. & CRIMINOLOGY 329, 330 (2005).

193. *See infra* Appendix.

194. *See* Assemb. 375, 78th Gen. Assemb., Reg. Sess. (Nev. 2015).

195. 444 F.3d 1118 (9th Cir. 2006), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007).

196. *Id.* at 1138.

197. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 87 (6th ed. 2012) (noting the requirement of an act, or occasionally an omission, in defining criminal liability).

198. *Robinson v. California*, 370 U.S. 660, 660 (1962). The statute in question stated:

> No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation in granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail.

Id. at 660 n.1 (quoting CAL. HEALTH & SAFETY CODE § 11721 (West 1972) (repealed 1972)).

confirmed that conviction requires proof of an act, concluding that criminalization of a status alone not only runs contrary to this long-held principle, but also violates the Eighth Amendment's prohibition on cruel and unusual punishment.[199]

Acknowledging that California has considerable authority to regulate illegal drugs and collateral crime that narcotics may spawn within its borders, the Court nonetheless struck down the statute.[200] The problem with the statute was not that it punished a drug addict but that it punished him *because* he was an addict.[201] The Court noted that the statute in question "makes the 'status' of narcotic addiction a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.'"[202] The status of being a drug addict "may be contracted innocently or involuntarily" and would permit the state to punish even individuals who have "never touched any narcotic drug within the State or been guilty of any irregular behavior."[203] The Court concluded that punishing a person under such circumstances, even if the punishment is relatively mild, constitutes a violation of the Eighth and Fourteenth Amendments.[204]

While the *Robinson* decision found statutes regulating status alone constitutionally wanting, it also hinted at a burgeoning debate.[205] First, the *Robinson* Court seemed to draw a line between status—even statuses that might be socially harmful such as narcotic addiction—and criminal law.[206] *Robinson* acknowledged that the state could regulate narcotic addiction and the social problems stemming from addiction in such civil realms as healthcare, education, or social welfare, but it could not criminalize being an addict.[207] This border between crime and status, however, was limited. A state could not criminalize the status of an addict, but California was free to criminally regulate the manufacturing, distribution, or possession of narcotics—even if this regulation affected addicts disproportionately or was

199. *Id.* at 666–68.

200. *Id.* at 667–68. To bolster this claim, the Court cited *Whipple v. Martinson*, 256 U.S. 41 (1921), in which the Court clearly stated that states maintain the authority to exercise police power in regulating the sale, prescription, and use of dangerous drugs. *Robinson*, 370 U.S. at 664.

201. *See id.* at 666.

202. *Id.*

203. *Id.* at 666 n.3.

204. *See id.* at 666. The Court in *Robinson* also brings up other examples of possible statuses that a state would not be permitted to punish, including mental illness and venereal disease. This Article does *not* mean to suggest that the "status" of being trans is, in any way, comparable to a disease or illness.

205. *Id.* at 665–66.

206. *See id.*

207. *See id.* at 666. Ironically, perhaps, some of these nonpunitive measures might result in involuntary commitment to a treatment or mental health facility. This suggests that the Court's true constitutional concern with the California statute was not that it regulated addiction or the behavior associated with it or that it produced a period of confinement based on that regulation but that it punished Robinson for being an addict.

the product of their addiction.[208] These twin components of the *Robinson* holding foreshadowed the debate to come.

Six years after *Robinson*, in *Powell v. Texas*, [209] the Court revisited these questions. Powell had been convicted of public intoxication in violation of a Texas statute.[210] At trial, Powell had claimed that "his appearance in public [while drunk was] . . . not of his own volition" but was a product of chronic alcoholism.[211] In support of his position at trial, Powell introduced the testimony of a psychiatrist, Dr. David Wade, who characterized Powell as "a 'chronic alcoholic,' who 'by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink.'"[212] As such, like other alcoholics, Powell was an "'involuntary drinker,' who [was] 'powerless not to drink,' and who 'loses his self-control over his drinking.'"[213] Even in conceding that Powell's decision to take a first drink when sober was a "voluntary exercise of his will," Dr. Wade added that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence."[214] Powell himself testified to a long history of alcohol abuse and public intoxication.[215] The trial court was unimpressed and disallowed Powell's defense of chronic alcoholism.[216] Nonetheless, the court entered a defense-requested finding of fact that chronic alcoholism was a disease that destroyed the afflicted person's free will, including his will to avoid public intoxication and that Powell was in fact a chronic alcoholic.[217]

Based on these findings, Powell argued on appeal that he did "not appear in public by his own volition," but rather "under a compulsion symptomatic of the disease of chronic alcoholism."[218] As such, Powell argued, Texas's regulation of his public intoxication was in fact a regulation of his illness or status as an alcoholic.[219] While Texas was free to regulate the social woes associated with alcoholism, under the *Robinson* decision it was not free to criminalize Powell's condition.[220]

208. *See id.* at 664.

209. 392 U.S. 514 (1968) (plurality opinion).

210. *See id.* at 517. The statute in question provided that "[w]hoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." TEX. PENAL CODE ANN. art. 477 (1952) (repealed 1973).

211. *Id*. (alteration in original).

212. *Id.* at 518 (alteration in original).

213. *Id.*

214. *Id.*

215. *See id.* at 519 ("He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried.").

216. *See id.* at 521.

