Immutability of Identity, Title VII, and the ADA Amendment Act: How Being "Regarded As" Transgender Could Affect Employment Discrimination

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IMMUTABILITY OF IDENTITY, TITLE VII, AND THE ADA AMENDMENT ACT: HOW BEING "REGARDED AS" TRANSGENDER COULD AFFECT EMPLOYMENT DISCRIMINATION

INTRODUCTION

Transgender and gender-queer individuals, especially those of color, are at-risk of being victims of employment discrimination, homelessness, violence, rape, police brutality, and incarceration. The transgender and gender-queer rights movement has also faced an uphill battle, with opposition coming from not only the mainstream, traditional, and conservative sectors of society, but within the broader LGBT community itself. Larger, mainstream LGBT organizations have been criticized for only advancing agendas in the interest of an essentialized “Gay Identity” that places an emphasis on policies and legislation that benefit a small portion of the LGBT community, mainly those who are white, male, and affluent. Many critical race theorists have argued against polarizing notions of essentialist “Gay Identity.” They assert that it fails to take into account the complex needs of individuals who fall into multiple legal categories. Angela Harris describes “essentialism” as the notion that identity can be described in isolated, universal terms; for example, defining an individual’s identity as a “woman” as discrete from her race, class, and sexual orientation. In opposition to this notion that a single aspect of an individual’s identity can be abstracted from the whole, Kimberle Crenshaw’s concept of “intersectionality” seeks to examine social and legal inequality created by an individual’s multiple, overlapping, and interacting identities.

such as race, gender, sexuality, class, and ability. Because of their general emphasis on essentialist notions of identity, policies advanced by the broader LGBT rights movement that are meant to solve problems faced by transgender or queer individuals often do not take into account the diversity among transgender and queer individuals, including how their needs are affected by their race, religion, and class status.

Ideas of essentialized identity and assimilation within women's rights movements and racial rights movements have made their way into constitutional equal protection and federal employment discrimination law. The reliance upon an immutable essentialized identity in equal protection jurisprudence and Title VII employment discrimination have protected some interests on the basis of race, gender, and sexual orientation, but

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5 Hutchinson, supra note 2, at 1361. See also, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) (finding “transgender” is not protected as a status under Title VII).

6 The Supreme Court began to fully adopt the concept of immutable classifications as worthy of protection in the post-Lochner era equal protection cases. Most notably, footnote 4 of *U.S. v. Carolene Products*, 304 U.S. 144 (1938) discussed a possible concern with Court protection of “discrete and insular minorities.” For a more complete discussion of immutability in antidiscrimination and equal protection jurisprudence, see generally Marc R. Shapiro, *Treading the Supreme Court’s Murky Immutability Waters*, 38 GON. L. REV. 409 (2002) (available at http://gonzagalawreview.org/files/2011/02/Shapiro.pdf). Immutability as a judicial doctrine can work as a barrier to protection for sexual minorities where conduct is separated out from the status of the individual, often resulting in inconsistent results in terms of prohibiting discrimination. For example, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), the Supreme Court upheld the constitutionality of a state law criminalizing sodomy, in part, because the Court found no fundamental right for homosexuals to engage in the act of sodomy. In contrast, in *Romer v. Evans*, 517 U.S. 620 (1996), the Court struck down a state constitutional amendment that would prohibit any ordinances that create protections on the basis of homosexual, lesbian, or bisexual status. For a more complete discussion of the status/conduct distinction and the problem of immutability in equal protection jurisprudence, see Francisco Valdes, *The Status/Conduct Distinction and Sexual Orientation: Exploring a Constitutional Conundrum*, 50 Guild Prac. 65 (1993).
have denied benefits to the trans population.7 "Transgender" identity is a concept that is fluid and not easily categorized, which may contribute to transgender exclusion from anti-discrimination protections.

In contrast, the disability rights movement rejects the idea that the identity of disability lies within the individual, and instead defines "disability" as the end result of discriminatory forces that deny social access to individuals.8 Many disability rights legal scholars have argued that the law should force society to deconstruct and change its own discriminatory practices to accommodate impaired individuals, as opposed to the individual being forced to "cure" her disability to gain access, ultimately allowing society to stay the same.9 As a result of the work of disability rights activists, the Americans with Disabilities Act (the ADA) allows claims of disparate treatment and impact to be made by those who are "regarded as" having an impairment, whether or not they actually have such an impairment.10 By re-orienting concepts of "identity" from immutable characteristics inherent in an individual to the perceived characteristics of the individual by discriminatory actors, the "regarded as" portion of the ADA provides a flexible legal scheme for making employment discrimination claims.

