

Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination:

Cautionary Tales From Title VII & An Argument for Inclusion

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INTRODUCTION

For six weeks in the fall of 2007, many lesbian, gay, bisexual, and transgender (LGBT) Americans watched with dismay and confusion as their community—especially its national leaders—engaged in a contentious public debate about the future of the federal Employment Non-Discrimination Act (ENDA).¹ What was supposed to be a celebratory event marking the first time either chamber of Congress passed legislation prohibiting sexual orientation discrimination in the workplace became an occasion that many LGBT people marked with sadness and frustration.² This was due to a last-minute decision by

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1. See Shailagh Murray, *Quandry Over Gay Rights Bill: Is It Better to Protect Some or None?*, THE WASHINGTON POST, Oct. 18, 2007, at A23; Carolyn Lochhead, *Gays Angered by Scaled-Back Rights Bill*, SAN FRANCISCO CHRONICLE, Oct. 2, 2007, at A1; *ENDA to be Separated Into Two Bills*, ADVOCATE.COM, Sept. 29, 2007, <http://www.advocate.com/article.aspx?id=41128>. The Washington Post editorial board even weighed in on the debate and supported a bill that excluded transgender protections. See *A Civil Rights Law: Employment Discrimination Against Gays and Lesbians Should be Outlawed*, THE WASHINGTON POST, Sept. 28, 2007, at A18. The decision to exclude gender identity provisions from the bill was based on a “whip count” by the House Democratic Leadership that apparently showed waning support for transgender protections. See Lou Chibbaro, *ENDA Hits Snag Over Transgender Inclusion*, WASHINGTON BLADE, Sept. 26, 2007, available at http://washingtonblade.com/thelatest/thelatest.cfm?blog_id=14507. The controversy led to the resignation of the first openly transgender member of the Human Rights Campaign’s Board of Directors because HRC refused to oppose a non-inclusive bill. See Kevin Naff, *HRC Trans Board Member Resigns*, WASHINGTON BLADE, Oct. 3, 2007, available at http://www.washblade.com/thelatest/thelatest.cfm?blog_id=14615.
 2. H.R. 3685, the non-inclusive version of ENDA, passed the House on November 7, 2007 by a vote of 235-184. 153 Cong. Rec. H13228, 13252 (2007); see Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007), available at

ENDA's lead sponsor to drop consideration of a bill that protected gender identity in favor of a bill that only included sexual orientation.³ Abandoning consideration of legislation that included gender identity provisions meant that discrimination against transgender people was again left unaddressed by ENDA, an omission was a crucial concern for transgender people and their allies for over a decade.⁴ For many, this compromise was unacceptable for a movement that was beginning to formally recognize transgender rights as inseparable from lesbian, gay, and bisexual rights.⁵ To the lead sponsor of the bill, Congressman Barney Frank, and the largest LGBT lobbying organization, the Human Rights Campaign, the compromise appeared politically necessary to move forward a workplace nondiscrimination agenda was a goal of the gay rights movement since the 1970s.⁶ Other gay advocates questioned whether a transgender rights agenda should even be part of LGB goals.⁷ They accused advocacy organizations of being "trans jacked" at the expense of achieving protections for LGB people who, they argued, had little in common with transgender individuals.⁸

At points in the debate, some community activists and legal advocates argued that gender identity provisions were needed not only to protect

http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3685ih.txt.pdf.

3. See *supra* note 1.
4. See National Gay and Lesbian Task Force, *ENDA as We Know it Must Die*, Aug. 3, 2004, http://www.thetaskforce.org/press/releases/pr717_080304.
5. A coalition called United ENDA comprised of over 370 local, state, and national LGBT organizations formed to oppose a federal antidiscrimination bill that did not include gender identity. See National Gay and Lesbian Task Force, *United ENDA Forms*, Oct. 3, 2007, http://www.thetaskforce.org/press/releases/prUENDA_100307.
6. See Congressman Barney Frank, *Statement of Barney Frank on ENDA*, Sept. 28, 2007, <http://www.house.gov/frank/ENDASeptember2007.html> (last visited Sept. 19, 2009). The Human Rights Campaign initially voted to oppose a non-inclusive bill but changed its position before the final House vote. Compare Human Rights Campaign, *Human Rights Campaign Board of Directors Votes to Reaffirm 2004 Policy on ENDA*, Oct. 2, 2007, <http://www.hrc.org/news/7762.htm>; Human Rights Campaign, *U.S. House Takes Historic Step by Passing the Employment Non-Discrimination Act*, Nov. 7, 2007, <http://www.hrc.org/8190.htm>. Some version of a sexual orientation antidiscrimination bill has been proposed in Congress since 1974, when Congresswoman Bella Abzug (D-N.Y.) first introduced legislation in the House. In 1994, ENDA was scaled back to an employment-only bill. Many thought that would increase the bill's chance of passing and becoming law. When ENDA was brought up for a vote in 1996 in the Senate, it lost by one vote. See Chai Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149-187 (John D'Emilio et al. eds., 2000).
7. Two gay bloggers, John Aravosis and Chris Crain were the most vocal in advancing the critique of transgender rights as usurping a gay rights agenda. See John Aravosis, *How Did the T Get in LGBT?*, SALON.COM, Oct. 7, 2007, <http://www.salon.com/opinion/feature/2007/10/08/lgbt/>; Chris Crain, *ENDA, Gay Rights Get Trans-Jacked*, Oct. 2, 2007, <http://citizenchris.typepad.com/citizenchris/2007/10/enda-gay-rights.html>.
8. *Id.* For a prescient account of the struggle and justification for transgender inclusion in LGB agendas, see Shannon Minter, *Do Transsexuals Dream of Gay Rights*, in *TRANSGENDER RIGHTS* 141 (Paisley Currah et al. eds., 2006).

transgender workers from discrimination, but also to ensure protection for gender nonconforming lesbians and gay men. These advocates worried that courts would construe sexual orientation provisions in ENDA narrowly to authorize discrimination against gender nonconforming lesbian and gay people.⁹ The new gender identity provisions, included for the first time in ENDA as introduced by Congressman Frank in 2007, prohibited discrimination based on “gender-related identity, appearance, or mannerism or any other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”¹⁰ Many advocates argued that these provisions prohibited significant forms of discrimination faced by gender nonconforming lesbians and gay men that sexual orientation antidiscrimination provisions standing alone did not.¹¹ Although this point was debated in public exchanges with Congressman Frank in a few hurried days before the vote, it was obscured by the larger concern that transgender protections were excluded entirely from the bill.¹² Ultimately, the House of Representatives rushed a “non-inclusive” ENDA to a vote before the discussion was fleshed out in detail.¹³

Politically, the disagreement within the LGBT community about the proper scope of antidiscrimination provisions in ENDA had much to do with historical

