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Lost in Trans*-lation: Why Title VII Jurisprudence Fails to Address Issues of Gender Identity in Employment Discrimination Litigation

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"Judges know next to nothing about [sex and sexuality] beyond their own personal experience, which is limited, perhaps more so than average, because people with irregular sex lives are pretty much…screened out of the judiciary."

- Richard Posner, former Seventh Circuit Court of Appeals Judge[1]

Emma is a post-college graduate pursuing a career in advertising and public relations. In today's hostile economy, every move she makes is under a microscope and may be scrutinized in relation to other similarly situated candidates. Emma graduated summa cum laude, held multiple internships over the course of her college career, and has stellar recommendations from her professors and former employers. On the outside, Emma looks poised for success. But Emma believes there is one thing may deter her from attaining employment after graduation. For the past year, Emma has been undergoing hormone therapy to transition to life as a male. Diagnosed with gender identity disorder, Emma believes that she was always meant to be "Evan."[2] *Emma now has a dilemma: Does she disclose this information to potential employers, or wait until she is secure in her position to make the full transition?*

Contrast Emma's situation with Betty's. Betty is a post-operative transgender woman who has come a long way from her roots. Betty is 35 years old and was a former sex worker on the streets of Chicago after having been kicked out by her family as a teen due to her "effeminate" behavior. Betty managed to emerge from the sex trade at 25 years old and was able to attend and graduate from college. After working with transgender youth for ten years, Betty wishes to attain a more corporate-based career. Betty's current identification information states her name as given at birth, as well as what was determined to be her biological sex. When applying for jobs, how does Betty reconcile a social security number affixed to the name "Javon Carter"? Does she have to? And does it matter?

Lastly, consider this: Jenna has worked at Price Waterhouse for the past ten years and is currently up for partnership. However, Jenna recently divorced from her spouse of seven years because Jenna's gender identity is inconsistent with her current physical appearance. Jenna believes she was always meant to be a man and would like to begin dressing in a more masculine manner in order to transition slowly into her life. Jenna does not know if she would like to pursue medical or surgical procedures at the time; rather, she just wants to feel it out. Does Jenna's transition to more "masculine" professional wear put her at risk for not only losing her partnership, but her job entirely?

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[1] *See* RICHARD POSNER, SEX AND REASON (1992).

[2] *See Generally Diagnostic and statistical manual of mental disorders*, American Psychiatric Ass'n., (5th ed. 2013) (replacing the diagnostic term "Gender Identity Disorder" with "Gender Dysphoria". Gender dysphoria will be used to diagnose individuals for displaying a "a marked incongruence between one's experienced or expressed gender and assigned gender").

Introduction

The legacy of Title VII has been profound. It has existed as a safeguard for those whose work performance has often been judged in comparison not with the value of their work product, but with or according to their perceived biological sex. Under Title VII, employers may not discriminate against their employees on the basis of sex in hiring, firing, or disciplinary related actions. Title VI was further strengthened by subsequent case law and legislation such as the Lilly Ledbetter Fair Pay Act.[3]

Despite these achievements, Title VII has left many vulnerable to the prejudices and biases of their employers. While today's debate on the wage gap, maternity leave, and sexism in the workplace continues to fill media airwaves, many communities who would otherwise fall under the purview of Title VII's protections have nonetheless slipped through the cracks. In particular, the increasingly visible and vocal transgender community continues to suffer higher rates of poverty, criminalization, and — of particular importance to Title VII — unemployment and employment discrimination.[4] Currently, the Supreme Court has only recognized gender-based discrimination as discrimination against one's *biological se*x. Because Title VII is silent on the theological debate between sex and gender, lower courts have scrambled to seek guidance when applying Title VII's protections to discrimination based on one's presentation of their gender identity. Transgender plaintiffs have consistently been left unprotected, leaving potential plaintiffs such as Emma, Betty, and Jenna vulnerable to potential *legal* prejudice and bias against them, regardless of their work ethic or performance. If Title VII was meant to protect against discrimination in the workforce, why has this community been left behind?

[3] 29 U.S.C. § 626(d) (2009).
[4] *See generally* Erin Fitzgerald, et. al., *Meaningful Work: Transgender Experiences in the Sex Trade. December 2015*, Transequality, Dec. 2015, http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.

There is no one answer to this question, but looking beyond static interpretations of gender and sex can help illustrate how the two very complicated concepts interact today. In particular, the judicial system's interpretation of "sex discrimination" under Title VII has perpetuated increasingly *inconsistent* interpretations of sex, gender, and sexual orientation under the law, leaving vulnerable victims across the country unprotected. The judicial system has managed to conflate sex and gender into a single category, yet has simultaneously found ways to separate them when it is convenient to do so. These decisions have created a complicated array of ad hoc precedent around the country that often leaves victims of discrimination at the will of the judge of each particular case.

Who is to blame for this inconsistency, and can it be reconciled? As this paper will demonstrate, modern feminism and queer theory have attempted to break down the subtle distinctions between sex and gender in order to determine what "sex" actually means in light of current jurisprudence. Currently, Title VII does not provide a precise definition of "sex"; rather, it has been left to the courts to parse out themselves. In doing so, they have struggled to come to a consensus on what is the "sex" in "sex discrimination" and have virtually left the legal concept of "gender" either undefined or entwined with sex. These inconsistent interpretations have failed to recognize the way gender norms and stereotypes operate to inform the very meaning of "sex" and what it means to be "male" and "female" in society today. As a result, transgender individuals have failed to reach protected class status, which renders them vulnerable to otherwise impermissible forms of workplace discrimination.

In order to comprehensively protect transgender individuals from workplace discrimination, it is imperative that courts adopt a more contemporary and informative methodology that properly embraces the average transgender plaintiff's freedom of gender identity

and expression. In order to bring about this change, the courts must engage with contemporary, alternative understandings of sex and gender. To that end, this paper will address the current predicament of transgender plaintiffs in workplace discrimination cases. Part One will analyze the plain language of Title VII and its subsequent interpretation to sex discrimination in the workplace, particularly in the seminal cases of *McDonnell Douglas Corp. v. Green* and *Price Waterhouse v. Hopkins.* Part Two will analyze how, despite *Price Waterhouse's* forward-thinking discussion and interpretation of sex and gender norms in the workplace, courts have continued to perpetuate the conflation of sex and gender under Title VII, thus leaving transgender plaintiffs unprotected from workplace bias and prejudice. Part Three will analyze various critiques set forth by queer and transgender theorists in regard to the court system. Part Four will survey the current methods of addressing transgender workplace discrimination, alternative methods of guidance, and whether it is feasible to imagine transgender individuals as a unique protected class under Title VII jurisprudence.

Without a critical understanding of how the court system addresses sex and gender, the legal system will be incapable of fulfilling the Title VII's mandate to prohibit sex and gender discrimination. Transgender plaintiffs in workplace discrimination cases ultimately present an opportunity for the courts to reevaluate how sex and gender have been analyzed within the system and within emerging mainstream society. This article seeks to help situate the current judicial system's position and hopes to shed light on an existing societal problem, one that can be solved by the society that created it in the first place.