217. *Id.*

218. *Id.*

219. *See id.*

220. *See id.*

A four-member plurality of the Court rejected this argument, characterizing it and the findings of fact upon which it was based as a transparent attempt to bring *Powell* within the Court's language in *Robinson*.[221] In distinguishing the two cases, the plurality first questioned whether alcoholism was in fact a "status" (or more accurately, in the words of the Court, a disease or a mere symptom of other diseases).[222] Beyond this, Justice Thurgood Marshall, writing for the plurality, noted that Texas was punishing Powell for his conduct of appearing drunk in public, rather than for the dubious status of being an alcoholic.[223] Justice Marshall wrote that "[t]he entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing . . . ."[224] In *Powell*, the Court seemed to jettison *Robinson*'s premise that social ills can and should be dealt with in the civil realm. Instead, the plurality promoted the notion that states may criminalize actions that are the "product" of a status that the state seeks to control.[225]

Powell may have been based in part on the plurality's unwillingness to recognize that alcoholism was in fact a status even though the Court in *Robinson* had recognized narcotic addiction as a status or illness. The *Powell* plurality noted that there was no general agreement among the medical community about whether alcoholism constitutes a disease.[226] There was also disagreement about whether alcoholism truly strips a person of his or her ability to control the amount of alcohol consumed.[227] As the plurality reasoned:

> It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to drink, but that he also retains a certain amount of "free will" with which to resist.[228]

Turning to the question of what precisely Texas sought to regulate, the plurality contrasted the facts in *Powell* with the facts in *Robinson*. Unlike in *Robinson*, the State of Texas was not punishing Mr. Powell for being a chronic alcoholic.[229] Rather, Texas was punishing him for the act of being

221. *See id.* at 536–37.
222. *See id.* at 522–23.
223. *See id.*
224. *Id.* at 533.
225. *Id.* at 536.
226. *See id.* at 522 ("One of the principal works in this field states that the major difficulty in articulating a 'disease concept of alcoholism' is that 'alcoholism has too many definitions and disease has practically none.'").
227. *See id.* at 525.
228. *Id.* at 526. It is also worth noting that the Court went into great detail about the state of scientific understanding about alcohol addiction at the time of *Powell*. The Court ultimately concluded that the available scientific evidence was far from incontrovertible regarding whether alcohol addiction could effectively eliminate free will. *See id.* at 526–31.
229. *See id.* at 532.

in public *while* drunk.[230] This distinction, though seemingly minute, was constitutionally significant. The plurality reasoned that Texas sought to regulate Powell's behavior as opposed to his status.[231] This act—being intoxicated in public—could create a serious health and safety hazard both for Mr. Powell and for the public.[232] Accordingly, the state had the power to criminalize it, even if the statute disproportionately affected those less capable of regulating such behavior themselves.[233] In reaching this conclusion, the plurality rejected Powell's claim that *Robinson* stood for the broader proposition that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[234] The plurality worried that to adopt such a broad position would render the Supreme Court "under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility."[235] If the Eighth Amendment could bar prosecution of an alcoholic for being drunk in public, could it bar prosecution of an addict for possessing drugs or committing a theft to buy drugs? Would the broad reading Mr. Powell urged bar the prosecution for murder of someone with an "exceedingly strong" impulse to kill?[236]

The plurality even compared Mr. Powell's argument to an attempt to craft a sort of "insanity test" under the Eighth Amendment.[237] The opinion stated:

> If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that . . . "his unlawful act was the product of mental disease or mental defect," [under the so-called *Durham* test for legal insanity] would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard . . . .[238]

In other words, the plurality found it difficult to distinguish between Mr. Powell's proposed extension of *Robinson* and an effective constitutionalization of the *Durham* test for legal insanity.[239] Given this ambiguity, these Justices opted against taking a step that would hamper state

230. *Id.*
231. *See id.* at 533.
232. *See id.* at 532 (clarifying that the punishment of an act that poses a public safety risk is different from punishing someone for, as the *Robinson* Court described, being "mentally ill, or a leper" (quoting Robinson v. California, 370 U.S. 660, 666 (1962)).
233. *See id.*
234. *Id.* at 533.
235. *Id.*
236. *See id.* at 535–36.
237. *See id.* at 536 ("Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms.").
238. *Id.* (quoting Durham v. United States, 214 F.2d 862, 875 (D.C. Cir. 1954), *overruled by* United States v. Brawner, 471 F.2d 969 (1972)).
239. *See Durham*, 214 F.2d at 874–76.

autonomy to define and limit criminal responsibility.[240] Ultimately, the plurality opinion appeared to strictly differentiate status and conduct.[241] Even under the most generous interpretation, Mr. Powell's public intoxication was classified as conduct rather than as a status—and so the State of Texas was well within its rights under the Eighth Amendment to punish Mr. Powell.

The dissenting Justices argued for an expansion of the Eighth Amendment to protect against the criminalization of conduct that an individual is powerless to avoid.[242] To these four justices, the Constitution prohibited states from punishing a person for conduct that was "a characteristic part of the pattern of [a] disease [that is] not the consequence of [his] volition."[243]

In the end, faced with a four-Justice plurality and a four-Justice dissent, the separate concurrence of the ninth member of the Court set the boundaries of the holding.[244] Justice Byron White, concurring in the result, rejected the distinction between status and conduct, instead focusing on the *voluntariness* of Mr. Powell's conduct.[245] He wrote:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion.[246]

It may very well be the case, Justice White reasoned, that a chronic alcoholic could become so drunk in private that he would "lose[]the power to control his movements and for that reason appear[] in public."[247] Justice White concluded the Eighth Amendment would forbid punishment in such circumstances.[248] But the record in *Powell* did not provide enough evidence to reach such a conclusion.[249] Powell had been convicted not merely of use or possession of alcohol but for the separate act of being drunk in public, and so Justice White upheld the conviction as constitutionally sound.[250]

240. *Powell*, 392 U.S. at 536–37 (explaining in part that "formulating a constitutional rule would reduce, if not eliminate, that fruitful experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold").

241. *See id.* at 234–35.

242. *See id.* at 567 (Fortas, J., dissenting).

243. *Id.* at 558.

244. *See id.* at 548 (White, J., concurring).