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9. Lambda Legal, *Lambda Legal’s Analysis of H.B. 368: Narrow Version of ENDA Provides Weaker Protections for Everyone*, Oct. 16, 2007, http://data.lambdalegal.org/pdf/enda_llanalysis_20071016.pdf.
 10. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 3(a)(6) (2007).
 11. Lambda Legal, *supra* note 9.
 12. Specifically, Frank engaged in a public debate with Lambda Legal, a leading LGBT legal organization. Frank used special order speaking time in the House of Representatives to rebut Lambda Legal’s legal memoranda that current law did not sufficiently protect lesbian and gay workers who are gender nonconforming. *See* 153 CONG. REC. H11383 (2007) (Titled: Protecting People Against Discrimination Based on their Sexual Orientation and Gender Identity). Lambda Legal’s main argument was that while litigators would try to use a sexual orientation-only ENDA to protect gender nonconforming plaintiffs, “without an express prohibition on discrimination based on gender nonconformity, there is a real risk we might not succeed” especially since it is a risk that “play[ed] out in other antidiscrimination laws.” Letter from Kevin M. Cathcart, Executive Director of Lambda Legal, to Barney Frank, U.S. Congressman at 2 (Oct. 4, 2007) (on file with author), *available at* http://data.lambdalegal.org/pdf/ltr_enda_frank.pdf.
 13. I use the term “non-inclusive” throughout this Article to refer to the sexual orientation-only bill passed by the House of Representatives in 2007. *See* H.R. 3685, 110th Cong. (2007). This bill excluded the “gender identity” provisions of H.R. 2015. While it might seem odd to refer to a sexual orientation antidiscrimination bill as “non-inclusive,” the House-passed version of ENDA, H.R. 3685, 110th Cong. (2007), did become widely known by this moniker within the LGBT community and even among policymakers who subsequently stressed that they support a “fully inclusive” bill. *See* Julie Bolcer, *HRC: Only Trans-Inclusive ENDA Will Do*, Apr. 17, 2009, http://personals.advocate.com/News/Daily_News/2009/03/26/HRC_Only_Trans-Inclusive_ENDA_Will_Do/ (quoting a statement from the Human Rights Campaign stating that “[HRC] look[s] forward to Congress sending President Obama a fully inclusive ENDA for his signature.”); The White House, *Civil Rights*, http://www.whitehouse.gov/issues/civil_rights/ (expressing President Obama’s support for an ENDA that includes gender identity and sexual orientation) (last visited Sept. 19, 2009).

tension between gay and transgender concerns.¹⁴ However, the disagreement was also borne of considerable confusion about the extent to which the sexual orientation antidiscrimination law, acting in concert with existing protections under Title VII, protected lesbian and gay workers who expressed gender nonconforming traits.

The primary argument among those advocating for gender identity provisions in order to fully protect lesbian and gay people from workplace discrimination is that lesbian and gay people who are gender nonconforming are not fully protected by a law that only prohibits sexual orientation discrimination.¹⁵ It is commonly recognized that gender nonconformity and lesbian and gay identity are sometimes linked.¹⁶ Indeed, early unsuccessful efforts to protect gay and lesbian workers under Title VII began with the theory that *all* lesbian and gay people are gender nonconforming insofar as their same-sex attraction is not in conformance with the stereotypical expectation that men and women are heterosexual.¹⁷

Even though gender nonconformity and sexual orientation are often conflated—and thus courts might interpret a bill protecting against sexual orientation discrimination as also protecting against gender nonconformity discrimination—excluding gender identity protections from a federal antidiscrimination bill potentially leaves some lesbian and gay workers at risk. Simply put, the concern is that even if a sexual orientation-only ENDA becomes law, employers will continue to discriminate against lesbian and gay workers, but on the basis of gender identity rather than sexual orientation.¹⁸

In light of this concern, it is important to step back and reassess the landscape for a federal antidiscrimination law banning workplace discrimination against lesbian and gay individuals.¹⁹

14. See Minter, *supra* note 8, at 142-43.

15. I use the term “gender identity” throughout this Article instead of “gender identity and expression” because the term “gender identity” is defined in the inclusive ENDA as encompassing many gender expressive traits. See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 3(a)(6) (2007).

16. See *infra* notes 194-200 and accompanying text.

17. An early effort to use this theory in order to advance a sexual orientation discrimination claim under Title VII was rejected in *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 328 (9th Cir. 1979). This theory was prominently advanced by Professor Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 199 (1994) (contending that “laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex.”).

18. In this sense, this Article is an extension of legal scholarship in the mid-1990s looking at the disaggregation of sex and gender. See Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995); 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. 1 (1995).

19. A note on terminology: throughout this Article, I use “lesbian and gay” instead of “LGBT” intentionally in order to respond to a specific concern that sexual orientation antidiscrimination protections may not reach some forms of discrimination against lesbian

This Article begins that reassessment in three ways. Part I discusses the legal precedent developed in race, national origin, and sex discrimination contexts since the passage of Title VII of the Civil Rights Act of 1964.²⁰ In particular, Part I reviews the scope of protection under Title VII with regard to traits associated with race, national origin, or sex.²¹ I conclude that current precedent muddies the waters for lesbian and gay workers because Title VII only prohibits trait-based discrimination for traits that are immutable or tied to a fundamental constitutional right.²² Additionally, even though sex discrimination doctrine reaches some types of discrimination against gender nonconforming people, courts have limited this doctrine, especially outside of the sexual harassment context.²³ Thus, the evolution of Title VII doctrine tells a cautionary tale for efforts to enact an effective federal law prohibiting job discrimination against lesbian and gay workers in the United States.

Part II reviews cases under state- and local-level sexual orientation antidiscrimination laws, revealing that some courts interpreting these laws disaggregated sexual orientation and gender nonconformity. While no consistent doctrine emerged on the state or local level, the *reasons* courts gave for distinguishing sexual orientation from gender nonconformity provide us insight into how future courts might interpret a federal law purporting to combat sexual orientation discrimination.²⁴ Some courts hesitated to draw an inference that an employer automatically knew or perceived that an employee with gender nonconforming traits was gay or lesbian, and discriminated against the employee on that basis.²⁵ Other courts have reasoned that inferring homosexuality from gender nonconforming traits is inappropriate because it forces the fact-finder to rely on stereotypes about lesbian and gay men in order to reach an inference of

and gay workers. It is widely understood that the inclusive ENDA is designed to prohibit discrimination against transgender workers. Also, because of the unique way bisexual identity has been addressed under sex discrimination doctrine, it is conceptually difficult to discuss bisexual identity when grappling with issues of gender nonconformity discrimination. *See infra* notes 185-187 and accompanying text. However, I do think that bisexual concerns illuminate the need to include gender identity provisions, so those issues are discussed. *See infra* notes 185-187 and accompanying text. It is important to recognize that transgender people can also be lesbian or gay, so all of the discussion herein equally applies to those individuals. Some scholars argue that any gender nonconforming lesbian or gay person is included under the “transgender umbrella.” *See Paisley Currah, Gender Pluralisms under the Transgender Umbrella, in TRANSGENDER RIGHTS supra* note 8, at 3. I do not subsume lesbian and gay gender nonconforming individuals under a transgender rubric here because the inclusive ENDA as it is currently drafted includes two analytically distinct protected classes: “sexual orientation” and “gender identity.” This Article addresses confusion regarding the likely applicability of gender identity provisions to gay and lesbian workers.

20. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006).

21. *See infra* Part I.

22. *See infra* Part I.

23. *See infra* Part I.B.

24. *See infra* Part II.A.