Part One: The History of Title VII and *Price Waterhouse*

In response to the pervasive existence of sex discrimination in the workplace, Congress passed Title VII of the Civil Rights Act in 1964.[5] Although it has been amended in multiple ways, such as through the passage of the Civil Rights Act of 1991 and the Lilly Ledbetter Fair Pay Act of 2009, the Act's intent was to prohibit employment discrimination based on race, color, religion, sex and national origin.[6] Section 703 provides as follows:

> "It shall be an unlawful employment practice for an employer: 1) to fail to refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex,* or national origin; or 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, *sex*, or national original."(emphasis added).[7]

Title VII's plain language also intended to resolve how sex discrimination cases in the workplace should be handled practically within the court system. The act included various burdens of proof, both on the part of the plaintiff employee and the defendant employer. However, because discrimination was often difficult to prove on behalf of the plaintiff's side, the Supreme Court's subsequent interpretation of Title VII became increasingly important to future plaintiffs. For example, in *McDonnell Douglas,* the Court dealt with the issue of proving racial discrimination under Title VII.[8] There, the plaintiff was an African American male who had been employed as a mechanic.[9] Following significant company cutbacks, the plaintiff was laid off. However, the plaintiff believed he had been let go for other reasons. Specifically, plaintiff alleged that his

[5] 42 U.S.C. § 2000e (1964).
[6] 42 U.S.C. § 2000e-2(b) (2016).
[7] *Id.*
[8] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
[9] *Id*. at 794.

discharge was racially motivated due to his involvement in various civil rights demonstrations and marches.[10] The Court accepted the case to clarify the requirements for alleging a proper employment discrimination claim and subsequently set the stage for future causes of action not limited to race, but for those involving sex discrimination as well.

The Court first noted that Congress's intention in enacting Title VII was *not* to ensure every person a job, regardless of qualifications, simply because they were members of a minority group.[11] Rather, Title VII was written to balance the interests of both employer and employee. For instance, there was a broad, overriding societal interest, shared by the employer, employee, and consumer, that mandated efficient and trustworthy workmanship.[12] According to the Court, this interest had needed to be equitably balanced against Title VII's commitment to fair and racially neutral employment and personnel decisions.[13]

Ultimately, the Court created a burden-shifting test to reflect this careful balance of competing interests. To establish a prima facie case of workplace discrimination, a plaintiff would have to show that: (1) she belonged to a recognized minority and protected class; (2) she applied for and was qualified for the job for which the defendant employer was seeking applicants; (3) despite her qualifications, she was rejected; and (4) after the rejection, the position remained open and the defendant employer continued to seek applications from individuals with qualifications similar to those of the plaintiff.[14] After a prima facie case of employment discrimination was established, the burden then shifted to the defendant employer to provide a legitimate, non-discriminatory reason for rejecting the plaintiff's application.[15] If the defendant employer could

[10] *Id.*
[11] *Id.* at 801.
[12] *Id.*
[13] *Id.* at 801.
[14] *McDonnell Douglas Corp.*, 411 U.S. at 802.
[15] *Id.*

meet this burden, the plaintiff was then "afforded a fair opportunity to show that [the] stated reason for [the rejection] was in fact a pre-textual reason."[16]

Title VII and "Because of Sex" Discrimination

While *Price Waterhouse* would become the pivotal case for the interpretation of Title VII, it was not the first case to address the notions of stereotypes based on sex.[17] Rather, as legal theorist Ilona Turner articulates, the history of sex discrimination via sex-stereotyping actually developed in three stages.[18] During the first stage, courts gradually prohibited categorical legal exclusions based on the assumption that wives were economically dependent on their husbands and that, ultimately, women had domestic obligations that would supersede their ability to work.[19]

Phillips v. Martin Marietta Corp is one such case illustrative of the Court invalidating prohibitions on categorical legal exclusions. There, plaintiff Ida Phillips applied for a job whose workforce was "nearly eighty percent female."[20] Although Phillips was found to be qualified for the position, she was turned away from the job because the company — believing that it would ultimately result in conflicting "domestic complications" — had a ban against hiring women with preschool-aged children.[21] In a brief per curiam decision, the Supreme Court held that any ban, informal or not, on hiring women with young children was discriminatory and that any failure to hire candidates based on this reason was impermissible unless there was evidence suggesting that

[16] *Id.* at 804. In the immediate case, the Court determined that the plaintiff had established a prima facie case for racial discrimination and remanded the case back down to the District Court level to provide him with a fair opportunity to demonstrate that McConnell's reason for discharge was pre-textual or discriminatory. *Id.* at 807.
[17] Zachary R. Herz, *Price's Progress: Sex Stereotyping and its Potential for Anti-Discrimination Law*, 124 Yale L. J. 396, 404 (2014).
[18] Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 CAL. L. REV. 561, 573 (2007).
[19] *Id.* at 573.
[20] Phillips v. Martin Marietta Corp., 400 U.S. 542, 543 (1971).
[21] *Id.* at 544.

"family obligations could be shown to be demonstrably more relevant to job performance for a woman than for a man."[22] In doing so, the Supreme Court reversed the Fifth Circuit's interpretation of Title VII, which had held that in order for a plaintiff to prove impermissible workplace discrimination, the plaintiff had to produce evidence showing that the employer had engaged in discrimination against an entire group. Instead, the Court found that Title VII's anti-discriminatory protections extended to "discrete subgroups."[23] Thus, in order to adequately plead a cognizable claim of sex discrimination in the workplace, employment decisions regarding hiring and firing had to be based on traditional assumptions of *groups* rather than a single individual's adherence to normalized gender ideals.

In the second stage of sex-stereotyping jurisprudence, courts prohibited employers from making adverse employment decisions based on an individual's adherence to certain stereotypes.[24] For example, in *Los Angeles Department of Water and Power v. Manhart*, the Court held that greater pension fund contributions from female employees on the basis that women lived longer than men violated Title VII because such decisions rested on an assumption that one sex would live longer than the other.[25]

The third stage of sex-stereotyping jurisprudence led to *Price Waterhouse.* There, individuals were discriminated against for *non-conformity* to gender stereotypes. As this paper will demonstrate, *Price Waterhouse* was significant in the development of sex-stereotyping jurisprudence because of its focus on a plaintiff's individual characteristics in relation to an

[22] *Id.*
[23] Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 405 (2014).
[24] Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 573 (2007).
[25] City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 727 (1978).

"unacceptably biased norm."[26] Specifically, in *Price Waterhouse*, the plaintiff's personality, characteristics, and behaviors were not disputed by either of the parties; rather, the central question in the litigation evaluated the way in which her unique personality was evaluated against how women "should" behave. By engaging in this nuanced discussion, the Court opened the door to debate between sex and gender under Title VII.

Price Waterhouse

It has been twenty-seven years since the Supreme Court's decision in *Price Waterhouse* established precedent that proved to be foundational for alleging, and succeeding, on claims of sex discrimination in the workplace.[27] There, the plaintiff, Ann Hopkins, claimed to have been denied a partnership two years in a row based inappropriate sex-stereotypes. Hopkins was a senior manager at Price Waterhouse, a nationwide professional accounting firm. Hopkins had worked for Price Waterhouse for five years when she was first proposed for partnership, at a time when only 7 out of 662 partners at the firm were women.[28] She was first proposed for partnership in 1982, but her candidacy was tabled for reconsideration for the following year.[29] When her candidacy was refused again for the following year, Hopkins resigned and filed suit under Title VII, alleging that the firm had discriminated against her on the basis of sex in their partnership decision.[30] The dispute between Hopkins and Price Waterhouse centered around the standard of causation necessary to violate Title VII.[31] According to Price Waterhouse, an employer could only violate Title VII if it gave "decisive consideration to an employee's… gender in making a decision

[26] Zachary R. Herz, *Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law*, 124 Yale L.J. 396, 406 (2014).
[27] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[28] *Id.* at 233.
[29] *Id.* at 231.
[30] *Id*. at 232.
[31] *Price Waterhouse*, 490 U.S. at 237.

that affects that employee."[32] In essence, even if gender did play a role in a specific employment decision, it was still up to Hopkins to show that the decision would have been different had there been no discrimination. In contrast, Hopkins argued that an employer violates Title VII whenever it *allows* an attribute to play *any part* in an employment decision.[33] (emphasis added).