245. *See id.* at 548–52 (explaining in part how, for some alcoholics, it may be that drunkenness is a symptom of their disease that they could have a hard time avoiding and so it is simultaneously conduct and part of status).

246. *Id.* at 548 (citation omitted).

247. *Id.* at 552.

248. *See id.* at 552.

249. *Id.* at 552–53.

250. *See id.* at 552–53 (explaining how Powell could have drunk at home and made plans while he was sober to prevent ending up in a public place). Justice White also observed a number of other potential problems with Mr. Powell's argument in the record. *Id.* The medical testimony did not seem to indicate that Mr. Powell was unable to comprehend or control his behavior because of his intoxication. *Id.* at 553–54. It may have been that Mr. Powell fully

In its wake, the *Powell* decision left an uncertain constitutional line regarding the criminalization of status. At least one commentator concluded that the Court in *Powell* "relegated [*Robinson*] to the outermost fringe of the criminal law by the narrow reading placed upon it."[251] Others are less certain.[252] Between the plurality opinion, the dissent, and Justice White's concurrence, it is difficult to delineate a definitive rule from *Powell*. To be certain, *Powell* does not appear to overrule *Robinson*.[253] It does appear, however, to significantly narrow the *Robinson* doctrine. Taken together, the two cases seem to confirm the constitutional requirement that criminal laws must regulate *some* conduct by the defendant, with Justice White requiring that such conduct be voluntary.[254] But the legacies of *Powell* and *Robinson* are more complex. Just as *Robinson* prohibited criminalization of status, the dissent and White's concurrence in *Powell* would seem to suggest that some conduct is so linked to status itself that it may not be constitutionally criminalized. To paraphrase Justice White, it is the fever to the crime of flu. This recognition of conduct entwined with status pushes against the plurality's concern in *Powell* that overextension of the *Robinson* status doctrine could eviscerate the notion of criminal responsibility. As lower courts have struggled to disentangle questions of conduct and status, the complexity of this debate remains apparent.

B. Extending Status Crimes to Inextricably Linked Conduct

The story of status crimes in the years following the decisions in *Robinson* and *Powell* has been largely one-sided as courts have increasingly declined to find statutes regulating conduct unconstitutional, even when the regulated conduct is closely linked to status.[255] The use of the *Robinson* doctrine has been so limited that some scholars lament the lost opportunity to expand the

understood his actions at the time he appeared in public drunk. Mr. Powell himself testified that he had no clear recollection of the situation. *Id.* In the record, Mr. Powell had only really shown that he was drunk at the time of his arrest and that he was somewhat compelled to drink because of his infliction. *Id.* What he failed to do is show that he was incapable of staying off the streets that night. *Id.*

251. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270 (1998).

252. *See e.g.*, Sarah Gerry, Jones v. City of Los Angeles*: A Moral Response to One City's Attempt to Criminalize, Rather Than Confront, Its Homelessness Crisis*, 42 HARV. C.R.-C.L. L. REV. 239, 245 (2007).

253. *See* DRESSLER, *supra* note 197, at 99.

254. *See* Kent Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment: Implications of* Powell v. Texas, 69 COLUM. L. REV. 927, 931 (1969) ("[T]he dissent comes closer to stating the principles accepted by a majority of the Court [in *Powell*] than does the plurality opinion.").

255. *See, e.g.*, Joyce v. City & County of San Francisco, 846 F. Supp. 843, 845–46 (N.D. Cal. 1994) (declining to find an Eighth Amendment violation for targeted enforcement of laws, directed at conduct "arguably [] committed predominately by the homeless"); State v. Margo, 191 A.2d 43, 44–45 (N.J. 1963) (per curiam) (upholding New Jersey statute criminalizing use of narcotics as distinct from criminalizing the status of narcotic addict).

constitutional limitations on criminal punishment.[256] Others, however, have argued that extending *Robinson* could pose a "radical threat to traditional criminal law doctrine" so serious that it could "threaten[] the continued existence of the criminal law itself" by eviscerating traditional notions of responsibility.[257] Given the lack of a clear holding in *Powell*, lower courts have used different tests when examining whether a statute constitutes the criminalization of status in violation of the Eighth Amendment. In large part, they have concluded that state regulations—even those that appear linked to status itself—are permissible under the Eighth Amendment so long as they restrict conduct as opposed to status.[258]

Efforts to draw a strict dichotomy between the criminalization of status and the criminalization of voluntary conduct have focused on the language

256. *See, e.g.*, Richard S. Frase, *The Warren Court's Missed Opportunities in Substantive Criminal Law*, 3 OHIO ST. J. CRIM. L. 75, 78–79 (2005) (concluding that, after *Powell*, the *Robinson* doctrine appeared to merely stand for the proposition that states cannot punish "pure status or propensity" and that it does not appear to impose "a constitutionalized 'voluntary act' standard"); Bilionis, *supra* note 251, at 1270 ("[W]hat followed from *Lambert* and *Robinson*, the received wisdom holds, is a story of unfulfilled potential, the unexciting tale of an exciting substantive constitutional criminal law that never came to be.").