Although the ADA may provide a better model than Title VII for transgendered people seeking to gain protection against employment discrimination due to its more fluid definition of identity, I argue that the disability model is still inadequate for the transgender community because their most likely coverage under the "regarded as" prong of disability would only allow for

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7 Eastern Airlines, Inc., 742 F.2d at 1085 (7th Cir. 1984) (holding that "the words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder"). See also Sommers v. Budget Marketing, 667 F.2d 748 (8th Cir. 1982), Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977). But see Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008);
9 Id. at 420-21.
disparate treatment claims under the recently enacted ADA Amendments Act of 2008. As such, allowing transgender plaintiffs to bring “regarded as” claims under the ADA would merely allow them to prevail upon the same types of claims that are already currently emerging for transgender plaintiffs under Title VII.

Part I of the article discusses the debate on transgender identity, comparing conceptions of “transgender identity” within the transgender community, the medical model of transgender identity, and disabled identity under the social model of disability. Part II of the article discusses the current state of the law under the ADA and Title VII, highlighting possible legal avenues where transgender individuals may be included under existing employment discrimination statutes. Part III explains what transgender inclusion under the ADA’s “regarded as” prong of disability may look like in practice, and why it is a viable avenue to extend more protections to transgender plaintiffs.

I. WHO TO PROTECT AS “TRANSGENDER”: THE DEBATE OVER IDENTITY, THE MEDICAL MODEL, AND THE DISABILITY RIGHTS MOVEMENT

“Transgender” is an umbrella term covering those who feel or express gender identity contrary to the sex they were assigned at birth.11 Transsexuals, cross-dressers, and other individuals who express some sort of gender non-conformity would all be considered transgender.12 Transsexuals are most commonly defined as those who seek medical intervention, as they “desire to live and be accepted as a member of the opposite sex . . . and . . . wish to have surgery and hormonal treatment to make [their bodies] as congruent as possible with [their] preferred sex.”13 Other individuals who are defined as or identify themselves as gender-non-

12 Id.
conforming may not seek medical intervention, and many perceive of their gender identity as something fluid or flexible outside of the traditional male/female gender binary. Some who conceive their gender identity and expression as existing outside of the gender binary self-identify as genderqueer.

Of course, even these terms are by no means exhaustive. Activists, bloggers, and scholars within the transgender community often disagree about how to categorize “trans identity.” Certain activists use the signifier “trans*” to differentiate from the more binary concepts of “trans woman” and “trans man,” using trans* to indicate all non-cisgender identities, including genderqueer, genderfluid, non-binary, agendered, non-gendered, third gendered, two spirit, etc. Though many transgender individuals identify as “MTF” (male-to-female) or “FTM” (female-to-male), others consider such terms inaccurate because they believe “trans identity is not a linear path from one category to another.”

It is because of a defiance of traditional categorization that many transgender individuals have had problems successfully arguing for benefits under the law. Many successes gained by lesbians, gays, and bisexuals have been gained by taking on “sexual orientation” as an immutable identity or status. As discussed previously, many transgender individuals reject the

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16 Sam Killerman, *What does the asterisk in trans* stand for?*. It’s Pronounced Metrosexual at http://itspronouncedmetrosexual.com/2012/05/what-does-the-asterisk-in-trans-stand-for/ (“Cis” individuals are those whose gender identity aligns with their sex assigned at birth).
notion of defining themselves as either male or female, even as “trans man” or “trans woman,” and instead conceive of gender identity and expression as a complex and ever-changing concept. Because this perception of gender is fluid, it rejects taking on an essentialized identity necessary to gain a marginalized “status” worthy of legal protection. Dean Spade, a prominent transgender activist, has noted that it is painful for him, as a transgender activist, to seek benefits by categorizing himself by a “pretended belief in a binary gender system that [he has] been working to dismantle since adolescence.”

Many transgender individuals move in and out of different categories of feminine and masculine expression over the course of their lives, and many do not try to “pass” as one sex or the other. Because of this fluidity of identity, it is difficult to find a legal standard that adequately protects and accurately reflects the rights and experiences of trans* individuals.

One complication in establishing protection for trans* individuals under anti-discrimination legal doctrines is entrenchment within the medical establishment. Many transgender individuals seek medical intervention in the form of gender-affirming surgery and hormone treatments. While sexual orientation is no longer listed as a recognized mental illness in the DSM-IV, Gender Identity Disorder (hereinafter ‘GID’) is listed as a mental disorder. Many transgendered activists wish to go the route gay, lesbian, and bisexual activists took before them to depathologize transgenderism as a recognized disorder. Activists in favor of demedicalization feel that medicalization and requirement of a diagnosis only reinforces normative heterosexual concepts of gender identity, whereas queerness and gender-nonnormative expression should celebrate the diversity and vari-