During trial, Hopkins provided evidence of sex discrimination. Such evidence included her reviews for partnership, which showed that while the company viewed her as an "outstanding professional", "extremely competent, intelligent", "very productive", "energetic" and "creative," she was also viewed as aggressive and sometimes downright brusque.[34] In fact, many of her negative partner reviews stemmed from what was deemed her "interpersonal skills."[35] Other reviews were even less polite, with some co-workers describing her as aggressive, foul-mouthed, and unladylike to the point that she needed a "course in charm school."[36] The most striking comment came a member of the board, who advised Hopkins that in order to improve her chances for partnership, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear makeup, have her hair styled, and wear jewelry."[37] These statements were corroborated at trial by other female candidates, as well as various expert witnesses who testified that many partnership candidates at the firm had been evaluated in sex-based terms.

Upon review, the Supreme Court determined that the case demonstrated clear evidence of sex-stereotyping, and ultimately held that "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."[38] The

[32] *Id.*
[33] *Id*. at 238.
[34] *Id*. at 234.
[35] *Price Waterhouse*, 490 U.S. at 234-35.
[36] *Id*. at 235.
[37] *Id*.
[38] *Id.* at 250.

Court noted that "in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[39]

The Court ultimately agreed with Hopkins' interpretation of Title VII, finding that the plain language of the statute mandated that any employment decisions based on gender were improper. Further, even decisions based on a "mixture of legitimate and illegitimate factors at the time of making [the decision]" — namely gender in relation to other workplace-related considerations — were to be condemned.[40] With regard to sex-stereotyping, the Court held that sex-stereotypical remarks at work do not inevitably prove that gender played a role in an employment decision; instead, the burden fell on the plaintiff to show that employer relied on gender in making its decision, with stereotyped remarks providing *evidence* that gender played a role.[41]

But the discussion in *Price Waterhouse* also considered the interests of the employer as well. The Court made sure to note that the Title VII was written to balance an employee's protection from discrimination against an employer's legitimate "remaining freedom of choice."[42] This meant that an employer could escape liability under the statute if it is able to prove that, even without gender, the same decision would have been made in regard to the plaintiff's employment.[43] Further, "while an employer may not take gender into account in making an employment decision, it [was] free to decide against a woman *for other reasons*."[44] (emphasis added). Moreover, it would

[39] *Id.* at 251.
[40] *Id.* at 240-41.
[41] *Id.* at 251.
[42] *Id.* at 242.
[43] *Price Waterhouse,* 490 U.S. at 242.
[44] *Id.* at 244.

be the employer's burden to prove, via a preponderance of the evidence, that there were other objective, permissible reasons for termination.[45]

The aftermath of *Price* Waterhouse was felt in multiple ways. First, he court's discussion of burden-shifting was ultimately codified by Congress with the passage of the Civil Rights Act of 1991, which allowed employers to avoid monetary damages and other remedies if they can prove that they would have made the same decision in the absence of the "impermissible motivating factor."[46]

Second, the discussion of the subtleties of sex and gender opened doors for theoretical discussions between biological sex and gender performativity. Ann Hopkins's *biological sex* was not the issue that underlined her discrimination claim. Rather, it was the way in which her biological sex aligned — or rather, according to her employers, *misaligned* ― with how she was expected to act because of her sex. Ultimately, the discussion has raised issues of performativity with regard to gender.

Last, the Court's discussion of the balancing test of protecting employees against employers' legitimate business interests would also prove to be a challenge for future transgender plaintiffs under Title VII. Their very livelihoods, read as defiant of normative sex and gender roles, would present interesting questions to the mixed-motive rule articulated by the Supreme Court. What was the "impermissible motivating factor" in their cases? Could employers discriminate against them based on gender norms, or did it all lead back to biological sex? Could it be both? And if so, what proof was required to show it? As the next few sections will demonstrate, this ambiguity would manifest itself in legal jurisprudence that was inconsistent, incoherent, and subsequently allowed vulnerable plaintiffs to fall through the cracks.

[45] *Id.* at 250-53.
[46] 42 U.S.C. Sec. 2000e-2(m) (1991).

Part Two: Sex, Gender, and the Transgender Predicament

Introduction

Price Waterhouse's discussion of impermissible sex discrimination provoked debate on the relationship between biological sex, gender performativity, and what it meant to be a "man" or "woman" in society. Further, these discussions were not simply relegated to the legal field; rather, for years, feminist theory had contemplated separating the two in order to understand oppressive societal institutions.[47]

Sex, Gender, and Society

The basic societal understanding of sex and gender is simple: your sex and gender is definitively defined and settled by your biological traits, i.e. whether you have a penis or vagina.[48] Courts have often resorted to the same simplistic understanding of gender by simply attributing it to whatever physical body part is or was present on a transgender plaintiff. In contrast, gender has been used to define the personal appearance, personality attributes, and socio-sexual roles that ultimately provide the foundation for our society's mainstream understanding of "masculine" or "feminine."[49] Such roles are imposed on the individual through assignment of sex as determined at birth.[50]

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[47] *See* Linda Nicholson, *Interpreting Gender*, 20 J. WOMEN & CULTURE IN SOC'Y 79 (1994); *see also* Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 2 (1995); *see also* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3 (1995) (stating that the Valdes discussion also brings in the inherently related topic of sexual orientation, which will be limited here only to discuss the ways in which courts have deflected the discussion regarding the difference between sex and gender).

[48] *See also* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3, 20 (1995).

[49] *Id.* at 22.

[50] *Id*. at 47.

One of feminism's key tenets is to acknowledge the nuanced interplay of sex and gender, and how those concepts perpetuate particular types of oppression. In feminist circles, "gender" refers to two distinct concepts.[51] The first concept depicts gender in opposition to sex. Under this view, gender is "typically thought to refer to personality traits and behavior" as distinctive from the physical body itself.[52] By contrast, the second approach evaluates gender as the differences between "female" and "male" bodies.[53] This distinction demonstrates how society shapes our personality and behavior in relation to sex, and how our bodies are presented as either more masculine or feminine to the rest of the world.[54] This view posits sex not as something entirely separate from gender, but "rather, that which is subsumable under it."[55]

In *Queers, Sissies, Dykes, and Tomboys*, Francisco Valdes views the second concept as crucial to understanding the foundational legal basis for sex discrimination. Valdes argues that the conflation of sex and gender did not happen accidentally; rather, the confusion between the two is, and has been, perpetuated by both social and legal actors to enforce andro-sexist and heterosexist values which Valdes terms as "hetero-patriarchy."[56] Further, hetero-patriarchy is reinforced through a "formal, intellectual belief system…codified through various clinical theories and a pervasive normative standard that shape and govern human life more generally."[57] Moreover, the conflation of sex and gender is responsible for creating the social and sexual order ultimately accepted as a truism.[58]

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[51] *See* Linda Nicholson, *Interpreting Gender*, 20 J. WOMEN & CULTURE IN SOC'Y 79 (1994).
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *See also* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3, 4 (1995).
[57] *Id.* at 6.
[58] *Id.* at 6-13.