257. *See, e.g.*, Martin R. Gardner, *Rethinking* Robinson v. California *in the Wake of* Jones v. Los Angeles*: Avoiding the "Demise of the Criminal Law" by Attending to "Punishment,"* 98 J. CRIM. L. & CRIMINOLOGY 429, 429 (2008). In recent years, homeless litigants have invoked this line of cases to argue that "laws that criminalize otherwise innocent conduct—such as sleeping, eating, and urinating—[that is] . . . often innocent, life-sustaining, and/or reflexive." Weisberg, *supra* note 192, at 330. Scholars have also argued that a range of punishments violate the Eighth Amendment's bar on status crimes. For example, scholars and advocates have attempted to apply the logic from *Robinson* and *Powell* to a number of other contexts, including laws that criminalize drug addiction, laws that punish the homeless for engaging in life-preserving acts in public spaces, and laws that punish loitering. *See, e.g.*, Joel D. Berg, *The Troubled Constitutionality of Antigang Loitering Laws*, 69 CHI.-KENT L. REV. 461, 483–84 (1963) (discussing how loitering can be considered a status crime); Mary Boatright, Jones v. City of Los Angeles*: In Search of a Judicial Test of Anti-Homeless Ordinances*, 25 L. & INEQ. 515, 515–16 (2007) (discussing the application of the *Robinson* doctrine to the context of statutes criminalizing unavoidable behavior by the homeless and the Ninth Circuit's application of *Robinson* in such contexts); Victoria R. Coombs, *Status Versus Conduct: Constitutional Jurisprudence Meets Prejudice in* Steffan v. Perry, 1995 UTAH L. REV. 593, 613–20 (arguing that the punishment and pressed resignation of a military member for being gay constitutes an effective punishment for a status); Dawn Marie Korver, *The Constitutionality of Punishing Pregnant Substance Abusers Under Drug Trafficking Laws: The Criminalization of Bodily Function*, 32 B.C. L. REV. 629, 633–34 (1991) (arguing against the criminalization of drug use in pregnant women); Tiffany Lyttle, *Stop the Injustice: A Protest Against the Unconstitutional Punishment of Pregnant Drug-Addicted Women*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 781, 783 (2006) (same); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 660–64 (1992) (walking through the Court's opinions in *Robinson* and *Powell* before arguing that communities that do not provide the homeless with alternative shelter options provide them with no voluntary choice but to break the law); Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1632–33 (1995) (arguing that the Eighth Amendment after *Robinson* prevents states from punishing the status of being homeless by criminalizing acts homeless individuals cannot avoid like sleeping in public spaces). *But see* Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 443–44 (1975) (arguing that actions taken by addicts are not involuntary).

258. *See infra* notes 269–272 and accompanying text.

of the *Powell* plurality. For example, in *Lehr v. City of Sacramento*,[259] a group of eleven homeless persons and three nonprofit charities brought a civil action under 42 U.S.C. § 1983 against the City of Sacramento and the police in the hope of enjoining the enforcement of the city's ordinance barring camping within city limits.[260] As the plaintiff's expert testified at trial, the majority of the homeless individuals in Sacramento "have neither a legal place to go nor sufficient resources to obtain one."[261] Homelessness, the expert contended, is due to factors outside of the individuals' control, like poverty, social isolation, and disability.[262] Evidence also suggested that Sacramento was unable to provide accommodations for homeless people, leaving approximately 1200 persons on the street nightly without access to shelters.[263] Therefore, the plaintiffs in *Lehr* alleged that the city's enforcement of the anticamping law constituted a violation of the Eighth Amendment as it effectively criminalized the status of being homeless by expressly criminalizing an involuntary act by potential defendants—sleeping in the only location available to them.[264]

In rejecting this argument, the *Lehr* court relied primarily on the plurality opinion in *Powell*.[265] While the city was able to establish that homelessness constituted a serious problem, the court held that "this does not give us license to expand the narrow limits that, in a 'rare type of case,' the Cruel and Unusual Punishment Clause of the Eighth Amendment places on substantive criminal law."[266] Echoing some legal commentators, the court in *Lehr* also emphasized that any ruling preventing Sacramento from enforcing such an anticamping law under the Eighth Amendment would have "extraordinary" ramifications for the criminal law more broadly.[267] "A decision in Plaintiff's favor," the court warned, "would set precedent for an onslaught of challenges to criminal convictions by those who seek to rely on the involuntariness of their actions."[268]

Similarly, courts have opted not to extend the *Robinson* doctrine to drug possession offenses,[269] possession with intent to distribute drugs,[270] child

259. 624 F. Supp. 2d. 1218 (E.D. Cal. 2009).
260. *See id.* at 1219–20.
261. *Id.* at 1222.
262. *See id.*
263. *See id.* The City of Sacramento housed approximately 1500 individuals at emergency shelters but the number of beds provided was simply inadequate for the number of individuals on the streets every night. *See id.*
264. *See id.* at 1224–27.
265. *Id.* at 1229 (identifying the disagreement between the Justices in *Powell* and ultimately relying on the plurality as "sound logic").
266. *Id.* at 1231 (quoting Jones v. City of Los Angeles, 444 F.3d 1118, 1138–39 (9th Cir. 2006), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007) (Rymer, J. dissenting)).
267. *Id.* at 1232.
268. *Id.* at 1234.
269. *See, e.g.*, United States v. Ritter, 752 F.2d 435, 438 (9th Cir. 1985); United States v. Moore, 486 F.2d 1139, 1149 (D.C. Cir. 1973) (holding that the logic from *Robinson* does not prevent the state from punishing possession of narcotics by a drug addict).
270. *See, e.g.*, United States v. Kidder, 869 F.2d 1328, 1332 (9th Cir. 1989).

pornography distribution,[271] and illegal reentry into the United States after deportation.[272] In each case, the courts noted not only that the statutes in question regulated conduct as opposed to status, but they also rejected the notion that such conduct was beyond the defendant's control or constituted a necessity of life itself.