25. *See infra* Part II.A.1.

sexual orientation discrimination.²⁶ Part II concludes by exploring the implications in these state-level cases for federal law.²⁷

Part III contends that the harms associated with gender identity discrimination are real and pervasive for lesbian and gay workers. Given this reality, it is critical to reevaluate traditional political and legal frameworks that assume discrimination faced by lesbian and gay workers is solely an issue of sexual orientation rather than also one of gender identity. Part III begins this reevaluation by articulating the harms associated with trait-based discrimination in other contexts, particularly race and national origin, and emphasizes that current antidiscrimination doctrine does not adequately alleviate those harms.

Part III then draws parallels to the harms associated with similar types of trait-based discrimination against lesbian and gay people, particularly discrimination based on gender nonconforming traits. Because traits that some courts are likely to classify as volitional may be central to many lesbian and gay people's identities, advocates must work to enact strong and effective legislation that reaches discrimination based on these traits. To accomplish this goal, I contend that advocates must engage in a more honest assessment of the harms to lesbian and gay people who face prejudice on the basis of gender identity in addition to the threat of sexual orientation discrimination. Without engaging in this assessment there is a real danger that courts will view these harms as *de minimis*, as they do in other antidiscrimination contexts.²⁸ Part III concludes that this assessment is especially needed in light of attitudes and trends among a younger generation of LGBT people, who is increasingly hold gender identity and sexual orientation as distinct and equally important identities.²⁹

I. OVERVIEW OF TRAIT-BASED DISCRIMINATION UNDER TITLE VII: RACE, NATIONAL ORIGIN, AND SEX

The general rule that developed under Title VII case law is that traits associated with race, national origin, and sex are generally only protected from discrimination if they are immutable characteristics or tied to a fundamental constitutional right. In other words, significant forms of race, national origin, or sex discrimination that can be characterized as based on volitional traits—and therefore viewed as causing *de minimis* harm—remain unprotected under Title VII.

A. Race and National Origin Trait Discrimination

1. Race

Many courts interpreting Title VII treat race and ethnicity as biological,

26. *See infra* Part II.A.2.

27. *See infra* Part II.B.

28. *See infra* Part I.

29. *See infra* Part III.B.2.

“morphological” concepts, where discrimination is clearly established when there is an adverse employment action based on a reaction to these fixed traits.³⁰ However, courts do reject discrimination claims where discrimination occurs based on “voluntarily chosen physical traits or ‘performed’ behaviors that communicate racial or ethnic identity.”³¹

This trend was most famously illustrated in the race discrimination context in *Rogers v. American Airlines, Inc.*, where an African American woman brought a race discrimination disparate impact claim based on her employer’s grooming code, which prohibited braided hairstyles.³² Renee Rogers argued that her cornrow hairstyle was “a fashion and style adopted by Black American women, reflective of [the] cultural, historical essence of . . . Black women in American society.”³³ Nevertheless, the district court dismissed her claim, finding that she did not demonstrate that “an all-braided hair style is worn exclusively or even predominantly by black people.”³⁴ The court reasoned that because the no-braid policy applied to all employees and wearing a cornrow was an “easily changed characteristic,” Rogers’s claim failed to establish that the policy discriminated against African American women.³⁵ Many courts have extended the *Rogers* court’s reasoning in race discrimination cases to uphold not only no-braid policies, but also a variety of other dress and grooming rules that produce a disparate impact on racial minorities.³⁶

2. National Origin

A leading case limiting trait discrimination claims in the national origin context is *Garcia v. Gloor*.³⁷ Garcia, a salesman at a lumber and hardware store, was fired when he asked—in Spanish—another Mexican-American employee about an item requested by a customer.³⁸ The Fifth Circuit held that an employer’s blanket English-only rule did not constitute national origin discrimination under Title VII.³⁹ The court reasoned that an employer does not need to justify such a rule as a business necessity when applied to a bilingual

30. Camille Gear Rich, *Performing Racial and Ethnic Identity Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134 (2004).

31. *Id.* at 1134.

32. *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981).

33. *Id.* at 231-32.

34. *Id.* at 235.

35. *Id.*

36. *See Pitts v. Wild Adventures, Inc.*, No. 7:06-CV-62-HL, 2008 U.S. Dist. LEXIS 34119 (M.D. Ga. Apr. 25, 2008); *McBride v. Lawstaf*, No. 1:96-CV-0196-CC, 1996 U.S. Dist. LEXIS 16190 (N.D. Ga. May 28, 1996); *see also* Michelle L. Turner, *The Braided Up roar: A Defense of My Sister’s Hair and a Contemporary Indictment of Rogers v. American Airlines*, 7 CARDOZO WOMEN’S L.J. 115 (2001).

37. *Garcia v. Gloor*, 618 F.2d 264 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981); *accord Garcia v. Spun Steak Co.*, 998 F.2d 1480 (9th Cir. 1993).

38. *Garcia v. Gloor*, 618 F.2d at 266.

39. *Id.* at 269.

employee like Garcia.⁴⁰ Noting that “national origin must not be confused with ethnic or sociocultural traits or an unrelated status,” the court characterized Garcia’s use of Spanish as a “matter of choice” that did not burden Garcia’s “cultural expression.”⁴¹ Several courts followed *Garcia* over EEOC guidelines disfavoring English-only rules finding that the guidelines contradicted congressional intent.⁴²

3. The Puzzle of Immutability in Race and National Origin Cases

As *Garcia v. Gloor* and *Rogers* demonstrate, one of the problems for race and national origin discrimination claims is that, in order to be actionable under Title VII, the litigant has the difficult task of tying the trait to immutability. Courts typically view their job as one of “line-drawing” to effectuate congressional intent, to create clear expectations of employers, and to ensure that antidiscrimination law achieves its primary objective: providing equal employment opportunity. Consequently, it is understandable when courts seek a definition of “immutability” that draws clear lines.

However, American legal history tells a more complicated story. The law has long struggled to construct consistent definitions of race and national origin. Several scholars noted that judicial construction of race and national origin is often a slippery and disenfranchising process.⁴³

For example, Professor Camille Gear Rich recounts how earlier American courts “openly acknowledged the fluid nature of morphological race definitions and shaped them to deal with the political imperatives of the moment,” such as protecting white slave owners who had sexual relationships with black slaves or conditioning citizenship claims on how well a person fit into categories of “whiteness.”⁴⁴ Even though acknowledging fluid definitions of race in the past was motivated by a desire to maintain white supremacy, Rich nonetheless argues that present-day courts could “amend or retract morphological rules for identifying the races” to protect race-based traits currently dismissed as voluntary.⁴⁵

40. *Id.* at 269-70.

41. *Id.* at 270.

42. In addition to the Sixth Circuit, the Ninth, Eleventh, and Fourth Circuits and district courts in other circuits have upheld similar English-only rules. See *Garcia v. Spun Steak Co.*, 998 F.2d at 1487-89; *Long v. First Union Corp.*, 894 F. Supp. 933, 940 (E.D. Va. 1995), *aff'd*, 86 F.3d 1151 (4th Cir. 1996); *Gonzalez v. Salvation Army*, No. 89-1679-CIV-T-17, 1991 U.S. Dist. LEXIS 21692 (M.D. Fla. May 28, 1991), *aff'd*, 985 F.2d 578 (11th Cir. 1992). EEOC guidelines state that an English-only rule can be “justified by ‘business necessity’ if it is needed for an employer to operate safely or efficiently.” [13 Nat’l Origin Discrimination] EEOC Compl. Man. § 13-V(C), available at <http://www.eeoc.gov/policy/docs/national-origin.html#VC> (last visited Apr. 29, 2009).