In addition, Valdes critiques current feminist approaches to understanding the conflation of sex and gender. He argues that although feminist critiques of the law have generally probed the *normative* aspects of gender, theorists have still failed to address the "underlying presumptions of the equation", namely that sex determines gender.[59] In failing to apply a transformative lens to this conflation, legal institutions have continued to "collapse [the two] into an undifferentiated jumble.[60]

This "undifferentiated jumble" has become more apparent with the rise of a politically active transgender community. While increasingly more mainstream figures such as Janet Mock and LaVyrne Cox are providing insight to the "T" within the LGBTQ acronym, the exposure has also brought questions about what sex and gender mean within our modern understanding of identity.

History of the "Third Sex" and Normative Sex/Gender Standards

According to the San Francisco Human Rights Commission, the term "transgender" is "an umbrella term that includes male and female crossdressers, transvestites, female and male impersonators, pre-operative and post-operative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender and anatomic sex may conflict with the[ir] gender expression."[61]

Envisioning a "third sex" or something outside of heteronormative understandings of sex and gender is not a new concept. Rather, international communities have societally adapted to the interplay by establishing their own categories of identity. For example, on the international scale, the Zapotec people in Mexico have devised a third category of identity — called "muxes" — for

[59] *Id.* at 13-14.
[60] *Id.* at 14, 19.
[61] Julie A. Greenberg, *Health Care Issues Affecting People with an Intersex Condition of DSD: Sex or Disability Discrimination?,* 45 Loy. L.A. L. Rev. 849, 853 (2012).

men who consider themselves women and live in a socially sanctioned world between the two "normal" genders.[62] There is no one way to express oneself as a "mux"; instead, expression ranges from dressing as woman, taking hormones to change the physical aspects of their bodies, or even preferring male clothes overall.[63] Additionally, the Navajo community has also identified a third category of identity, called "nadle" or nadleehee."[64] Last, Australia allows for three gender options on one's passport: male, female, and "X upon certification that the individual is receiving 'appropriate clinical treatment.'"[65]

Further, the discussion of a "third sex" has not solely been confined to the international context. Rather, Valdes's historical investigation of institutionalized sex and gender reveals that the conflation has very much been an active project in Euro-American society. Specifically, Valdes describes what he terms the "active-passive paradigm" as a way of defining what is "masculine" and "feminine."[66] Once defined, these characteristics serve as a way to "deter and punish social or sexual departures from, or disruptions of" normative identities.[67] As a result, surveillance and regulation sets the stage for "the clinical codification of…sex-determined gender."[68]

Clinical codification of sex-determined gender has pervaded mainstream society, and any deviation from these categories spurred vigorous scientific and academic study of those living

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[62] *See* Marc Lacey, *A Lifestyle Distinct: The Muxe of Mexico*, N.Y. TIMES, Dec. 6, 2008, http://www .nytimes.com/2008/12/07/weekinreview/07lacey.html.
[63] *Id.*
[64] *See* Alison Shaw, *Is it a Boy, or a Girl? The Challenges of Genital Ambiguity, in Changing Sex and Bending Gender* 20, 25-26 (Alison Shaw & Shirley Ardener eds. 2005); *see also* Jessica Knouse, Intersexuality and the Social Construction of Anatomical Sex, 12 Cardozo J. L. & Gender 135, 150 (2005).
[65] AUSTL. GOV'T DEP'T OF FOREIGN AFF. & TRADE, *Sex and gender diverse passport applicants*, https://www.passports.gov.au/passportsexplained/theapplicationprocess/eligibilityoverview/ Pages/changeofsexdoborpob.aspx.
[66] Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3, 39-40 (1995).
[67] *Id.* at 39-40.
[68] *Id.* at 43.

outside of them. Prior to World War Two, inversion theory was used to classify individuals whose identification with or performance of 'correct' sex-derived gender was inherently stunted and, therefore, "inverted."[69] Next came the study of sexology, which "routinely and officially assigned [sex] on the basis of observable or external genital anatomy," making the "correct gender identification…the one that coincided with the sex assigned to the individual at birth."[70] Last, the Uranian school of thought attempted to develop a formalized scientific theory that would help justify any anomalies to prevailing sex and gender framework through the suggestion of a third sex.[71] Uranians were persons who "while belonging distinctly to one sex as far as their bodies were concerned…were said to belong mentally and emotionally to the other."[72]

Overall, these theories were attempting to establish some kind of regulatory device to "induce or demand sex/gender correctness in every respect throughout modern culture."[73] The hope was that by employing such a device, society would be able to "specifically target, diagnose, and mistreat sexual minorities as part of a general campaign against persons who broke its official sex-determined gender codes."[74] Today, while these theories have ultimately been debunked, contemporary disciplines such as sociology, psychology, and psychiatry has attempted to incorporate medicine into the regulatory scheme. For example, those who identify as transgender are often diagnosed with "gender identity disorder", now re-named as "gender dysphoria."[75] In order to transition from one sex to another with the assistance of medicine or therapy, an individual

[69] *Id.* at 45.
[70] *Id.* at 47.
[71] *Id.* at 59-61.
[72] *Id.* at 61.
[73] Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3, 55 (1995).
[74] *Id.*
[75] *See Generally Diagnostic and statistical manual of mental disorders*, American Psychiatric Ass'n., (5th ed. 2013).

must attain a diagnosis from their doctor, undergo extensive therapy, and then receive a recommendation for whatever medical intervention they are seeking.[76] Thus, although the methods have changed, the policing of sex and gender at the institutional level continues to persist and contributes to additional burdens faced by the transgender community.

The Transgender Community Today

In December 2015, the National Transgender Discrimination Survey was released. Groups such as the National Center for Transgender Equality (NCTE) and the National LGBTQ Task Force conducted a national survey over a six-month period.[77] The survey's goal was to document the lived experiences of over 6,400 transgender individuals. To date, the survey is the "largest reported survey of transgender people in the U.S."[78] The survey measured the community's current demographics, educational and employment statistics, interactions and relationship with the police and the court system, and their physical and mental health struggles.[79] Overall, the survey's general findings concluded that transgender people "experience high levels of discrimination in every area of life."[80] Specifically, within the survey's employment category, an overwhelming majority of respondents — 69.3% — reported experiencing "adverse job outcomes in the traditional workforce," including being denied a job or promotion, or being fired due to their gender identity or expression.[81]

[76] Maria Pahl, *Immutability of Identity, Title VII, and the ADA Amend. Act: How Being "Regarded as" Transgender Could Affect Emp. Discrimination*, 3 DePaul J. Women, Gender & L. 63, 69 (2014).
[77] *See generally* Erin Fitzgerald, et. al., *Meaningful Work: Transgender Experiences in the Sex Trade. December 2015*, Transequality, Dec. 2015, http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.
[78] *Id.* at 12.
[79] *Id.*
[80] *Id.* at 4.
[81] *Id.* at 5.