By contrast, other courts have interpreted the *Powell* and *Robinson* line of cases to provide a more significant Eighth Amendment limitation on criminalization.[273] These courts have held that states cannot constitutionally punish conduct that is so inextricably linked to one's status as to render its regulation indistinguishable from the punishment of status itself. These courts have examined the criminalized conduct in relation to the status claimed. The most prominent of these cases is *Jones v. City of Los Angeles*.[274] Similar to the *Lehr* case, the plaintiffs in *Jones* were a group of homeless individuals seeking to enjoin a Los Angeles ordinance that criminalized actions like sitting, lying, or sleeping on public sidewalks.[275] As expected, the *Jones* court began its Eighth Amendment analysis by discussing *Robinson* and *Powell*.[276] After walking through the history of these cases, the *Jones* court ultimately concluded that "five Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being."[277] The court also concluded that the articulation of this understanding by the *Powell* dissenters and Justice White in his concurrence was not mere dicta but rather was a point of agreement that had garnered the requisite five votes to be binding.[278]

In applying this interpretation of *Powell* and *Robinson* to the facts at hand, *Jones* made two important findings. First, the court observed the fundamental unfairness of penalizing individuals for engaging in conduct that

271. *See, e.g.*, United States v. Black, 116 F.3d 198, 201 (7th Cir. 1997) (declining to extend *Robinson* to distribution of child pornography by a stipulated pedophile or ephebophile absent evidence that the act of distribution was linked to disease and involuntary).

272. *See, e.g.*, United States v. Ayala, 35 F.3d 423, 425–26 (9th Cir. 1994).

273. *See, e.g.*, Farber v. Rochford, 407 F. Supp 529, 534 (N.D. Ill. 1975) (overturning a loitering statute as a status crime); State v. Adams, 91 So.3d 724, 751 (Ala. Crim. App. 2010) (holding that *Robinson* and *Powell* together "stand for the proposition that the Cruel and Unusual Punishments Clause of the Eighth Amendment forbids punishing criminally not only a person's pure status, but also a person's involuntary conduct that is inseparable from that person's status").

274. 444 F.3d 1118 (9th Cir. 2006), *vacated by settlement*, 505 F.3d 1006 (9th Cir. 2007).

275. *See id.* at 1120–23.

276. *See id.* at 1132–35 (discussing in detail the history of *Robinson* and *Powell* and emphasizing that the majority of Justices in *Powell* supported some finding that involuntary actions could constitute status offenses).

277. *Id.* at 1135. *See also* Robert L. Minser, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 219 (1981) ("[T]he consensus [of the majority of Justices in *Powell*] was that an involuntary act does not suffice for criminal liability.").

278. *Jones*, 444 F.3d at 1135 (citing United States v. Johnson, 256 F.3d 895, 915, 914–16 (9th Cir. 2001) (en banc) (Kozinski, J., concurring)).

is necessary to sustain life.[279] The acts that the Los Angeles ordinance criminalized—sitting, lying, and sleeping—are "unavoidable consequences of being human."[280] A person is "biologically compelled" to engage in this conduct.[281] It would be unreasonable to expect individuals not to engage in otherwise innocent and necessary conduct.

Second, and relatedly, the court held that the life-sustaining conduct criminalized under certain circumstances in the Los Angeles ordinance was inextricably linked to the status of being homeless.[282] Even if Los Angeles sought to criminalize "acts" and not status, given the lack of available housing, homeless individuals had no real voluntary choice—they must either break the law or cease to exist. Their bodies required sleep, and alternative accommodations were not available.[283] To survive, the homeless of Los Angeles would eventually be compelled to break the law.[284] Thus, the court concluded that the Los Angeles statute amounted to "criminalizing Appellants' status as homeless individuals."[285]

In the context of bathroom laws, it is also worth noting that the judges in *Jones* included language about the meaning of status under the Eighth Amendment. The Ninth Circuit noted that "[h]omelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism."[286] Individuals may escape homelessness only to become homeless again in the future.[287] Nonetheless, the court held that a statute need not criminalize an immutable characteristic to run afoul of the Eighth Amendment.[288] It need only create a situation where an individual, because of her current condition, must choose between existence and lawfulness.

The *Jones* court's recognition of acts linked to status is not unique. In other contexts, at least one Supreme Court Justice previously flirted with the idea that acts "so closely linked" to the status of being LGBTQ may be protected under the *Robinson* doctrine. [289] Subsequently, at least one court

279. *See id.* at 1136.

280. *Id.* ("It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public."). Soon after this quote, the majority admonishes the dissenters for suggesting that a homeless person could simply avoid sleeping, lying, or sitting in public: "The City and the dissent apparently believe that Appellants can avoid sitting, lying, and sleeping for days, weeks, or months at a time to comply with the City's ordinance, as if human beings could remain in perpetual motion." *Id.*

281. *Id.*

282. *See id.* at 1137.

283. *See id.* at 1121–23.

284. *See id.* at 1135–36.

285. *Id.* at 1137.

286. *Id.*

287. *See id.*

288. *See id.*

289. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by Lawrence v. Texas*, 539 U.S. 558 (2003), where the majority upheld a state's ban on sodomy, Justice Lewis Powell's clerks "felt that the act of sodomy was so closely linked to the status of homosexuality that perhaps *Robinson* could be stretched to protect both from criminal prosecution." Marc S. Spindelman, *Reorienting* Bowers v. Hardwick, 79 N.C. L. REV. 359, 408 n.151 (2001) (quoting JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 52027 (1994)). Justice Powell

has relied on the *Robinson* doctrine in suggesting that states cannot criminalize the status of being gay or lesbian.[290]

Likewise, *Jones*'s acknowledgment that the criminalization of transient status may offend the Eighth Amendment is not unique. For juvenile offenders, the Supreme Court has held that offenses such as truancy, curfew violation, or unruliness that depend on the offender's status as a minor must be treated differently than other criminal (or in the terms of juvenile court, delinquency) offenses.[291] While this distinction is premised on the notion that the conduct in question is inseparably tied to the defendant's status as a child—youth is in fact an element of the offenses in question—in many ways it is a distinction that serves to deny greater protections, because children adjudicated to have committed status offenses may be held without a due process precommitment hearing.[292] Even so, the Court has recognized that, in limited cases, even a transient status such as youth requires shelter from criminalization under the Eighth Amendment.