43. See IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 78-108 (1996); Rich, *supra* note 30, at 1150-58.

44. Rich, *supra* note 30, at 1150-58.

45. *Id.*

This history is important for two reasons. First, it calls into question Title VII's insistence on immutability before certain types of trait-based discrimination associated with race and national origin are prohibited. Because courts have been willing to construct definitions of race and national origin in other contexts, perhaps case law establishing current preconditions for protecting certain traits under Title VII could, and should, be open to revision. Also, how a court demarcates the line of immutability for other protected classes has enormously important implications in the sexual orientation context since a fundamental debate continues about the biological and/or environmental origins of sexual orientation.⁴⁶

B. Sex-Based Trait Discrimination

However fuzzy the scope of the protected class in the race and national origin contexts may be, the contours of discrimination "because of sex" under Title VII are equally, if not more, confounding. Understanding how Title VII has protected (or underprotected) gender nonconforming workers is critical to determine whether gender identity protections are needed to adequately protect lesbian and gay workers against workplace discrimination.

There is little legislative history discussing the scope of "sex" as a protected class under Title VII.⁴⁷ The absence of legislative history has cut both for and against sex discrimination plaintiffs and led to a confusing network of legal rules governing sex discrimination under Title VII. Reviewing how courts struggled to define the scope of protection for discrimination based on sex-related traits reveals the potential interplay between Title VII and a federal law prohibiting sexual orientation discrimination in employment.

1. Initial Conceptual Confusion about Sex-Related Traits

The confusion surrounding the scope of "sex" as a protected class was first illustrated in the Supreme Court's 1974 decision in *Geduldig v. Aiello*.⁴⁸ In *Geduldig*, a California state disability insurance program excluded pregnancy from the list of covered disabilities.⁴⁹ The program was challenged on constitutional grounds as a violation of Fourteenth Amendment guarantees of equal protection.⁵⁰ After discussing the cost-based justifications for upholding the exclusion, the Court turned to the conceptual issue of whether excluding

46. Aside from scientific debate, tying LGBT civil rights claims to immutability is controversial within the LGBT movement. See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (arguing that "pro-gay legal arguments from biological causation should be abandoned").

47. For an interesting historical discussion of Title VII and the inclusion of sex discrimination, see Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 2, 163 (1991).

48. *Geduldig v. Aiello*, 417 U.S. 484 (1974).

49. *Id.* at 488-89.

50. *Id.* at 494.

pregnancy constituted sex-based discrimination.⁵¹ The Court held that pregnancy classifications were not impermissible sex-based classifications.⁵² The Court reasoned that:

The lack of identity between the excluded disability [pregnancy] and gender as such . . . becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.⁵³

By framing the distinction in this way the Court was able to conclude that, because not all women possess the trait of pregnancy, discrimination on the basis of pregnancy was not sex-based discrimination.

Although *Geduldig* was a constitutional equal protection challenge, the Court extended its reasoning two years later to Title VII cases in *General Electric v. Gilbert*.⁵⁴ In *Gilbert*, an employer withheld non-occupational disability benefits from pregnant female employees.⁵⁵ Even though the policy disfavored a trait tied to a fundamental constitutional right—the right to procreate—the Supreme Court, resting on *Geduldig*'s rationale, held that Title VII did not prohibit the policy.⁵⁶ It took enactment of the Pregnancy Discrimination Act for Title VII's reach to include discrimination on the basis of pregnancy.⁵⁷

Even with federal and state laws that were amended to include pregnancy in the definition of sex discrimination, there continues to be considerable contentiousness about the scope of protection for discrimination based on pregnancy-related traits. The Ohio Supreme Court, for example, recently considered a case that presented the issue of whether lactation is a condition of pregnancy under Ohio's employment antidiscrimination law, which mirrors sex discrimination prohibitions under Title VII.⁵⁸ In *Allen v. Totes/Isotoner Corp.*, a female employee, LaNisa Allen, was fired for insubordination after taking "extra, unauthorized breaks" at work to pump milk because she was breastfeeding her 5-month old infant.⁵⁹ She claimed that her termination

51. *Id.* at 495-97.

52. *Id.* at 497.

53. *Id.* at 496 n.20.

54. *Electric v. Gilbert*, 429 U.S. 125 (1976).

55. *Id.* at 127.

56. *Id.* at 135.

57. Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k) (2006).

58. *Allen v. Totes/Isotoner Corp.*, 915 N.E.2d 622 (Ohio 2009) (per curiam). As with Title VII, the Ohio Fair Employment Practices Act was amended to prohibit pregnancy discrimination "because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions." OHIO REV. CODE ANN. § 4112.01(B) (2009). *Cf.* Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k) (2006).

59. *Allen*, 915 N.E.2d at 623.

constituted pregnancy and sex discrimination since lactation was a trait associated with both pregnancy and gender.⁶⁰

In granting summary judgment to the employer, the trial court reasoned that Ohio state law did not prohibit discrimination against a woman who was breastfeeding because lactation was not necessarily a trait related to pregnancy or sex.⁶¹ The lower court justified this exclusion by emphasizing that breastfeeding was a choice:

Allen gave birth over five months prior to her termination from [Isotoner]. Pregnant [women] who give birth and choose not to breastfeed or pump their breasts do not continue to lactate for five months. Thus, Allen's condition of lactating was not a condition relating to pregnancy but rather a condition related to breastfeeding. Breastfeeding discrimination does not constitute gender discrimination.⁶²

The Ohio Supreme Court declined to analyze the lower court's legal conclusions. Instead, the court issued a per curiam opinion that only addressed the narrow question of whether Allen had failed to put forward enough evidence to refute her employer's assertion that she was fired for insubordination.⁶³ Thus, the court failed to decide whether and when breastfeeding discrimination constitutes gender or pregnancy discrimination under Ohio law.⁶⁴ Other courts similarly struggled to define the scope of protection for working mothers under antidiscrimination laws.⁶⁵

Courts' hesitance to provide protection to a variety of traits associated with pregnancy, an obviously female-gendered condition,⁶⁶ echo decisions like

60. *Id.*

61. *Allen v. Totes/Isotoner Corp.*, 2007 WL 5843192 (Trial Order) (Ohio Com.Pl. Jul 31, 2007) (NO. CV06030917), *aff'd*, 915 N.E.2d 622 (Ohio 2009).

62. *Id.*

63. *Allen*, 915 N.E.2d at 624.

64. In a vigorous dissent, Justice Paul Pfeiffer criticized the court for failing to decide the substantive issue of whether breastfeeding is a pregnancy-related trait included within the scope of Ohio's antidiscrimination law:

This is the Supreme Court, and when the opportunity arises, we should answer the questions that Ohioans need answered. In this case, we are asked whether breastfeeding mothers can be fired from their jobs for pumping their breasts in the workplace. That is, in its protection of pregnant workers in R.C. 4112.01(B), did the General Assembly include protection of women who are dealing with the aftereffects of their pregnancy? The lead opinion dodges the opportunity to provide an answer.