With regard to employment opportunities, the survey noted that many transgender individuals, given their difficulties within formal employment, tend to turn to sex work to earn income.[82] In fact, those who lost a job due to anti-transgender bias were almost three times as likely to engage in the sex trade.[83] About 10.8% of the general survey reported participating in sex work, while about 2.3% reported trading sex for rent or a place to stay.[84] These findings were higher for black and multi-racial respondents, with an overall rate of sex trade participation at 39.9%, with Hispanic and Latino/a respondents were close behind at 33.2%.[85] The survey also suggested difficulties in re-joining a formal workforce after becoming involved in the sex trade. Specifically, the survey indicated that unemployment rates for those who reported involvement in the sex trade was about 25.1%, versus 12.4% for those who had not been involved.[86]

History of Transgender Employment Discrimination

However, even when transgender individuals are able to secure formal employment outside of sex work, it is still difficult to gain access to certain opportunities, secure their positions within the institution, or acquire promotions. In 2015, the Washington D.C. Office of Human Rights ("OHR") conducted what is considered to be the "first known government-conducted resume testing to focus on discrimination against transgender and gender non-conforming job applicants."[87] On November 4, 2015, the OHR released the findings and a report of their six-month

[82] "Sex work" is a "broad term used to describe exchanges of sex or sexual activity. [It] is also used as a non-stigmatizing term for 'prostitution'…Not every person [involved] in the sex trade defines themselves a sex worker or their sexual exchange as work. [Rather], some may regard what they do…[as] simply a means to get what they need" [i.e. medical care, money for rent, etc.]. *Id.* at 7.
[83] *See generally* Erin Fitzgerald, et. al., *Meaningful Work: Transgender Experiences in the Sex Trade. December 2015*, 1, 4 Transequality, Dec. 2015, http://www.transequality.org/sites/default/files/Meaningful%20Work-Full%20Report_FINAL_3.pdf.
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] Lou Chibbaro, Jr., *Sting Reveals Anti-Trans Job Bias*, THE WASH. BLADE, Nov. 4, 2015, http://www.washingtonblade.com/2015/11/04/sting-reveals-anti-trans-job-bias/.

study, entitled "Qualified and Transgender: A Report on Results of Resume Testing for Employment Discrimination Based on Gender Identity." The OHR stated that the study was conducted in "response to ongoing reports of job-related discrimination" in D.C. and across the United States.[88] The report provided concrete data in support of the notion that transgender individuals are incredibly marginalized within the formal workplace context.[89]

Overall, the study indicated that "48% percent of employers appeared to prefer at least one less-qualified job applicant over a better-qualified applicant perceived as being transgender."[90] Replicating the methodologies of earlier studies investigating race and sex discrimination, researchers sent out 200 cover letters and resumes to 38 employers currently advertising 50 job openings, ranging from openings within universities, grocery and retail stores, restaurants, and administrative positions.[91] The OHR sent two sets of cover letters and resumes to every advertised job from applicants who "appeared to be transgender" and another two sets from applicants who were seemingly not so.[92] Both the transgender and non-trans applicants created for the study met the minimum requirements for the job positions advertised by the employers.[93] In fact, the study presented the transgender applicants as more qualified than their cisgender counterparts by giving

[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] Lou Chibbaro, Jr., *Sting Reveals Anti-Trans Job Bias*, THE WASH. BLADE, Nov. 4, 2015, http://www.washingtonblade.com/2015/11/04/sting-reveals-anti-trans-job-bias/ (The study did not specifically identify the transgender plaintiffs as so; however, the resumes sent out to various employers did hint at the status of the applicant's gender identity by listing past jobs or volunteer positions with transgender advocacy organizations, such as the National Center for Transgender Equality. Additionally, some of the transgender applicants listed their former names that typically conformed to the opposite gender representation).
[93] *Id.*

them higher college grade point averages, more work experiences, and degrees from prestigious collegiate and post-graduate institutions.[94]

According to the report, 33% of employers offered interviews to one or more less qualified applicants presenting as cisgender, while those deemed to be better qualified and perceived to be transgender were not interviewed.[95] Following the findings, the OHR stated that enforcement action against four different employers would be initiated as a result of findings, but these actions were necessarily limited given the fact that no real individuals were victims of discrimination in the test case.[96] As a result, the discriminatory actions of the four employers resulted in only an "advisory determination" being issued against them.[97]

Conclusion

It is clear based on the history of sex and gender that transgender individuals encounter specific and particularized harms in the context of everyday life, especially within the court system. As the next section will point out, courts have not been immune to the conflation of sex and gender, especially when applying Title VII's statutory language to sex discrimination litigation. As a result, many vulnerable plaintiffs fall through the cracks specifically created by congressional silence and the court system's inability to differentiate between biological sex and gender performativity.

Part Three: Transgender Employment Discrimination and the Limits of Law

Introduction

Price Waterhouse's discussion suggests that not only is Title VII capable of recognizing claims of sex discrimination beyond biological sex**,** but that our court system was becoming better able to recognize the subtle yet pervasive societal structures that govern sex and gender.

[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*

Specifically, Hopkins's claim arose out of an underlying belief regarding how women were supposed to act in the workplace, suggesting a clear separation between birth-determined sex and how society places distinctive values and ideologies on different bodies.

The line of cases following *Price Waterhouse* appeared to further continue the debate. In *Oncale v. Sundower Off-Shore Services, Inc.*, the Court held that a male employee, repeatedly subject to same-sex harassment from other male coworkers, had stated a valid claim under the act.[98] Specifically, the Court noted that while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when enacting Title VII,…the statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils….Ultimately, the provisions of our laws rather than the principal concerns of our legislators [are] by which we are governed."[99]

Read optimistically, these court decisions should have been the impetus for a more progressive understanding of gender and identity overall. Instead, lower courts seemed to lose their way and instead applied inconsistent interpretations to Title VII, ranging from examination of original congressional intent to a plain language understanding of sex that continued to reinforce the conflation between sex and gender. As a result, while some claims by transgender plaintiffs have been read as cognizable, others have been dismissed as failing to state a cause of action.

However, discrimination against transgender plaintiffs so rarely fits a textbook definition. Rather, the lives of transgender individuals implicate a nexus between biology and free will, what we are born as and how we choose to live and perceive ourselves to be. Further, the transgender community and those with an intersex condition challenge the law's assumption that a person is either male or female and that sexual designation is permanent.

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[98] *See* Oncale v. Sundower Off-Shore Services, Inc., 523 U.S. 75 (1998).
[99] *Oncale*, 523 U.S. at 78.

Judicial Interpretations post-Waterhouse for Transgender Plaintiffs

With regard to formal employment, transgender individuals have generally been unable to pursue any mechanism of recourse.[100] First, courts have held that that Title VII does not protect sexual orientation discrimination under Title VII's "because of sex" provision, nor does the statute extend to transgender plaintiffs. Second, the ability to resolve what is "sex" and what is "gender" is increasingly complicated when analyzed on a jurisdictional level. Much of the early case law emerged from a family law background, which is, for the most part, governed by local and state law.[101] When paired with the increasingly complicated understanding of what "sex" means under both federal and state law, inconsistent judicial precedent has left gaps in the law that have allowed courts to maintain rigid heteronormative structures of identity that leave those that fall between the cracks neglected and vulnerable.