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19 Cromwell, supra note 55, at 4.
20 Spade, supra note 26, at 22.
21 Id. at 27.
22 Diagnostic and Statistical Manual of Mental Disorders (4th ed.).
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ance of gender identity.\textsuperscript{24} These transgender activists seek to liberate transgender individuals from medicalized legal conceptions and argue from a sex discrimination standpoint that these methods of gaining legal protections and benefits are arguably less successful in obtaining protection.\textsuperscript{25} However, this is problematic when transgender individuals are faced with the issue of procuring hormone therapy and surgery. Since many transgendered individuals continue to seek medical treatment, some transgender activists have questioned whether it is the law’s role to remove transgender issues from the medical establishment.\textsuperscript{26}

In order to receive gender-affirming medical treatment, most transgender individuals need to go through a process of gaining a diagnosis, going through therapy, and finally getting the recommendation required to receive hormones and surgery.\textsuperscript{27} This process requires them to take on a diagnosis that creates an identity as a “transsexual with GID.”\textsuperscript{28} As Anna Kirkland noted of the connection between transgender rights and the medical system, “lawsuits are only successful insofar as petitioners characterize themselves in need of a clear surgical gender assignment . . . .”\textsuperscript{29} This medical model of transgender identity is similar to the medical model of disability that requires diagnosis with an illness or impairment in need of “treatment, rehabilitation, a cure, or charity” in order for the individual to be considered as “disabled” for the purposes of legal claims.\textsuperscript{30} Transgender-activists have noted that disability law is an avenue for gaining medical benefits for transgender clients.\textsuperscript{31}

\textsuperscript{24} Id.
\textsuperscript{25} Dean Spade, Documenting Gender, 58 Hastings L.J. 731, 736 (2008).
\textsuperscript{26} Spade, supra note 26, at 33.
\textsuperscript{27} See Deborah Rudacille, The Riddle of Gender 195 (2005).
\textsuperscript{28} Cromwell, supra note 55, at 19-20.
\textsuperscript{29} Anna Kirkland, Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory, 28 Law & Soc. Inquiry 1, 7 (2003).
\textsuperscript{31} Spade, supra note 26, at 33.
Jennifer Levi argues in favor of the legal medical model of disability when seeking medical treatment for transgender individuals. Discussing different outcomes of cases where transsexual plaintiffs with diagnosed GID prevailed, she noted that these cases included extensive discussion of the inelasticity of gender identity as a facet of disability.\textsuperscript{32} She argues that the medical model of disability explains transgender identities to hostile courts in a way that sex and gender-centric discourse does not. She writes, "[a disability claim] humanizes the plaintiff . . . [and] gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language the judge can understand."\textsuperscript{33}

However, accepting a medical model of transgender identity comes with a number of problems. Firstly, there is the problem of access to diagnosis with GID, which can be a lengthy, expensive process outside of the means of many transgender individuals, particularly those of color within lower socioeconomic classes.\textsuperscript{34} Even with the diagnosis of GID, transgender individuals still face difficulty obtaining access to hormone treatment and sex reassignment surgery.\textsuperscript{35} Under the medical model of transgender identity, without a clear diagnosis of GID, it is incredibly difficult for legal claims to prevail.\textsuperscript{36} Legal protection designed to protect on the basis of "transgender identity" therefore remains inaccessible to those trans* individuals who do not have the means to obtain a diagnosis.

A second consideration is that the medical model of transgender identity allows the courts to intrusively consider the

\textsuperscript{32} Jennifer Levi, Clothes Don't Make the Man (Or Woman), But Gender Identity Might, 15 COLUM. J. GENDER & L. 90, 101 (2006).

\textsuperscript{33} Id. at 104.

\textsuperscript{34} Spade, supra note 26, at 33.

\textsuperscript{35} APA Position Statement on Access to Care for Transgender and Gender Variant Individuals (July 2012) at http://www.psychiatry.org%2FFile%2520Library%2FAdvocacy%2520and%2520Newsroom%2FPosition%2520Statements%2Fps2012_TransgenderCare.pdf&usg=MRxOOorgLHx0y4NynvS9mskHB7A.

\textsuperscript{36} See Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 377 (N.J. Super. Ct. App. Div. 2001), dismissing a claim where plaintiff's diagnosis with GID was not established through clear, established, medical standards.
medical histories of trans* individuals in determining whether they are worthy of legal protection. The medical model of transgender identity opens the door to allow courts to ask how much medical intervention is required before an individual is considered "transgender," and thereby worthy of protection. Is the mere diagnosis of GID enough, or would the individual also have to undergo hormone treatments? Would any sex-reassignment surgery (such as a trachea shave or breast augmentation) render that individual "transgender," or would nothing less than full genital reassignment surgery allow the courts to protect on the basis of transgender identity? When a medical model of transgender identity is used as a vehicle for determining which individuals should receive legal protection, courts and legislatures traditionally only give protection to those trans* individuals who are "transsexuals with GID" and have had full genital-reassignment surgery. 37 This becomes particularly problematic because not all trans* individuals seek surgery. For example, 20 percent of transgender women do not want vaginoplasty or an orchiectomy, and 72 percent of transgender men do not want phalloplasty. 38