Id. at 632.

65. Of particular note are cases brought under the Pregnancy Discrimination Act that denied discrimination protections for women who have caregiving responsibilities. *See* Joan Williams, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 172 n.7 (2006) (summarizing cases brought under the PDA for women who have been discriminated against on the basis of caregiving responsibilities).

66. I recognize that the increasing visibility of male-identified transgender individuals who have become pregnant complicates the seemingly obvious connection between female gender and

Garcia and *Rogers*.⁶⁷ These cases have a common theme. Trait-based discrimination on the basis of race, sex, or national origin is less likely to be considered within the scope of antidiscrimination laws if a court views a particular trait as one that a plaintiff chooses, rather than an immutable characteristic clearly associated with race, sex, or national origin.

As the next section shows, the conflict over “volitional” versus “immutable” traits also arises in cases involving sex stereotyping.

2. *Price Waterhouse* and Per Se Sex Stereotyping

In *Price Waterhouse v. Hopkins*, Ann Hopkins was denied promotion in a prominent accounting firm where women were vastly underrepresented amongst the partnership.⁶⁸ In Hopkins’ promotion review, one partner described her as “macho,” and another suggested that she “overcompensated for being a woman.”⁶⁹ Another partner advised her to take “a course at charm school.”⁷⁰ The partner who informed Hopkins that the firm would not advance her to partnership advised her that to increase her chances of partnership she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁷¹ The Court found that some of the negative reaction to Hopkins’ personality was motivated by sex stereotypes.⁷² Specifically, the Court found that Hopkins was in an impossible double-bind.⁷³ Price Waterhouse valued aggressiveness and traditionally masculine traits in their partners; indeed, they were important qualifications for the job.⁷⁴ However, when Hopkins applied for partnership, she was criticized for holding these traits as a woman.⁷⁵ The Court held that Price Waterhouse’s treatment of Hopkins violated Title VII insofar as the treatment was based on sex stereotyping. The court explained:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘in forbidding employers to discriminate against individuals because

pregnancy. See Thomas Beatie, *Labor of Love: Is Society Ready for This Pregnant Husband?*, THE ADVOCATE, (Apr. 8, 2008), available at <http://www.advocate.com/article.aspx?id=22217>. However, until scientific advances enable more men to become pregnant, I think it is fair to label pregnancy as a female-gendered trait, especially for purposes of legal analysis.

67. See *supra* Part I.A.

68. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-33 (1989) (there were 7 female partners out of 662 partners at Price Waterhouse at the time Hopkins was denied a promotion).

69. *Id.* at 235.

70. *Id.*

71. *Id.*

72. *Id.* at 250.

73. *Id.* at 251.

74. *Id.*

75. *Id.* at 235.

of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’ An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22 . . . Title VII lifts women out of this bind.⁷⁶

Given the Court’s strong condemnation of sex stereotyping in *Price Waterhouse*, the case seemed like an important advancement in Title VII sex discrimination doctrine that could extend antidiscrimination protections to gender nonconforming employees. However, as several commentators noted, it is not clear that the Court’s holding established that sex stereotyping per se violates Title VII.⁷⁷ Instead, as the Court suggested, sex stereotypes are the most insidious when women or men are placed in a double-bind—where it is impossible for them to do their jobs because an employer demands conflicting gendered behaviors. Further, the Court’s discussion of sex stereotyping was not central to the key holding of the case, which was to resolve how a plaintiff must prove a “mixed-motive” discrimination case, where “an employment decision [is made] from a combination of legitimate and illegitimate motives.”⁷⁸

The limits of *Price Waterhouse* for gender nonconforming workers are most apparent in sex discrimination cases involving gender-based dress and grooming codes. As the next section will show, except at the extremes, gender-based dress codes have largely been upheld by the federal courts.

3. Dress and Grooming Codes and the Limits of *Price Waterhouse*

Dress and grooming codes have been the subject of sex discrimination claims since the early years of Title VII litigation.⁷⁹ A significant body of scholarship has analyzed these cases and their impact on the quest to eradicate racial and sexual stereotypes from the workplace.⁸⁰ Scholarship also focuses on the assimilationist themes running through these cases, arguing that the courts’ reasoning in these decisions severely limits the ability of subordinated groups to achieve equal opportunity in the workplace.⁸¹ Further, to the extent that some

76. *Id.* at 251 (citation omitted).

77. See KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 916 (2006) (discussing the Court’s emphasis on the impermissible Catch-22 and not sex stereotyping per se); Case, *supra* note 18, at 45 (fearing that *Price Waterhouse*’s claim was successful primarily because of the “doubleness of [Hopkin’s] bind.”).

78. *Price Waterhouse*, 490 U.S. at 232.

79. See, e.g., *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753 (9th Cir. 1977) (challenging sex-differentiated dress code); *Willingham v. Macon Tel. Pub’g Co.*, 507 F.2d 1084 (5th Cir. 1975) (challenging sex-differentiated hair-length policy).

80. See, e.g., Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987); Jennifer Levi, *Clothes Don’t Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90 (2006).

81. See, e.g., Bayer, *supra* note 80; Rich, *supra* note 30; Kimberly Yuracko, *Trait Discrimination as Sex Discrimination: An Argument against Neutrality*, 83 TEX. L. REV. 167 (2004).

lesbians and gay men find it difficult to comply with gender-based dress and grooming codes, there is concern that narrow protection of gender nonconformity under Title VII will adversely affect their employment opportunity.⁸²

The dress and grooming codes cases are the clearest example of narrow protection for gender nonconformity under Title VII. The general rule today in sex discrimination cases is that unless an appearance requirement places a greater burden on one sex it is upheld under Title VII.⁸³ Courts typically give two reasons for upholding gender-based dress and grooming policies: courts assume that either 1) the policies do not conflict with the statutory goal of equal employment opportunity if they are evenly applied to men and women, or that 2) the policies only have a de minimis discriminatory effect because courts assume men and women can easily adapt to gender-based dress and grooming policies.⁸⁴

These cases also show the perils of limited legislative history: without clear congressional intent about the scope of a protected class in antidiscrimination law, courts are hesitant to hold employers liable for discriminatory distinctions that push the bounds of statutory definitions.⁸⁵ This point cautions against congressional legislative action that excludes gender identity provisions from legislation since courts are unlikely to impute meaning into a statutory definition of sexual orientation that does not explicitly encompass this type of discrimination.⁸⁶

One of the first cases to narrow Title VII liability of employers whose employment rules rely on sex stereotypes is *Willingham v. Macon Telegraph Publishing Co.*⁸⁷ *Willingham* involved a man who objected to a workplace rule that allowed women, but not men, to wear long hair.⁸⁸ The Fifth Circuit held that in the absence of more explicit direction from Congress, a hiring policy relying on a sex stereotype does not violate Title VII unless it interferes with a fundamental right or draws distinctions based on immutable characteristics.⁸⁹

Significantly, the *Willingham* court distinguished its decision from the Supreme Court's holding in *Phillips v. Martin Marietta*.⁹⁰ *Phillips* established

82. See generally Levi, *supra* note 80.

83. See *infra* notes 102-105 and accompanying text.

84. See *infra* notes 87-112 and accompanying text.

85. See *Willingham v. Tel. Publ'g Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (finding that "the meager legislative history regarding the addition of 'sex' in [Title VII] provides slim guidance for divining Congressional intent"); *Baker v. California Land Title Co.*, 507 F.2d 895, 897 n.2 (9th Cir. 1974) (discussing legislative intent); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (interpreting the dearth of legislative history on Title VII's sex discrimination prohibition as evidence against a broad interpretation of the term "sex" to include homosexuals and transsexuals).