Prior to *Price Waterhouse*, federal courts had the opportunity to interpret Title VII's sex discrimination provisions in relation to claims brought by "transsexual" employees.[102] In *Voyles v. Ralph K. Davies Medical Center*, the Northern District Court of California opined that Title VII's had never contemplated protecting transsexuals, homosexuals, or bisexuals in employment discrimination practices.[103] The court stated that this was indicated by the fact that, on numerous

[100] Shannon Minter & Christopher Daley, *A Legal Needs Assessment of San Francisco's Transgender Communities* (2003), www.ftmi.org/images/0TransFinal.pdf.
[101] *See* Littleton v. Prange, 9 S.W.3d 223, 233 (Tex Ct. App. 1999) (holding that a male-to-female transsexual was unable to recover against husband's doctor in wrongful death suit); *see also* In Re Estate of Gardiner, 22 P. 3d 1086 (Kan. 2001) (invalidating marriage between man and transsexual woman on grounds that legal sex cannot be changed for purposes of marriage law).
[102] Please note that much of the early case law frequently referred to transgender plaintiffs as "transsexuals" or "transvestites". For purposes of this article, the two terms shall refer to non-normative identities.
[103] Voyles v. Ralph K. Davies Medical Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975).

occasions, various bills supporting sexual orientation as a protected category under Title VII had consistently failed to garner support in Congress.[104]

In 1977, the Ninth Circuit was the first federal court of appeals to contemplate the legitimate existence of transgender identity as a protected class under Title VII.[105] However, in *Holloway v. Arthur Anderson,* the court seemed to undermine the specific plaintiff's claim by framing the issue in a way that would almost never be cognizable under Title VII. The question presented was "whether an employee may be discharged, consistent with Title VII, for *initiating the process of sex transformation*."[106] In *Holloway,* the plaintiff informed her supervisor that she was preparing for sex reassignment surgery and changed her personnel information to reflect her new "feminine" name.[107] Soon after, she was fired.[108] Not surprisingly, the court held that under Title VII sex was to be given its "traditional meaning" and that the statute could not be read so expansively as to include protections for transgender employees.[109]

Significantly, the court stated that the plaintiff could bring forth a claim if they experienced discrimination against their new designated sex — meaning that if the plaintiff experienced discrimination in accordance with gender stereotypes, such a claim would be cognizable.[110] In doing so, the court drew a line in the sand regarding what constitutes *permissible* sex discrimination, meaning that discrimination because of sex is only cognizable under Title VII when it is dictated in accordance with a static view of identity. Because the premise of transgender

[104] *Id.*
[105] Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 568 (2007).
[106] Holloway v. Arthur Anderson & Co., 566 F.2d 659, 661 (9th Cir. 1977) (emphasis added).
[107] *Id.*
[108] *Id.*
[109] *Id.* at 664.
[110] *Id.*

identity relies on the notion that such identities are fluid, for the purposes of sex discrimination litigation, this meant that the *transition* itself was unprotected.

Protected Classes and the Immutability Debate

Holloway raised interesting questions about the nature of gender identity and whether it is either a static or a fluid concept. One of the central debates regarding Title VII's applicability to transgender plaintiffs is the issue of immutability, specifically whether their gender or identity presentation is something controllable or alterable. The immutability issue poses the question of whether transgender individuals have the ability to avoid discrimination based on how society views gender identity or sexual orientation.

Recent anti-discrimination laws enacted after Title VII have emphasized the importance of protections against discrimination based on *biological characteristics.* Two such laws include the Genetic Information Non-Discrimination Act (GINA) and the ADA Amendments Act (ADAA). GINA was enacted in 2008 and prohibits employers from making adverse employment decisions based on genetic information, such as genetic diseases.[111] With limited exceptions, the act also prohibits employers from requesting that information.[112] In 2006, The ADAA was enacted to amend the Americans with Disabilities Act (ADA).[113] Specifically, the ADAA expanded the definition of disability to include a non-exhaustive list of basic life activities, such as "caring for oneself."[114] Further, the act also covered major bodily functions as life activities, including life activities related to the reproductive system.[115] Moreover, under the ADAA, an individual is

[111] 42 U.S.C. § 2000ff-4 (2010); 42 U.S.C. § 2000ff-1(a) (2010).
[112] *Id*. at § 2000ff-1(b)(1).
[113] Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 Wm. & Mary L. Rev. 1483, 1494 (2011), http://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=3384&context=wmlr.
[114] *Id.*
[115] *Id.* at 1496-97.

disabled if they have an "actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[116]

There is no doubt that courts have found the immutability argument persuasive. Most recently, the Supreme Court's decision in *Obergefell v. Hodges* — holding that the legality of gay marriage was justified on the basis that "psychiatrists and others have recognized that sexual orientation is both a normal expression of human sexuality *and immutable"* — demonstrated the power of the immutability argument.[117] While the immutability argument proved successful for a fundamental change in discrimination jurisprudence against gay and lesbian plaintiffs, the same argument has not been so successful for transgender plaintiffs.

With regard to transgender plaintiffs, immutability has been defined in multiple ways. In some instances, immutability is contingent on what one's gender performance may be *in accordance with* their external attributes. For example, in *M.T. v. J.T.*, a New Jersey superior court emphasized the importance of external genitalia in determining whether gender expression is, in fact, immutable.[118] In *M.J.*, the plaintiff was a post-operative male-to-female transsexual who filed a complaint against her ex-husband for "support and maintenance." To prevail on her claim, the plaintiff was required to prove that she was, in fact, a woman under the law. To bolster her claim, the plaintiff offered evidence dating back to her childhood that supported the notion that her physical changes complimented her current gender identity.[119] Accordingly, the court analyzed, in vivid detail, her sex change procedure, ultimately coming to the conclusion that because her genital features had been manipulated to conform to her gender expression, plaintiff's evidence was

[116] 42 U.S.C. § 12102 3(a) (2008).
[117] Obergefell v. Hodges, 135 S. Ct. 2584, 2596 (2015) (emphasis added).
[118] M.T. v. J.T., 355 A.2d 204, 210-211 (N.J. Super. Ct. App. Div. 1976).
[119] *Id.* at 205.

sufficient to render her gender status as a woman for purposes of her claim.[120] In doing so, the court "affirmed the bottom-line belief that external genitalia constituted the controlling determinant of sex" and was, therefore, the immutable characteristic in gender expression.[121]

Similarly, many legal thinkers favor the argument that the immutability argument is necessary for transgender plaintiffs, particularly in claims brought under the ADAA. For instance, Jennifer Levi believes such an approach will bring about a discussion of gender identity's inelasticity and that bringing a gender-centered claim under disability statutes actually provides a chance for the plaintiff to become humanized under the law.[122] This would allow the court system to read immutability favorably in regard to gender stereotypes in ways it may have not been able to do so before given the law's frequent conflation of sex and gender, particularly within discrimination cases.[123]

However, for activists and scholars within the transgender community, the concept of immutability is inconsistent with the premise of trans identity and remains a divisive issue within the broader LGBTQ community. Many activists consider trans identity as more than the rejection of binary concepts of gender and instead use it to refer to a myriad of identities, indicating that "trans identity is not a linear path from one category to another."[124] In rejecting these traditional understandings of identity, transgender plaintiffs in workplace discrimination cases are presented with numerous difficulties, especially those who do not intend to seek medical intervention to complement their gender expression.

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[120] *Id.* at 206.
[121] *See also* Francisco Valdes, *Queers, Sissies, Dykes and Tomboys: Deconstructing the Conflation of "Sex", "Gender" and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL L. REV. 3, 132 (1995).
[122] Maria Pahl, *Immutability of Identity, Title VII, and the ADA Amend. Act: How Being "Regarded as" Transgender Could Affect Emp. Discrimination*, 3 DePaul J. Women, Gender & L. 63, 70 (2014).
[123] *Id.*
[124] *Id.* at 67.

Requiring a finding of immutability in order to confer protected status on a marginalized group ultimately presents a no-win situation for plaintiffs seeking protection under non-discrimination employment statutes. Under this standard, plaintiffs are required to exhibit their immutable yet controversial characteristic in order to demonstrate their status in a protected class, while at the same time risking the viability of their employment because such exhibition allegedly threatens the workplace's "order, morale, collegiality, and customer relations."[125] Simply put, if the discrimination is based on characteristics that are ultimately able to be changed because they are not immutable characteristics, transgender plaintiffs may have the ability to avoid the discrimination in the first place.