A third, and perhaps the most problematic, concern created by the medical model of transgender identity is that it is an incredibly exclusive category encompassing a significant, but relatively small portion of the transgender community. Dean Spade 37 For example, in Illinois, an affidavit from a physician is required certifying a sex-reassignment operation was performed before the gender marker on a birth certificate may be changed. 410 Ill. Comp. Stat. 535/17(d). The Department of Vital Records in Illinois has long had a standing policy of issuing new birth certificates only in cases where the certifying physician was licensed in the United States. See ACLU Challenges Unconstitutional Illinois Requirements for Correcting Transgender Birth Certificates, at http://www.aclu.org/lgbt-rights/aclu-challenges-unconstitutional-illinois-requirements-correcting-transgender-birth-cert. See also, In re Marriage of Simmons, 355 Ill. App. 3d 942 (1st Dist. 2005), terminating parental rights of transsexual father because he had not had full genital reassignment surgery, was therefore never legally married to his ex-wife, and could have no legal rights to their child. 38 National Transgender Discrimination Survey; Report on Health and Health Care, 11-12 (2010) at http://transequality.org/PDFs/NTDSReportonHealth_final.pdf. Vaginoplasty fashions a vaginal canal, while an orchiectomy removes the testes. Phalloplasty constructs a penis.
argues that the necessity for diagnosis as a transsexual requires conforming with a heteronormative view of masculinity and femininity, where to be a “real” transsexual male is to want to pass as a man all the time.\textsuperscript{39} This concept of “real transsexuality” creates an incredibly narrow category; a category that becomes even more problematic because it is defined by the out-group of medical practitioners who do not themselves identify as trans or gender-non-conforming.\textsuperscript{40} The DSM-IV describes GID without reference to sex-changing medical treatment or hormone therapy.\textsuperscript{41} In practice, however, a diagnosis of GID will not be given in situations where an individual does not establish they are a transsexual who seeks to medically alter their body and consistently live in social scenarios as a member of the opposite sex.\textsuperscript{42} As a result, when gender non-normative individuals who are not clearly diagnosable as “transsexuals with GID” seek medical treatment, they are often incapable of gaining the gender-affirming medical treatment they desire.\textsuperscript{43} Consider a scenario in which a person who expresses gender as a man but has the biological sex of a woman is fired because of his gender non-conformity. In order to make a claim on the basis of the medical model of transgender identity, he would have to gain a diagnosis of GID, which may be difficult to obtain if he does not seek to alter his biological sex through hormone treatment or surgery. If the courts accepted the medical model of trans-

\textsuperscript{39} Spade, \textit{supra} note 26, at 21.
\textsuperscript{40} \textit{Id.} at 26.
\textsuperscript{41} The DSM-IV lays out four criteria for diagnosis with GID:

1. Long-standing and strong identification with another gender.
2. Long-standing disquiet about the sex assigned or a sense of incongruity in the gender-assigned role of that sex.
3. The diagnosis is \textit{not} made if the individual also has physical intersex characteristics.
4. Significant clinical discomfort or impairment at work, social situations, or other important life areas.

\textsuperscript{42} Spade, \textit{supra} note 26, at 19.
\textsuperscript{43} \textit{Id.} at 21-22.
gender identity, this person would be left with no legal recourse for the discrimination he faced.

Scholars in the disability rights movement would likewise disagree with buying into the medical model of disability, regardless of whether individuals may succeed in bringing claims under this model, because it "personalizes disability, casting it as a deficit located within individuals that requires rehabilitation to correct."44 The disability rights movement includes certain fluid concepts of identity that are useful to the more fluid identity schema forwarded by many transgender activists. The disability rights movement (not to be confused with currently existing disability anti-discrimination statutes or jurisprudence) argues for legal protection from a socially constructed accommodation-creating standpoint that allows for mutability of identities worthy of protection.45 The driving theory behind this scheme is that disabled individuals have the ability to participate fully in society.46 But for artificial barriers created by certain social schemes and stigmas, these individuals would not truly be "disabled" in the sense that they cannot fully participate in the same way as individuals who do not have a disability.47

Disability legal studies reject the idea that disability is "an inherent, immutable trait located in the person."48 It reframes the concept of disability as a social phenomenon, defining the identity "disabled" subjectively.49 "Disabled" is reoriented as "a set of relations that determines a person's place in society."50 The minority group model of disability legal studies in particular focuses more on the relationship between the marginalized group

47 Id.
48 Kanter, supra note 71, at 407.
49 Id. at 408-09.
50 Id. at 416.
of disabled individuals and other groups. The social model of disability is seen by some disability scholars as an expansion on the minority group model and conceives of disability as a relationship between individuals and a discriminatory society.