86. See *infra* notes 173, 183 and accompanying text.

87. *Willingham v. Macon Tel. Publ'g Co.*, 507 F.2d 1084.

88. *Id.* at 1087.

89. *Id.* at 1091-92.

90. *Id.* at 1089. See also *Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971) (per curiam) (holding that a hiring policy differentiating between women and men who have

that some types of “sex-plus” discrimination (for example, job discrimination against women with young children but not men with young children) are prohibited by Title VII.⁹¹ However, the *Willingham* court reasoned that *Phillips* does not apply where gender-based dress and grooming policies exact only de minimis effects on employees:

[A] line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his judgment as to the way to operate a business. Hair length is not immutable and in the situation of employer vis a vis employee enjoys no constitutional protection.⁹²

Thus, discrimination based on sex plus *any* sexual stereotype was not, in the court’s view, what Congress intended to reach under Title VII. Significantly, like the rhetoric of “choice” and “voluntariness” used in race and national origin cases,⁹³ *Willingham* emphasized that Title VII’s purpose was only to provide equal employment opportunity to men and women, and that hair length was a “preference” that an employee could “subordinate” to keep a job.⁹⁴

Willingham is significant for two reasons: its narrow rule about which sex-based traits are covered under Title VII and, similarly, this rule’s impact on discrimination claims based on per se sex stereotyping. Courts have followed the *Willingham* rule in a variety of cases involving sex stereotypes, especially in cases challenging personal appearance regulations in the workplace. The eight circuits that have considered the hair length question are in accord with *Willingham*, even after *Price Waterhouse*.⁹⁵ On the larger issue of grooming codes, courts used an analysis similar to that in *Willingham* to affirm a variety of personal appearance requirements in the workplace.⁹⁶

Recently, the Ninth Circuit’s decision in *Jespersen v. Harrah’s Operating Co., Inc.* illustrates why *Price Waterhouse* may have a limited application to

responsibilities for small children is impermissible but leaving open the question if the employer could demonstrate a bona fide occupational qualification (BFOQ) for the distinction).

91. *Phillips*, 400 U.S. at 544.

92. *Willingham*, 507 F.2d at 1091.

93. *See supra* Part I.A.

94. *Willingham*, 507 F.2d at 1091-92 (“[w]e adopt the view, therefore, that distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment *opportunity* in violation of [Title VII]”).

95. Pre-*Price Waterhouse* cases include: *Barker v. Taft Broadcasting Co.*, 549 F.2d 400 (6th Cir. 1977); *Earwood v. Cont’l Se. Lines, Inc.*, 539 F.2d 1349 (4th Cir. 1976); *Knott v. Miss. Pac. R.R. Co.*, 527 F.2d 1249 (8th Cir. 1975); *Baker v. Cal. Land Title Co.*, 507 F.2d 895 (9th Cir. 1974); and *Dodge v. Giant Food, Inc.*, 488 F.2d 1333 (D.C. Cir.1973). Post-*Price Waterhouse* cases include: *Tavora v. New York Mercantile Exch.*, 101 F.3d 907 (2d Cir. 1996); *Harper v. Blockbuster*, 139 F.3d 1385 (11th Cir. 1998); *Dodd v. SEPTA*, 2007 U.S. Dist. LEXIS 46878 (E.D. Pa. June 26, 2007); *Austin v. Wal-Mart Stores*, 20 F. Supp. 2d 1254 (N.D. Ind. 1998).

96. *See Levi, supra* note 80, at 92 n.11.

discrimination against gender nonconforming people, especially in the dress and grooming context.⁹⁷ Darlene Jespersen worked as a bartender at Harrah's casino in Reno, Nevada for twenty years and had a good performance record.⁹⁸ However, after Harrah's implemented a new "Personal Best" dress and grooming policy, Jespersen refused to comply with the portion of the policy that required women to wear makeup.⁹⁹ The policy included several sex-differentiated requirements for dress and grooming, including requiring women to wear lipstick at all times and specifying specific hairstyles for men and women.¹⁰⁰ Jespersen testified that wearing the makeup, which was to be applied in a particular way, would "conflict with her self-image" and that she found the requirement offensive and disruptive to her ability to do her job.¹⁰¹

The court upheld the policy for two primary reasons. First, the court concluded that the policy did not place unequal burdens on men and women and therefore did not violate Title VII. The court stated that "grooming standards that appropriately differentiate between the genders are not facially discriminatory."¹⁰² To demonstrate unequal burden, the court required Jespersen to present evidence that Harrah's policy imposed unequal burdens on the class of women as a whole.¹⁰³ Jespersen tried to do this by asking the court to take judicial notice that it takes extra time and money for women to comply with the makeup requirement.¹⁰⁴ However, the court concluded that using judicial notice to establish this fact was inappropriate.¹⁰⁵

Second, the court analyzed the "Personal Best" policy to determine if it constituted unlawful sex stereotyping in violation of *Price Waterhouse*. The court concluded that it did not, explaining:

97. Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076 (9th Cir. 2004), *reh'g granted*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

98. Jespersen v. Harrah's Operating Co., Inc., 444 F.3d 1104, 1005 (9th Cir. 2006) (en banc).

99. *Id.* at 1105-06.

100. The "Personal Best" policy at Harrah's included the following sex-differentiated dress and grooming requirements for bartenders:

[Male Bartender Guidelines]: Hair must not extend below top of shirt collar. Ponytails are prohibited.; Hands and fingernails must be clean and nails neatly trimmed at all times. No colored polish is permitted.; Eye and facial makeup is not permitted.; Shoes will be solid black leather or leather type with rubber (non skid) soles.

[Female Bartender Guidelines]: Hair must be teased, curled, or styled every day you work. Hair must be worn down at all times, no exceptions.; Stockings are to be of nude or natural color consistent with employee's skin tone. No runs.; Nail polish can be clear, white, pink or red color only. No exotic nail art or length.; Shoes will be solid black leather or leather type with rubber (non skid) soles.; *Make up (face powder, blush and mascara) must be worn and applied neatly in complimentary colors. Lip color must be worn at all times.*

Id. at 1107.

101. *Id.* at 1107-08.

102. *Id.* at 1109-10.

103. *Id.*

104. *Id.*

105. *Id.*

The stereotyping in *Price Waterhouse* interfered with Hopkins' ability to perform her work; the advice that she should take 'a course at charm school' was intended to discourage her use of the forceful and aggressive techniques that made her successful in the first place. Impermissible sex stereotyping was clear because the very traits that she was asked to hide were the same traits considered praiseworthy in men . . . Harrah's 'Personal Best' policy is very different.¹⁰⁶

Unlike Hopkins, who was held in a double bind that made it impossible for her to advance to partnership, the Ninth Circuit concluded that the "Personal Best" policy did not interfere with Jespersen's ability to do her work.¹⁰⁷ Also unlike the circumstances in *Price Waterhouse*, the court found "no evidence . . . to indicate that [Harrah's 'Personal Best'] policy was adopted to make women . . . conform to a commonly-accepted stereotypical image of what women should wear."¹⁰⁸ This emphasis on *Price Waterhouse*'s condemnation of sex stereotypes that place women or men in a double bind limited the court's holding, at least with regard to dress and grooming codes, and indicated that *Price Waterhouse* did not necessarily reach sex stereotyping per se.