In other contexts, however, states have been left free to criminalize behavior that is dependent on youthful status. So called "juvenile status" offenses, such as "minor in possession of alcohol" or "minor in possession of a firearm," survive constitutional muster despite the fact that the act of the defendant is criminal only *because* of her status as a minor.[293]

The story of status offenses is a mixed and often neglected history with courts struggling to define the precise parameters and protections of the Eighth Amendment as set forth in *Powell* and *Robinson*. Despite this muddled history, there is at least some willingness to recognize that criminalization of conduct so closely linked to status may support Eighth Amendment challenges under *Robinson* and *Powell*. Admittedly, the category of conduct that is inextricably linked to status is narrow. Courts seem inclined to rely on this doctrine only in rare cases. But as explained in the next subpart, the context of bathroom laws may be one of the few

initially accepted this theory on *Robinson* but later abandoned it in favor of a disproportionality theory of the case. *See id.*

290. *See, e.g.*, Cyr v. Walls, 439 F. Supp. 697, 701–02 (N.D. Tex. 1977) ("[A] statute criminalizing [gay or lesbian] status and prescribing punishment therefore would be invalid." (citing *Robinson v. California*, 370 U.S. 660, 667 (1962))).

291. *See* Parham v. J.R., 442 U.S. 584 (1979).

292. *See id.* (holding due process protections did not extend to minors held on status offense in treatment and reform facilities). The Court reasoned that because such status offenses carried a rehabilitative component, they did not require an adversarial process or other protections associated with the adult criminal court. *Id.* The Court suggested that had the adjudication implicated a "punishment," the offenses might have run afoul of the Eighth Amendment. *See id.*

293. *See* Hannah Frank, *Unambiguous Deterrence: Ambiguity Attitudes in the Juvenile Justice System and the Case for a Right to Counsel During Intake Proceedings*, 70 VAND. L. REV. 709, 726 (2017) (noting that police often use status offenses to justify the arrest and detention of youthful offenders who are engaged in conduct that would be legal if they were adults); Franklin E. Zimring, *Toward a Jurisprudence of Youth Violence*, 24 CRIME & JUST. 477, 498–99 (1998) (discussing the status offense of minor in possession of a firearm and noting that if the offender had been an adult, the possession would not have been a crime).

circumstances that warrant the extension of this doctrine to a new category of criminal statutes.

C. Applying Robinson *to Bathroom Laws*

This Article contends that, should states pass laws that attempt to criminalize the use of bathrooms by trans individuals consistent with their gender identities (either as a standalone crime or a violation of existing statutes), such a law could constitute a violation of the Eighth Amendment. Read together, the Court's decisions in *Robinson* and *Powell* seem to suggest that while states may criminally regulate conduct linked to status, they may not criminally regulate conduct that is so entwined with the defendant's existence as to have the effect of criminalizing her or his status. To be sure, the category of conduct so tightly linked to existence is small, but given the biological imperative of bathroom use, regulation of such use based on trans status would appear to effectively criminalize the "status" of being trans.[294] Given the serious consequences of criminalization—both in terms of official and vigilante enforcement—this recognition of bathroom regulation as status regulation would offer private civil rights advocates a narrow avenue through which to challenge the constitutionality of certain categories of bathroom laws.

The argument proceeds as follows: First, using a bathroom is a necessary biological function without which human existence fails.[295] Second, existing laws prohibit the public exercise of this function outside designated spaces.[296] Third, as a result of their status as living human beings, trans individuals have no genuine, voluntary choice when in public but to use public bathroom facilities when needing to exercise biological functions. Fourth, bathroom regulations that prohibit a trans person from using a bathroom facility consistent with their gender identity create a Hobson's choice for trans individuals. If they obey the law and use a bathroom consistent with their "biological sex" as assigned at birth, they put themselves in serious risk of humiliation, embarrassment, and physical violence—particularly if their outward physical appearance is more in line with their gender identity. If they use the bathroom facility consistent with their gender identity, they violate the law. In short, because such laws are targeted specifically at trans individuals, and they criminalize conduct linked to existence, they criminalize the very existence of such individuals.

294. Courts need not recognize the trans community as a protected class of any kind to protect trans individuals from status crimes. This Article does not take a position as to this issue.

295. To quote the popular children's series, "All living things eat, so [e]veryone [p]oops." TARŌ GOMI, EVERYONE POOPS 25–27 (1993) (confirming that all living creatures, including humans, poop).

296. A simple Westlaw search reveals a wide array of statutes and regulations prohibiting public urination and defecation outside of designated bathroom facilities. The authors conducted a Westlaw search on March 8, 2017, using terms "urinat! /10 public."

Even if one adopts the position of the *Powell* concurrence that states may seek to regulate conduct linked to a status that produces social harm, there is no evidence that bathroom use by trans individuals actually produces such harm. Despite the loud and hyperbolic claims to the contrary,[297] experts have widely discredited the argument that the use of bathrooms by trans individuals consistent with their gender identities poses any safety risk.[298] Thus, bathroom laws are generally distinguishable from the overwhelming majority of criminal statutes in that they punish conduct that, for all practical purposes, is harmless. In other criminal law contexts, the Supreme Court has barred states from criminalizing harmless conduct.[299]

As seductively compact and efficient as the argument above may appear, there is more at play than the mere regulation of where an individual may perform particular biological functions. Bathroom regulations for trans individuals, like the criminal regulation of addicts and the homeless, seek to draw boundaries around spaces of existence.