Disability level may change throughout an individual's life, and many individuals in the disability rights movement do not see a "disability" as part of their permanent identity. Rather, they conceive of themselves as merely having "different" abilities from others, and that these different abilities still have social value in terms of contribution. The disability rights movement seeks to prevent arbitrary discrimination by removing the artificial social barriers that create it. It sees "difference" as being something created in social relationships, and argues that disability is a natural part of the human condition instead of a defect to be cured. By forcing society to accommodate all people, regardless of how "different" they may be or may be perceived, the disability rights movement seeks to foster the full societal inclusion of all individuals.

Many transgendered individuals do not wish to seek benefits under a disability law scheme, as they do not see themselves as being "disabled." The stigma attached to disability is something many transgendered individuals find offensive. However, as Dean Spade notes, this is an ableist stereotype at work. Many transgender activists are actually in line with the disability rights movement in fighting entrenched societal notions of "normal"; how people should participate in society and

51 Id. at 427.
53 Emens, supra note 59, at 876.
55 Kanter, supra note 71, at 409-410.
56 Weber, supra note 95, at 10.
57 Id.
58 Lloyd, supra note 87, at 187.
59 Id.
60 Spade, supra note 26, at 34.
how bodies should function or appear. Transgender activists can therefore work together with disability rights activists to argue against a restrictive medical model of disability and transgender identity, and work towards acceptance of a social model of disability and transgender identity under the law.

II. COMPARING CATEGORIES OF IDENTITY IN THE CURRENT LAW: BRINGING EMPLOYMENT DISCRIMINATION CLAIMS UNDER ADA AND TITLE VII

The Americans with Disabilities Act (ADA) provides protection from discrimination for those who can prove they have a "disability." Title I of the ADA prohibits employment discrimination on the basis of a disability. Unlike Title VII and similar anti-discrimination statutes, the ADA only prohibits discrimination against "disabled individuals" as opposed to "all individuals on the basis of race." This system is asymmetric in that only the defined group of marginalized, disabled individuals can make claims, as opposed to other legal models where unfair treatment regardless of an individual's group-status creates a cause of action. The ADA requires accommodations to be made, and the people or businesses that are forced to make accommodating changes cannot claim they are discriminated against in being forced to make accommodation. This asymmetric model may avoid some of the pitfalls of equal protection jurisprudence that has been criticized for backfiring by undermining policies designed to correct social inequalities faced by racial minorities, such as affirmative action.

61 Id. at 33.
62 Id.
In order to bring a claim under Title I of the ADA, a plaintiff must first establish that she has a "disability" as defined by the statute. The ADA defines a "disability" as 1) a physical or mental impairment that substantially limits one or more major life activities, 2) a record of such an impairment, or 3) being regarded as having such an impairment. When it was first enacted, the definition of "disability" under the ADA was vague, and as a result it was read strictly by courts so that many individuals, including those with AIDS, cancer, and bipolar disorder, were not considered covered by the ADA as individuals with disabilities. Subsequently, the ADA Amendments Act of 2008 broadened the definition of "disability" by, among other things, dramatically changing the "regarded as" prong. The ADA Amendments Act of 2008 clarified the definition of the "regarded as" prong to be:

An individual meets the requirement of being regarded as having such an impairment if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

Described as such, the category of disability covering those who are "regarded as" having an impairment does not require the plaintiff to show an actual or perceived substantially limited major life activity. If a plaintiff can establish that an employer perceived them to have an impairment, and that the adverse ac-

68 See Hoffman v. Caterpillar, 256 F.3d 568 (7th Cir. 2001).
tion was motivated by that perception, then they have satisfied the "regarded as" prong of disability.74 This allows for a broader category of disability than would be allowed under the "actual impairment" or "past impairment" portions of the Act.75

The ADA explicitly prohibits individuals from making claims on the basis of transsexualism or gender identity disorder.76 Because of this, some transgender activists bring anti-discrimination claims on behalf of transgender clients under Title VII’s sex discrimination clause instead.77 In many cases, the same arguments used to fight against sexual orientation and sex discrimination have not worked for transgender individuals, and many courts have found that transgender individuals are not protected by Title VII on the basis of sex or gender discrimination.78 However, some more recent decisions are beginning to recognize discrimination against transgender individuals as a form of sex discrimination under Title VII.79

Jason Lee identifies three approaches to claiming protection for transgender individuals under Title VII.80 Only the first two approaches he describes have been used by courts to prohibit employment discrimination against transgender plaintiffs under Title VII. Lee calls the first approach the Gender Nonconformity Approach, which argues that employment discrimination cases dealing with transgender individuals should be treated like sex-stereotyping claims, making the transgender identity of the plaintiff a neutral element.81 Under this approach, the gender