Finally, addressing Jespersen's claim that the policy was in conflict with her self-identity, the Ninth Circuit concluded that Jespersen's "resolve to be true to herself and to the image that she wishes to project in the world" was sincere but not enough to sustain a claim under Title VII.¹⁰⁹ The court reasoned that Jespersen's "subjective reaction" to the makeup requirement was not enough to overcome the conclusion that the Harrah's policy did not "objectively inhibit a woman's ability to do the job."¹¹⁰ The court cautioned that to conclude otherwise "would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination."¹¹¹ A rule leaving intact gender-based dress and grooming codes, even though they rely on sex stereotypes, potentially allows employers to fashion grooming and dress codes that reinforce gender norms. Courts generally uphold gender-based dress codes unless those codes are extremely sexually exploitative situations where there is a strong intuitive link between the dress code and subordination of women in a particular workplace.¹¹²

106. *Id.* at 1111.

107. *Id.*

108. *Id.* at 1112.

109. *Id.*

110. *Id.*

111. *Id.*

112. See *E.E.O.C. v. Sage Realty Corp.*, 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (holding that an employer could not mandate a "sexually revealing" uniform for a female employee.). *Cf. Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1209 (8th Cir. 1985). In *Craft*, the plaintiff alleged that she was told she was being fired because she was "too old, too unattractive, and not deferential enough to men." *Id.* at 1209. The trial court concluded that the television station

The undue burden rule articulated in *Jespersen* also leaves judges with discretion to determine what constitutes an inappropriate gender-based burden. Is disproportionate cost enough? Is the increased time it takes to meet a certain requirement enough? If so, what evidence will it take to tip the balance against the policy? Also, it appears that this rule does not leave much room for courts to take account of the more individualized harms against women and men who define “burden” in terms of affronts to their gender identity (as Darlene Jespersen was implying).¹¹³ This is because plaintiffs must demonstrate that a particular dress or grooming code places an unequal burden on women or men *as a whole*.¹¹⁴ To the extent that the burdens faced by gender nonconforming men and women are not shared by a majority of men or women, they will not be able to demonstrate unequal burden.

As *Jespersen*, *Willingham*, and their progeny demonstrate, antidiscrimination law inadequately protects gender nonconforming employees. These cases caution us to understand that despite the Supreme Court’s strong condemnation of the sex stereotyping in *Price Waterhouse*, Title VII may provide limited protection to workers who possess traits that may be characterized as expressive of one’s gender identity, instead of one’s sex.¹¹⁵ This limitation is particularly important for gender nonconforming lesbian and gay people who have difficulty complying with workplace rules that reinforce gender norms.

4. Sexual Harassment: Gender Nonconformity Discrimination that Title VII May Prohibit

Despite concerns that some federal courts curb *Price Waterhouse* with regard to sex stereotypes, especially in the dress and grooming context, some sex discrimination claims by men or women who are perceived as gender nonconformers have been successful in the limited, but important, context of sexual harassment. For example, in *Nichols v. Azteca Restaurant Enterprises Inc.*, the Ninth Circuit recognized that “a man who is discriminated against for acting too feminine” can sustain a hostile work environment sexual harassment claim under Title VII.¹¹⁶ In *Nichols*, the plaintiff was “subjected to a relentless

had imposed the same “business-like appearance” standard on both males and females, a finding which was upheld by the Eighth Circuit. *Id.*

113. *See infra* Part III.A.

114. *Jespersen*, 444 F.3d at 1112.

115. Paradoxically, there may be a growing exception to this general rule in discrimination cases involving transsexual employees. *See Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). *Contra Creed v. Family Exp. Corp.*, No. 3:06-CV-465RM, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009); *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007) (allowing successful employment discrimination suit brought by a transgender woman against the Library of Congress). However, my focus is on non-transgender identified employees, where there still seem to be gaps in Title VII for gender nonconforming employees.

116. *Nichols v. Azteca Rest. Enters. Inc.*, 256 F.3d 864, 874 (9th Cir. 2001). For a good summary of federal court decisions in this area see Keith Hilzendeger, *Walking Title VII’s Tightrope*:

campaign of insults, name-calling, and vulgarities.”¹¹⁷ Male co-workers and a supervisor repeatedly referred to the plaintiff in Spanish and English as “she” and “her” and taunted him as a “faggot” and “female whore.”¹¹⁸ Co-workers also mocked the plaintiff for walking and carrying his serving tray “like a woman.”¹¹⁹ Finding that “the systematic abuse directed at Sanchez reflected a belief that [he] did not act as a man should act,” the court concluded that “this verbal abuse was closely linked to gender.”¹²⁰

However, plaintiffs in these cases must be careful not to focus on harassment based on their perceived homosexuality because courts are resistant to attempts to “bootstrap” sexual orientation claims to Title VII.¹²¹ An opinion by Judge Posner of the Seventh Circuit, for example, carefully distinguished harassment “because of sex” and harassment based on perceived homosexuality.¹²² In *Hamm v. Weyauwega Milk Products, Inc.*, the court found that on balance the harassing comments and behaviors directed towards the employee were based on “speculation by his coworkers about his sexual orientation.” Co-workers called the employee “girl scout” and remarked on the plaintiff’s high-pitched voice.¹²³ However, other comments were directed at his perceived sexual orientation, such as “faggot” and “bisexual.”¹²⁴ He was also subjected to sexualized threats.¹²⁵ Posner acknowledged that “distinguishing between failure to adhere to sex stereotypes . . . and discrimination based on sexual orientation . . . may be difficult” when “a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes.”¹²⁶ However, on balance, the court held that the harassment was not because of sex, but rather because of perceived sexual orientation, which is not a protected class under federal antidiscrimination law.¹²⁷

A federal employment antidiscrimination law including real or perceived homosexuality as part of the protected class solves the problem of “bootstrapping” sexual orientation claims to Title VII by specifically prohibiting many gay-specific harassing behaviors and comments. Yet, cases like *Jespersion*

Advice for Gay and Lesbian Title VII Plaintiffs, 13 LAW & SEX. 705 (2004).

117. *Nichols*, 256 F.3d at 870.

118. *Id.*

119. *Id.*

120. *Id.* at 874.

121. See Hilzendeger, *supra* note 116, at 708.

122. *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058 (7th Cir. 2003).

123. *Id.* at 1064.

124. *Id.* at 1060.

125. *Id.* at 1061 (finding that a co-worker threatened to “shove [a] water hose up [his] ass”).

126. *Id.* at 1065 n.5.

127. *Id.* at 1064-65; accord *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (reasoning that recognizing the plaintiff’s same-sex harassment claim “would have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination”); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (holding that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII”).

and *Willingham* show that in the absence of sexualized harassing behavior, it is not clear that Title VII and a sexual orientation-only antidiscrimination law will combine to form a barrier to discrimination because of gender identity or expressive traits.¹²⁸ This lack of clarity poses barriers for gender nonconforming workers who are victims of discrimination, whether they happen to identify as lesbian, gay, or heterosexual.