Proponents of the bathroom bills decry the potential risk to women and children posed by trans individuals using bathroom facilities consistent with their gender identities.[300] These same proponents argue that they do not seek to ban trans bathroom use altogether—rather, private bathrooms exist that trans individuals may use just as there are private spaces in which trans individuals can exist.[301] They argue that bathroom regulations are less about criminalizing the status of being trans and more about criminalizing the conduct of bathroom use and the social harm that may flow from that use.[302]

That argument is tenuous at best and destructive at worst. At its core, the argument seeks to preclude the physical presence of trans individuals in public settings by regulating their bodily functions. It seeks to carve out only the narrowest spaces in which trans individuals can live and function as citizens and people. It seeks to exclude them from the public spaces that people share in a communal recognition of what it is to be a human being. And it seeks to relegate the status of being trans to the status of being other, foreign, and subject to regulation. Ultimately, this argument leads to exclusion, criminalization, and concealment.

297. *See* Wilson, *supra* note 86 and accompanying text; Jeff Brady, *When a Transgender Person Uses a Public Bathroom, Who Is at Risk?*, NPR (May 15, 2016), http://www.npr.org/2016/05/15/477954537/when-a-transgender-person-uses-a-public-bathroom-who-is-at-risk (describing various claims of danger by proponents of bathroom bills) [https://perma.cc/ZQY7-HJPA].

298. *See* Brynn Tannehill, *Debunking Bathroom Myths*, HUFFINGTON POST (Nov. 28, 2016), http://www.huffingtonpost.com/brynn-tannehill/debunking-bathroom-myths_b_8670438.html (noting studies by medical and law enforcement professionals all concluding that trans use of gender identity bathrooms does not increase predation or harm) [https://perma.cc/BD4J-G93X].

299. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down a Texas statute that prohibited consensual sexual activity between adults).

300. *See generally* Wilson, *supra* note 86 and accompanying text.

301. *See generally id.*

302. *See generally id.*

In sum, bathroom bills that propose the criminalization of trans bathroom use may run afoul of the Eighth Amendment by criminalizing seemingly involuntary, harmless, and life-sustaining conduct inextricably linked to the status of being trans. While courts have been reluctant to extend the *Robinson* and *Powell* doctrine to many criminal law contexts, bathroom bills present a unique situation—one where the majority has targeted a criminal prohibition at generally innocent conduct only in cases where it is inevitably committed by a disadvantaged minority. In the larger scheme, though, such bathroom bills signal the further marginalization of the trans population. While the Constitution may not explicitly recognize a right of human dignity, such recognition seems implicit in the Court's prohibition of the criminalization of status. However limited the *Robinson* holding may be after *Powell*, at a minimum it stands for the notion that criminal law cannot and should not outlaw people.

D. Possible Objections

Critics may have many legitimate reasons for concern about this Article's proposal to treat bathroom laws as status regulations. This section seeks to recognize and address such objections. First, and most obviously, such statutes arguably regulate conduct as opposed to status per se. As such, they could survive constitutional challenge under *Powell*. Such a characterization, however, overlooks both the involuntary nature of the conduct regulated and the cobbled holding of *Powell*. The need to use the bathroom, including at times public bathrooms, is a necessary biological function arguably no more avoidable than breathing in public. It is innocent conduct criminalized only because of status—that of being a trans individual.

Second, some may argue that being trans does not comport with the more traditional understanding of status under the Eighth Amendment. To bolster this argument, critics may contend that trans individuals ultimately make a choice to identify as a gender different from their so-called "biological sex" assigned at birth. Under this rationale, critics may argue that trans individuals are not barred from using public bathrooms under many proposed bathroom laws. They are merely required to use a bathroom consistent with their "biological sex." If trans individuals are worried about the possibility of humiliation, violence, or other backlash, they could simply abstain from using public, sex-segregated bathroom facilities.

The notion of trans status as "transitory" is hardly new to the Eighth Amendment debate on the criminalization of status. The dissent in *Jones* argued that being homeless was not the kind of status typically protected from criminalization under the Eighth Amendment, as it can be a "transitory state" that "can change."[303] Likewise, the *Powell* plurality questioned the sufficiency of the permanence of alcoholism to establish it as a status.[304]

303. *See Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated after settlement*, 505 F.3d 1006 (9th Cir. 2007) (Rymer, J., dissenting).

304. Powell v. Texas, 392 U.S. 514, 523–25 (1968).

In the context of trans status, however, the primary argument of the transitory nature of trans identity misunderstands the lived experience of a trans person and the nature of status crime prohibitions under the Eighth Amendment. For one thing, while the decision to live consistently with one's gender identity may technically represent a choice of sorts, emerging scientific evidence calls into question whether the status of being trans is in fact a choice or a biological phenomenon.[305] Beyond this, the fact that the status may be transitory does not preclude it from Eighth Amendment protection.

The Court in *Parham v. J.R.*[306] noted the inherently temporary nature of youth.[307] The *Jones* court acknowledged that homelessness might not be constant.[308] Each court confronted with an admittedly transitory status nonetheless found Eighth Amendment fault in criminalization of that status. In each opinion, the constitutional offense arises from the criminalization of the status itself as opposed to the permanence of the status. Neither *Powell* nor *Robinson* suggests that courts must view the concept of status so narrowly.