74 Long, supra note 20, at 224.
75 42 U.S.C. § 12102(2).
77 Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L.J. 15, 32 (2003).
78 See e.g. Eastern Airlines, Inc., 742 F.2d at 1086 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977).
79 See Billington, 577 F. Supp. 2d at 304 (Dist. DC 2008); Smith v. City of Salem, 378 F.3d 566, 574-75 (6th Cir. 2004).
81 Id. at 435.
stereotyping rationale of *Price Waterhouse* is heavily relied upon.\(^{82}\)

The premier example of the Gender Nonconformity Approach is *Smith v. City of Salem*.\(^{83}\) In *Smith*, a transgender woman claimed her employer discriminated against her because she failed to comport with her employer’s stereotypical beliefs about masculinity.\(^{84}\) Ultimately, the court found her claim should be framed as an instance of sex discrimination.\(^{85}\) The court noted that previous cases where transgender plaintiffs failed to prevail under Title VII were an example of courts improperly imposing the unprotected identity of “transsexual” on the plaintiffs.\(^{86}\) Furthermore, the court concluded that discrimination against transgender individuals for not conforming with gender stereotypes is the same as discrimination against non-transgender individuals who do not conform with gender stereotypes.\(^{87}\)

The second approach Lee describes is called the Per Se Approach.\(^{88}\) This approach recognizes that discrimination on the basis of transgender identity is per se actionable under Title VII.\(^{89}\) Discrimination resulting from an employee plans to transition, actual transition, or past transition is considered sex discrimination under Title VII.\(^{90}\) The Per Se Approach is illustrated by *Schroer v. Billington*.\(^{91}\) This case split the analysis.

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\(^{82}\) *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (The court found in favor of an employee who was discriminated against because she was too “macho” and did not comport with stereotypes about how women should dress and act. A plurality of justices found that Title VII barred discrimination on the basis of gender stereotyping in addition to discrimination on the basis of biological sex. The court noted, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”)

\(^{83}\) *City of Salem*, 378 F.3d at 572-75.

\(^{84}\) *Id.* at 574.

\(^{85}\) *Id.*

\(^{86}\) *Id.*

\(^{87}\) *Id.* at 575.

\(^{88}\) Lee, *supra* note 29, at 447.

\(^{89}\) *Id.*

\(^{90}\) *Id.*

into two sections. First, the court recognized that a plaintiff’s status as “transgender” does not bar a gender stereotyping claim, and second, that discrimination on the basis of an individual’s gender-transition is actually discrimination because of sex under Title VII. The court reasoned that transitioning from one gender to another is similar to transitioning from one religion to another for the purposes of a Title VII analysis. Discrimination on the basis of an individual’s status as a “convert” is literal discrimination under Title VII on the basis of religion, so discrimination against a transitioning individual is literal discrimination on the basis of sex. The court also noted that “[b]y definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify.”

Finally, the Equal Employment Opportunity Commission (the EEOC) recently held that discrimination against transgender individuals should be prohibited as a form of sex discrimination under Title VII. The EEOC found that discrimination against an individual on the basis of their status as transgender is discrimination against the individual on the basis of their sex. The EEOC ruling disagrees with the Per Se Approach of separating literal sex discrimination from gender stereotyping discrimination as two distinct types of Title VII claims. Instead, the EEOC determined that these are just different formulations of sex discrimination under Title VII. The court reasoned that

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92 Id. at 304.
93 Id. at 306-08.
94 Id. at 306.
95 Id. at 306.
96 Id. at 307.
98 Macy, 2012 WL 1435995 at *5.
99 Id.
100 Id.
“sex” for the purposes of Title VII refers to both biological sex and the socially constructed concept of gender, and Title VII prohibits discrimination on the basis of either.\textsuperscript{101} Therefore, the EEOC concluded that when an employer discriminates against an employee because the employee is transgender, the employer is discriminating on the basis of sex.\textsuperscript{102}

III. RE-CONCEPTUALIZING EMPLOYMENT DISCRIMINATION: INCLUDING TRANSGENDER INDIVIDUALS UNDER THE “REGARDED AS” PRONG OF THE ADA

Despite developing jurisprudential and legislative efforts to provide protections for marginalized individuals on the basis of sex, gender, and disability, disabled and transgender individuals continue to report a disproportionate amount of discrimination. Some disability activists have argued that disability employment has actually gone down since the passing of the ADA.\textsuperscript{103} Despite emerging Title VII protection in certain jurisdictions, transgender individuals are four times more likely to live in extreme poverty (less than $10K annual salary) than the general population, with transgender respondents of color faring worse across the board than white respondents.\textsuperscript{104} Whatever its ambitions, the current anti-discrimination legal scheme is failing to do gravely needed substantive work in ferreting out and prohibiting systematic oppression of transgender and disabled individuals.