The issue of immutability has been read in various ways by contemporary jurists and theorists. Some judges believe the Supreme Court has misconstrued the notion of immutability by viewing it as something that cannot be changed; rather, the method of inquiry should be focused on whether "changing…would involve great difficulty."[126] In a case regarding military policy, Judge Norris of the Ninth Circuit opined that the concept of immutability has never meant that "members of the class must be physically unable to change or mask the trait defining their class…. Reading the case law in a capacious manner, 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for the government to penalize a person for refusing to change them, regardless of how easy that change might be *physically*."[127] (emphasis added).

Similarly, queer theorist Janet Halley has argued that the focus on immutability as physical manifestation of identity in regard to sexual orientation is inappropriate as it "misrepresents the

[125] *See* Stephan v. Perry, 41 F.3d 677 (D.C. Cir. 1994) (en banc).
[126] *See* Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir. 1989) (en banc) (Norris, J., concurring).
[127] *Id.*

complex and changing way [it] evolves, [thus misperceiving] the harm of discrimination."[128] Instead, Halley argues in the alternative, suggesting that these characteristics are actually *mutable* because discrimination in the workplace encourages people to "manipulate the identity they attach to themselves, both in the secrecy of their own minds and on the public stage, in…their subjective and public identities."[129] Thus, a person's characteristics, arguably immutable or not, are all subject to manipulation based on the situations they place themselves in. For example, an individual who identifies as African American may choose to lessen their cultural persona or "act less black" in the workplace while performing their identity in a completely different way once at home. This argument suggests that all characteristics, even those deemed to be immutable under Supreme Court precedent, inherently stand on shaky grounds.

Despite these considerations, the immutability argument may still be the easiest way for transgender plaintiffs to properly allege workplace discrimination, because it is the only argument with sufficient legal precedent and case law to justify its usage. Moreover, this places transgender plaintiffs in a perpetual catch-22 of seeking to have their identities validated for purposes of bringing forth cognizable claims, while at the same time living lives that inherently seek to dismantle the same categories they require to bring the case forward in the first place.

[128] Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gays, Lesbians, and Bisexual Identity*, 36 U.C.L.A. L. REV. 915, 933 (1989); *see also* Janet Halley, *Sexual Orientation and the Politics of Bigotry: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994).
[129] Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gays, Lesbians, and Bisexual Identity*, 36 U.C.L.A. L. REV. 915, 933 (1989).

Part Four: Where Can it Go from Here? Promising Court Precedent and Alternative Mechanisms of Support

Favorable court interpretations

Following *Price Waterhouse*, some federal circuits have addressed the issue of whether a transgender plaintiff may bring a Title VII sex discrimination case on the basis of a gender-stereotyping theory. For example, in *Smith v. City of Salem*, the plaintiff, a fire fighter into her seventh year of employment, was diagnosed with Gender Identity Disorder.[130] Following the diagnosis, the plaintiff began to dress more femininely and contacted her supervisor about her plans to eventually undergo sex-reassignment surgery. Following a meeting with the executive body of Salem, the plaintiff was told the city planned to fire her, and she subsequently filed suit under Title VII.[131] The district court held that her claim was not cognizable, because the statute did not prohibit discrimination on the basis of transsexualism.[132]

On appeal, the Sixth Circuit reversed, finding that the plaintiff had articulated a prima facie case of sex discrimination.[133] The court cited *Price Waterhouse* as precedent that made clear that Title VII's ban on sex discrimination also equally prohibited discrimination based on gender, stating that "employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[134] Most significantly, the court disagreed with the district's court characterization of the plaintiff's claim as based on her status as a "transsexual." Instead, the court found, the discrimination was based on *gender nonconformity*.[135]

[130] *Id.* at 568.
[131] *Id.* at 568-69.
[132] *Id.* at 569.
[133] *Id*. at 570.
[134] *Id*. at 572-4.
[135] Smith v. City of Salem, 378 F.3d 574 (6th Cir. 2004).

Other circuits and district courts have followed the Sixth Circuit's reasoning in *Smith.*[136] However, with regard to transgender plaintiffs specifically, the Sixth and Eleventh Circuits are the only federal courts of appeals to apply this reasoning. Additionally, the Sixth Circuit came to its conclusion based on a sex-stereotyping claim rather than a more transformative understanding of gender, meaning that the court only contemplated gender roles when applied to biological sex considerations. Ultimately, transgender individuals were not given protections as a protected class, but rather were regarded as extensions of the *Price Waterhouse* doctrine, thus limiting the full range of protections afforded to other members of protected classes. Thus, courts continue to apply inconsistent interpretations of existing law to transgender plaintiffs, with the Supreme Court still silent as to whether there is a distinction between sex and gender-based discrimination.

Moreover, the court system and current precedent should not be the only avenue to which activists turn in supporting a vulnerable community at large. Other solutions also include enacting comprehensive federal legislative reform, as well as looking toward executive administrative agencies who have begun to demonstrate a willingness to recognize the transgender community's unique concerns.

Congress's current failures to address transgender discrimination

Because Title VII's plain language only provides protections against workplace discrimination for protected classes, transgender advocates have sought legislative recourse that provides protections for the transgender community.

More recently, the continuing struggle to protect employees from workplace discrimination manifested itself in attempts to pass the Employment Non-Discrimination Act (ENDA).[137]

[136] Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 583-84 (2007); *see* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).
[137] *See* Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. 811 (2011).

ENDA's ultimate goal was to prohibit employers from taking any action against their employees on the basis of sexual orientation or from retaliating anyone who sought to enforce these protections.[138] First introduced in the Senate in 1994, ENDA attempted to circumvent the struggles surrounding formerly unsuccessful bills by focusing specifically on employment discrimination.[139] Although proposed in many different forms on multiple occasions, the bill has not been successful, due in large part to opposition from conservatives.[140]

But conservatives have not been the only parties in opposition to the passage of legislation such as ENDA. Significantly, many gay rights advocates have been unable to come to a consensus on whether such protections should also extend to transgender individuals in the workplace. These debates came to fruition in the House of Representatives in 2007, when a version of ENDA that included protection over gender identity discrimination was introduced.[141] However, the House chose to pass a final bill that only included protections for discrimination in relation to sexual orientation.[142]

The Equal Employment Opportunity Commission

Federal executive agencies have begun to assess the application of Title VII to transgender plaintiffs in workplace discrimination cases. In 2012, the Equal Employment Opportunity Commission (EEOC) issued an administrative decision regarding discrimination against transgender individuals in federal employment. The EEOC is an executive agency responsible for

[138] *Id.*
[139] *Id.*
[140] Lydia DePillis, *Everything You Need to Know About the Employment Non-Discrimination Act*, WASH. POST, Nov. 5, 2013, https://www.washingtonpost.com/news/wonk/wp/2013/11/05/eve rything-you-need-to-know-about-the-employment-non-discrimination-act enda/?utm_term=.8 0f930430915.
[141] Jerome Hunt, *A History of the Employment Non-Discrimination Act*, American Progress, July 19, 2019, https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-emplo yment-non-discrimination-act/.
[142] *See* Katherine T. Bartlett, Deborah L. Rhode, and Joanna L. Grossman, *Gender and Law: Theory, Doctrine, Commentary*, 492-493 (6th ed.) (2013).