Next, critics may claim that even if faced with a choice between criminalization or humiliation (or worse) when using public bathrooms, trans individuals can make a choice to use either private, single-occupancy, or gender-neutral bathrooms. This critique suffers practical flaws, however. It is premised on the notion that trans individuals have access to such facilities at the moment of need.[309] As nearly any traveler can attest, the need for a bathroom and the presence of a bathroom do not always neatly align. Likewise, not all public buildings or accommodations offer single-occupancy bathrooms.[310] A careful examination of the bathroom laws proposed during

305. *See* Samantha Allen, *What Science Can Tell Us About Trans People's Brains—and What It Cannot*, DAILY BEAST (Jan. 19, 2017), http://www.thedailybeast.com/articles/2017/01/19/what-science-can-tell-us-about-trans-people-s-brains-and-what-it-cannot.html (discussing emerging scientific evidence surrounding a genetic or neurobiological basis for trans status) [https://perma.cc/5YGJ-PSLM]; Leslie P. Henderson, *Check the Science: Being Trans Is Not a 'Choice,'* OZY (Feb. 25, 2017), http://www.ozy.com/pov/check-the-science-being-trans-is-not-a-choice/69726 (same) [https://perma.cc/BR7V-F34V]; Francine Russo, *Is There Something Unique About the Transgender Brain*, SCI. AM. MIND (Jan. 1, 2016), https://www.scientificamerican.com/article/is-there-something-unique-about-the-transgender-brain/ (same) [https://perma.cc/Y36Q-TV6B]. *But see* Bradford Richardson, *Born Gay or Transgender: Little Evidence to Support Innate Trait*, WASH. TIMES (Aug. 24, 2016), http://www.washingtontimes.com/news/2016/aug/24/born-gay-transgender-lacks-science-evidence/ (noting that the question of whether or not trans status is biological is still open for debate) [https://perma.cc/6FG7-PH6B].

306. 442 U.S. 584 (1979).

307. *Id.* at 602–03.

308. *Jones*, 444 F.3d at 1137.

309. *See* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 65–66 (2013) (documenting the level of harassment trans individuals reported when forced to use bathrooms inconsistent with their gender identity and the widespread lack of gender neutral bathrooms).

310. *See id.*

the last four years reveals that virtually none of them require public buildings to provide trans persons with such an accommodation.

Critics may also contend that criminal law defenses of justification or necessity are available to trans populations charged with violation of bathroom regulations or other criminal statutes, and, as such, no constitutional claim is necessary. In *Powell*, Justice Marshall noted that "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[311] Indeed, such defenses—particularly justification or necessity—may provide some shelter for trans individuals arrested and charged for violating a bathroom statute. A justification defense permits a necessary and proportional response to triggering conditions.[312] Likewise, a necessity defense allows noncompliance with the law if the harm resulting from compliance is greater than that resulting from violation.[313]

Each of these defenses are available to trans individuals confronted with the choice of risking harm or arrest when performing the necessary life function of using a bathroom in public. The availability of such defenses, however, does not undo or solve the constitutional deficiency that arises from the criminalization of trans status. Nor does the availability of the defense offer shelter from the humiliation and personal costs associated with arrest, trial, or the possibility of conviction if the fact finder concludes that the defense is unpersuasive.

Finally, critics may contend that interpreting the criminalizing effect of bathroom bills as a violation of the Eighth Amendment's bar on status crimes will open the door for challenges to a wide range of other criminal statutes. This is the same fundamental argument made by the plurality in *Powell* and the court in *Lehr*. Such a fear, however, seems unfounded.

There is little reason to believe that an extension of the *Robinson* doctrine to this context would lead to any sort of slippery slope. Bathroom laws present a unique situation of a state outlawing conduct—the use of bathroom facilities consistent with a person's gender identity—only when committed by trans individuals. This conduct is, for all practical purposes, necessary and life sustaining. This raises concerns about the voluntariness of the conduct criminalized by proposed bathroom laws and also suggests that the category of conduct that the state criminalizes under bathroom laws is decidedly narrow. It is conceivable that a court could find that the unique character of bathroom laws runs afoul of *Robinson* by effectively outlawing involuntary conduct that is inextricably linked to the status of being trans without putting other criminal statutes at risk.

311. Powell v. Texas, 392 U.S. 514, 536 (1968) (plurality opinion) (emphasis in original).

312. *See* Paul Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199, 216 (1982) (describing justification defenses).

313. WAYNE LAFAVE, CRIMINAL LAW § 5.4(a) (3d ed. 2000).

Both *Robinson* and *Powell* recognized that there would be times when constitutional protection is required to prevent the criminalization of status. The reluctance to find the need for such protection in *Powell* seemed to stem from the lack of evidence on the voluntary nature of the conduct in question and its link to the status alleged rather than a belief that status cannot or should not be protected from criminalization.

CONCLUSION

It does not appear that bathroom bills are going away. The Trump administration has already removed the federal guidance that protected the ability of trans children to use the bathroom facilities consistent with their gender identity in public schools. In the absence of such executive leadership on this issue, there is a greater need than ever for civil rights advocates to help turn the tide. As more states and localities consider bathroom laws, researchers must be prepared to evaluate the long-term implications of these measures in a way that could sway state legislatures. The academic community must be prepared to evaluate the most audacious claims made by supporters of these laws. Advocates must be armed with concrete data on the likely costs and consequences of bathroom legislation.

Should these measures become law in some states, scholars must be ready to offer concrete, empirical evidence about the implications of these measures. Future research could empirically evaluate the preparedness of police to enforce such bathroom laws or qualitatively assess the impact of these measures on the well-being of the trans community.

For the time being, though, it is important to recognize that many of these bathroom proposals do more than merely stigmatize trans individuals. These measures are not just symbolic. As discussed in this Article, recent proposals would effectively criminalize public bathroom use by trans individuals. Criminalization comes with serious consequences. It exposes the trans community to the risk of physical and emotional harm as members of the community come into more regular contact with criminal justice actors. As shown in this Article, actors in the criminal justice system appear to be unprepared to handle this newfound responsibility. Criminalization is not just bad public policy—it may very well be unconstitutional. By criminalizing otherwise innocent, life-sustaining, and arguably involuntary conduct so inextricably linked to the status of being trans, some bathroom laws run afoul of the Eighth Amendment. This may provide advocates with a narrow but important avenue through which to challenge the constitutionality of certain categories of bathroom laws.