The “regarded as” prong conceives of identity in a fluid fashion that is more aligned with the broadness and fluidity of the actual experienced identities within the transgender community. As discussed previously, many transgender individuals perceive their gender identity in reference to an ever-shifting and fluid

\textsuperscript{101} Id.
\textsuperscript{102} Id. at *7.
\textsuperscript{104} The National Transgender Discrimination Survey Report, Executive Summary, at http://endtransdiscrimination.org/PDFs/NTDS_Exec_Summary.pdf.
social construct of identity.105 “Regarded as” disability under the ADA fits in nicely with the lived-experiences of transgender individuals because it recognizes how social forces construct the identity of an individual. Furthermore, the “regarded as” prong explains how society may perceive an individual’s identity separately from how that individual may experience their own identity. The “regarded as” prong expands the conception of identity to include complex notions of intersectional social identity as seen through the perception of the employer; forcing a confrontation with stereotyping and discriminatory views employers have about people they perceive to be “abnormal” or “lesser than.”

In order to show a “regarded as” disability, a transgender individual would most likely have to claim their employer perceived them to have some form of mental impairment due to their gender non-conformity. Under the ADA, physical or mental impairment is defined as:

Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

Any mental or psychological disorder, such as an intellectual disability (formerly termed “mental retardation”), or organic brain syndrome, emotional or mental illness, and specific learning disabilities.106

The most obvious perceived mental impairment to argue as a basis for inclusion under the ADA’s “regarded as” prong is GID. The ADA Amendments Act of 2008 included an expansion of mental health conditions that are “almost always” considered covered disabilities, including major depressive disorder,

105 See discussion infra at 8-15.
106 29 C.F.R. § 35.1630.2(h) (2011) (EEOC regulations governing title 1).
bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder or schizophrenia. A parallel could be drawn between these types of covered mental conditions and GID. Individuals diagnosed with GID are more likely to suffer gender-based discrimination, which in turn is a contributing risk factor leading to increased suicidal ideation and attempt. However, this argument would have to made carefully, as depression is a separate mental condition from GID. Those with GID do not always experience symptoms of depression, and individuals who report symptoms of depression in addition to their symptoms of GID are more likely to suffer suicidal ideation.

Allowing transgender plaintiffs to make claims for being “regarded as” having GID would deal with the problems involved in accessing a diagnosis. A transgender plaintiff bringing a “regarded as” claim would not need to show that an actual impairment exists, and therefore would not need to show an actual diagnosis with GID. What matters for a “regarded as” claim would not be actual diagnosis with GID, but whether, from the employer’s point of view, it appeared as if the plaintiff had GID or some other mental or physical disability. It’s also possible to see that a transgender plaintiff could amend a “regarded as” claim based on the circumstances to allege myriad different impairments the employer may have perceived. For example, the gender-non-conforming physical appearance of a transgender individual may cause an employer to perceive them as having some form of physical impairment. This creates a broader, more fluid concept of identity that would allow transgender individuals to bring varied, flexible claims without having to prove their own adherence to the strict, medical model of transgender identity.

109 Id.
In contrast, the concept of transgender identity under the Gender Non-Conforming Approach of Title VII jurisprudence is not as broad and flexible. As previously discussed, the Gender Non-Conforming Approach under Title VII views discrimination against transgender individuals as a form of sex discrimination. Jason Lee points out that inherent in the notion of sex discrimination is the acceptance of a set gender binary. "The act of determining whether a plaintiff's expressive gender deviates from his or her anchor gender forces a court to wade through antiquated, clichéd, and/or stereotypical notions of traditional gender roles in order to manufacture an 'anchor gender' for comparative purposes."

However, the proposition that sex discrimination claims only entrench restrictive, narrow gender norms is up for debate. In fact, it could be argued that the Gender Nonconforming Approach to sex discrimination under Title VII is in reality nearly synonymous with the "regarded as" prong of disability. In following the rationale of Price Waterhouse, "a court merely needs to consider whether, from the point of view of an employer, an employee failed to conform to the gender norms held by that employer, and need not determine for itself whether a plaintiff is in truth gender nonconforming." Similarly, the "regarded as" prong focuses on how the employer perceives the identity of an individual, and how the employer treats that individual based upon the perception of that identity. In both approaches, the court focuses on the perception of the employer, not on any immutable characteristic of the employee.