enforcing federal laws and, accordingly, is tasked with upholding Title VII's protections against discrimination because of sex.[143] Employers with over 15 employees are bound by EEOC laws, which are applicable to "hiring, firing, promotions, harassment, training, wages, and benefits."[144] The EEOC has the authority to investigate discrimination claims and provides guidance to federal agencies through mechanisms such as issuing regulations, evaluating affirmative action programs, and adjudicating appeals.[145] Although the EEOC is a federal agency without any binding authority on the court system, the Supreme Court has recognized that the agency's interpretation "need only be *reasonable* to be entitled to deference."[146]

In 2011, Mia Macy, a transgender woman, filed a complaint against her new employer.[147] After preparing to move to a new position within a different police department division, Macy disclosed her transgender status and was subsequently told that the position was no longer available.[148] The EEOC ultimately concluded that, pursuant to *Price Waterhouse,* discrimination against a transgendered individual based on either their status or identity is in fact sex discrimination.[149] The EEOC reasoned that Title VII's protections were broad enough to encompass not just biological sex, but the cultural and social implications associated with gender.[150] The EEOC also based its decision on similar Title VII court precedent, including the Eleventh Circuit's 2011 decision in *Glenn v. Brumby.*[151]

[143] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *About EEOC*, https://www.eeoc.gov/eeoc/.
[144] *Id.*
[145] *Id.*
[146] EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 115 (1988).
[147] Macy v. Holder, EEOC (IHS) 120120821, (E.E.O.C. DOC April 20, 2012).
[148] *Id.* at 2.
[149] *Id.* at 14.
[150] *Id.* at 7.
[151] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

However, the EEOC also engaged in the same type of conflationary tendencies described by Valdes. On page five of the decision, the EEOC justified its own application of Title VII sex-discrimination protections to transgender individuals on the basis that the terms "'gender' and 'sex' are often used interchangeably to describe the discrimination prohibited by Title VII.[152] Thus, although the EEOC's extension of Title VII protections is historic and significant in the short term, because the agency failed to interrogate gender and sex outside of precedent, the decision is limited in its ability to transform the law. Once again, transgender plaintiffs were not afforded the unique protections necessary for their community's particular vulnerabilities.

Department of Justice

Other federal agencies have also begun to address the issue of transgender discrimination. On May 9, 2016, Attorney General Loretta Lynch held a press conference announcing recent legal action by the DOJ against the state of North Carolina for passage of its most recent "bathroom bill," also known as House Bill 2.[153] Lynch stated that the DOJ had notified North Carolina officials that the law violated the Civil Rights Act and that they had until a given deadline to correct the issue.[154] Instead, North Carolina chose to sue the DOJ.[155] In response, the DOJ filed a civil rights lawsuit against the state, seeking a declaratory order that the bill is discriminatory as well as a preliminary injunction to stop enforcement.[156]

[152] *Macy* at 5.
[153] Tom Clary, *Loretta Lynch North Carolina 'Bathroom Bill' Lawsuit Full Statement,* May 9, 2016, http://heavy.com/news/2016/05/loretta-lynch-doj-north-carolina-hb2-bathroom-house-bill-2-transgender-lawsuit-full-speech-transcript-video/. ("House Bill 2" requires transgender people in public agencies to use the bathrooms consistent with their sex as noted at birth, rather than the bathroom that fits their gender identity. The bill was passed on March 23, 2016).
[154] *Id.*
[155] *Id.*
[156] *Id.*

Ms. Lynch's statement noted that "this action [was] a great deal more than just bathrooms."[157] She compared the discriminatory aspects of the bill to those found in Jim Crow laws, which inevitably "turn[ed]…neighbors, family members, [and] fellow Americans [against others] for something they cannot control, and deny what makes them human."[158] Ms. Lynch also stated that "none of us can stand by when a state enters the business of legislating identity and insists that a person pretend to be something they are not, or invents a problem that doesn't exist as a pretext for discrimination and harassment."[159] Speaking directly to the transgender community, Ms. Lynch concluded with a promise that the "Department of Justice and the entire Obama Administration..see[s] you…stand[s] with you, and will do everything we can to protect you going forward. Please know that history is on your side."[160]

Ms. Lynch's statement was historic for many reasons. First, the Obama administration is the first presidential administration to formally recognize calls for transgender rights. It signified a formal commitment to the community's struggle for inclusion and protection under the law. But it is also significant for analytical reasons. Consider Ms. Lynch's appeal to the American public to encourage inclusion and diversity on the basis of *immutable characteristics*, namely identities that are not controllable. Yet again, the fluidity of gender identity was undermined by the biological determinism that is so clearly prevalent within the American court system. Despite potential for transformative understandings of the identity, it is clear that the DOJ gave a hint as to what arguments would be utilized in the suit against North Carolina. Overall, the court system, while susceptible to the tides of social change and progress, is unable to undermine its own precedent in recognizing the complexities of identity politics.

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[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *Id.*

Conclusion

Is it possible to provide support to some of our most vulnerable citizens when the system established to remedy such injustices is inherently built upon a mistranslation of identity? While there have been considerable efforts to reform structural protections for transgender individuals, transformative reform is not likely to occur, especially given the currently hostile environment for transgender individuals.[161] Thus, it is imperative that both the court systems and those institutions deemed with the authority to provide justice to victims remain conscious, open, and reflective to how jurisprudence reads beyond solving the immediate difficulties at hand.

The court system will undoubtedly be constrained by the language of its own precedent, as demonstrated by Ms. Lynch's appeal to immutability in her statement to the American public. Additionally, Congress's unwillingness to recognize discrimination against the transgender community through legislative efforts such as ENDA has been made clear. Even the EEOC's own decision to effectively extend Title VII protections to transgender plaintiffs fails to recognize the community's discrete and unique needs and protections aside from sex discrimination claims. However, further creating the distinction between sex and gender is long-term project that will require dismantling of societal knowledge as we know it. For now, the immediate goals must be

[161] At the time of this article's publication, the year-old Trump administration had begun to wage war on the transgender community in notable ways. One particular instance included the withdrawal of the Obama-era policy articulated in a memorandum entitled "Dear Colleague." The policy had previously outlined protections for transgender students by allowing them to use bathrooms that corresponded with their gender identity. The Obama administration had based this decision on its interpretation of Title IX, a federal statute that prohibited sex discrimination in publicly funded schools. Its interpretation meant that gender identity was now subsumed within the category of sex-based discrimination. On February 23, 2017, the Trump administration withdrew from this initiative "in order to further and more completely consider the legal issues involved." *See* Ariana de Vogue, Mary Kay Mallonee, & Emanuella Grinberg, *Trump Administration Withdraws Federal Protections for Transgender Students* (February 23, 2017), at http://www.cnn.com/2017/02/ 22/politics/doj-withdraws-federal-protections-on-transgender-bathrooms-in-schools/index.html.

to continue protecting our most vulnerable members of society. The two can work in tandem together if they are guided along the way by conscientious jurists and legislators.

Ultimately, these interpretations should further galvanize the notion that transgender individuals are members of a protected class within their own right, not simply because their identities are subsets of the *Price Waterhouse* progeny. Activists, the community, and allies alike should continue to strive to help articulate the subtle interplay of sex and gender in society. Although they are not there yet, modern courts, as well as executive agencies in positions of authority to dictate public opinion, *have* demonstrated a willingness to think outside the box of determinative sex. Gender is being evaluated as somewhat separate from sex, and overall, contemporary understandings of the two are being reflected in court precedent and public opinion. It bears noting that Title VII is a relatively new statute and its reach is continually being tested by courts. At the time it was enacted, it is safe to assume that Congress never could have anticipated how one single word — "sex" — could produce such rich and thought-provoking jurisprudence. Accordingly, there is no reason to stop producing, provoking, and, most importantly, *protecting.*