Another concern Lee raises with transgender identity as conceived in the Per Se Approach of Title VII jurisprudence is that it makes certain subtle forms of second generation discrimination hard to combat. Second generation discrimination uses

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110 See discussion infra, 5-6.
111 Lee, supra note 29, at 444.
112 Id.
113 Id. at 445.
114 Id. (emphasis added.)
115 Id. at 451-52.
coded traits as proxies for sex distinctions that have been prohibited under Title VII (e.g. requiring waitresses to be “kinder” or more “soft” when interacting with customers, instead of requiring them to be “more feminine”). Recall that under the Per Se Approach sex discrimination against transgender individuals are viewed as the same kind of sex discrimination faced by cis-gender individuals. Certain distinctions based on gender-coded traits are permissible in some employment contexts, and under the Per Se Approach, a plaintiff is generally not able to prove the employer was motivated by animus toward their transgender status.

In any case, though the “regarded as” prong may establish a more fluid concept of identity, in application, a “regarded as” plaintiff can only make somewhat narrow claims of disparate treatment. What precisely a plaintiff must establish to show that they are “regarded as” having a disability under the ADA Amendments Act of 2008 remains unclear. Some scholars have argued that in order to determine whether a plaintiff is “regarded as” having an impairment courts should look primarily to how the plaintiff was treated rather than trying to determine the subjective perception of the defendant directly. The problem with any attempt to discover the perception of the employer is in determining what evidence can be used to prove that perception. How can a transgender plaintiff prove that the emp-

116 Id. at 452.
117 See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1319 (11th Cir. 2011), noting that sex discrimination against transgender individuals and non-transgender individuals differs “in degree but not in kind.” See also, infra pages 5-6.
119 Weber, supra note 26, at 74.
120 Stephen F. Befort, Let’s Try This Again: The ADA Amendment Act of 2008 Attempts to Reinvigorate the “Regarded As” Prong of the Statutory Definition of Disability, 2010 Utah L. Rev. 993, 1018 (2010).
ployer perceived them as having a physical or mental impairment? It is difficult for courts to come up with a consistent test to prove a perceived impairment in the “theoretical mind” of the employer.121

Under the current ADA Amendments Act “regarded as” prong definition, what allows a court to determine if the plaintiff is “disabled” is not whether the employer actually subjectively perceived the plaintiff to have an impairment, but whether the employer treated the plaintiff as if he or she did. Because a “regarded as” plaintiff has to show an adverse action taken by the employer on the basis of the perceived identity,122 courts determine whether an employee was perceived to have an impairment by looking directly at the alleged discriminatory conduct. This collapses the definition of “regarded as” into an inquiry about the affirmative, adverse conduct of the employer and whether that conduct was on the basis of a perceived disability, and results in “regarded as” plaintiffs only being able to bring claims under disparate treatment analysis.123

Emerging law under Title VII has already allowed transgender plaintiffs to begin bringing claims of sex discrimination

122 42 U.S.C. § 12102(3)(A)
123 To make a disparate treatment claim, a plaintiff must prove discriminatory intent on the part of the employer. This is either accomplished through direct evidence or through proof-of-intent-by-inference. Proof-of-intent-by-inference as articulated in McDonnell Douglas Corp. v. Green is much more difficult to prove. Under that standard, a plaintiff must show (1) that the plaintiff has a protected status under Title VII or the ADA, (2) the plaintiff was meeting the legitimate employment expectations of her employer, (3) the plaintiff experienced adverse employment action, and (4) similarly situated employees received more favorable treatment. Disparate treatment claims have a heavier burden on a plaintiff than reasonable accommodation claims in that they require the plaintiff to prove, either directly or indirectly, that the employer intended to discriminate on the basis of their disability. Reasonable accommodation claims have no requirement that the plaintiff show there was active intent to discriminate on the basis of disability. For a full discussion of disparate treatment claims under the ADA, see Weber, supra note 13, at 54-63.
under a disparate treatment scheme. As a result, allowing transgender individuals to bring claims under the “regarded as” prong of the ADA would not be too extreme in providing completely unheard of or un-established protections. Because of this, it should be fairly easy for courts to incorporate transgender individuals “regarded as” having a disability under the ADA’s disparate treatment analysis. While it would not create any groundbreaking doctrinal rationale, at the very least allowing transgender individuals to make claims under the “regarded as” prong of disability would allow more transgender individuals to seek varied types of protection under both Title VII and the ADA.

CONCLUSION

The ADA’s “regarded as” prong of disability provides a more fluid concept of identity that focuses on the employer’s perception of the individual instead of on narrow, immutable characteristics within the individual. While this may create a broader, flexible category that fits more harmoniously within transgender rights ideals about the fluidity of gender-identity, ultimately, even allowing transgender individuals to make claims under the “regarded as” prong would be insufficient in providing protection for transgender individuals. The “regarded as” prong would only allow trans* individuals to bring claims on the basis of disparate treatment, and there are already areas emerging under Title VII sex discrimination that allow transgender plaintiffs to bring such claims. As such, courts should not be hesitant to allow transgender plaintiffs to bring claims under the “regarded as” prong of the ADA.

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124 See discussion infra 4-7.

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