Further, as the next section shows, some courts interpreting state and local sexual orientation nondiscrimination laws have disaggregated gender nonconformity from lesbian and gay identity. The reasons courts articulated for making a sharper distinction between gender nonconformity and lesbian and gay identity foreshadow arguments that can be used to undermine the strength of federal sexual orientation protections for gender nonconforming employees.

II. DISAGGREGATION OF GENDER NONCONFORMITY AND LESBIAN AND GAY IDENTITY

A. State-Level Sexual Orientation Nondiscrimination Laws

Unfortunately, published case law under state sexual orientation antidiscrimination laws is scarce. While 21 states and the District of Columbia outlaw job discrimination on the basis of sexual orientation, these laws vary in scope, enforcement mechanisms, and remedies.¹²⁹ However, there are emerging signs that courts are hesitant to broadly construe statutory definitions of sexual orientation to include an array of gender nonconforming traits.¹³⁰

For advocates who are concerned about ensuring protections for lesbian and gay workers who also happen to be gender nonconforming, this is a real concern.

Each case presents potential problems at the outset for plaintiffs trying to meet their initial burden in an employment discrimination case, which is to make a prima facie case of discrimination.¹³¹ A prima facie case of disparate treatment discrimination requires that plaintiffs show that 1) they were a member of a protected class; 2) they were qualified for the position sought; 3) they were denied the position despite these qualifications; and 4) the circumstances of that

128. See *supra* Part I.B.3.

129. See National Gay and Lesbian Task Force, *State Nondiscrimination Laws in the U.S.* (July 1, 2009), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_09_color.pdf. Lambda Legal's memo to Congressman Barney Frank also explained why there is little case law in this area. See Lambda Legal, *supra* note 10, at 6-8.

130. See *infra* Part II.A.1-2.

131. A prima facie case is established using the *McDonnell Douglas-Burdine* framework. See *Texas Dep't. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (holding that the final element of a prima facie case is the "reject[ion] under circumstances which give rise to an inference of unlawful discrimination"); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

denial give rise to an inference of discrimination.¹³²

A review of cases in states where a state sexual orientation nondiscrimination law is in place reveals two situations where gender nonconforming employees struggle to make this prima facie case: 1) proving the employer had knowledge of the plaintiff's sexual orientation or perceived their orientation as gay or straight; and 2) cases where gender nonconformity is unsuccessfully used as a proxy for homosexual sexual orientation.¹³³ While no consistent doctrine emerges on the state or local level, the *reasons* courts give for distinguishing sexual orientation from gender nonconformity give us insight into how future courts might interpret a federal law purporting to combat sexual orientation discrimination. These cases demonstrate the potential limitations of a statutory definition that defines "sexual orientation" as only encompassing "homosexuality, heterosexuality, or bisexuality."¹³⁴

1. Knowledge of Real or Perceived Sexual Orientation & Inferences of Discrimination: How Much is Enough?

Some state courts interpreting sexual orientation antidiscrimination laws are hesitant to draw an inference that an employer discriminates against an employee with gender nonconforming traits because of a known or perceived sexual orientation.

For example, in *Akoidu v. Greyhound Lines*, a Greyhound baggage handler claimed he was fired and subjected to sexual harassment because he was perceived as homosexual. Akoidu was called "gay," "homosexual," "sissy," and "woman" and was allegedly victim to unwanted sexual groping and sexual jokes on a number of occasions.¹³⁵ He was fired for hitting another worker, but Akoidu maintained that he acted in self-defense after a coworker sexually harassed him.¹³⁶

With regard to Akoidu's unlawful discharge claim, the court held that Akoidu could not make it past the first prong of a prima facie case, finding that "Akoidu did not establish that he was in the protected class of homosexuals or persons perceived as homosexuals."¹³⁷ Although Akoidu's coworkers called him "gay," "homosexual," "sissy," and "woman," the court found that none of

132. *Burdine*, 450 U.S. at 253; *McDonnell*, 411 U.S. at 802.

133. LEXIS and WestLaw searches using various keyword searches were conducted in April 2009 for the 20 states that have a sexual orientation non-discrimination law: "perceived sexual orientation," "perceived homosexuality," "perceived [w/ 6 words] gay," "perceived sexuality." See also National Gay and Lesbian Task Force, State Nondiscrimination Laws in the U.S. (July 2008), *supra* note 129.

134. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 3(9) (as passed by the House, Nov. 7, 2007).

135. *Akoidu v. Greyhound Lines, Inc.*, No. BC 215328, 2002 WL 399476, at *5-7 (Cal. Ct. App. Mar. 15, 2002).

136. *Id.*

137. *Id.*

Akoidu's coworkers or supervisors perceived him as gay.¹³⁸ The court emphasized that "Akoidu's coworkers knew he had been married [to a woman] and had a child," and that his supervisor testified that he "never considered Akoidu's sexual orientation or considered him to be gay."¹³⁹ The court also gave weight to Akoidu's own testimony that he was heterosexual.¹⁴⁰

The court also held that Akoidu's harassment claim on the basis of sex and sexual orientation failed because "there was no evidence to suggest that [the harassing] comments were directed at Akoidu because he was a man or because of any sexual attraction."¹⁴¹ Instead, the court found that Akoidu faced harassment because he refused to fight a co-worker, and the subsequent harassing comments "were simply a reflection of personal animosity towards Akoidu for being a coward."¹⁴² The court acknowledged that the harassment was unpleasant but that "the [California Fair Employment and Housing Act] simply afford[ed] no protection for this kind of animosity."¹⁴³

Another case, *Brennan v. Metropolitan Opera Ass'n*, demonstrates that a heterosexual plaintiff who claims discrimination on the basis of their real or perceived heterosexual orientation can face similar problems proving that an employer had knowledge of the plaintiff's heterosexuality.¹⁴⁴ Martha Brennan worked at the Metropolitan Opera as an assistant stage director.¹⁴⁵ She claimed that her supervisor, a gay man, had a pattern of hiring "inexperienced under-qualified, perceived homosexuals" to replace "experienced, highly qualified, perceived heterosexuals" whom he did not rehire.¹⁴⁶ Applying New York City's sexual orientation non-discrimination law, the court held that Brennan did not establish the fourth element of her prima facie case—that the circumstances of denying her a contract renewal supported an inference of discrimination.¹⁴⁷

To reach this conclusion, the court relied heavily on Brennan's supervisor's testimony that he did not know Brennan's sexual orientation or that of her replacement.¹⁴⁸ Brennan did not offer specific evidence that her supervisor knew her sexual orientation.¹⁴⁹ Instead, she relied on evidence that her supervisor was not as collegial with her as gay employees and fostered a

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.* at *7.

142. *Id.* at *5-7.

143. *Id.* at *7.

144. *Brennan v. Metro. Opera Ass'n*, 729 N.Y.S.2d 77, 80 (2001).

145. *Id.* at 79-80.

146. *Id.* at 83.

147. *Id.* at 82.

148. The court quoted a Third Circuit case denying a pregnancy discrimination claim because the plaintiff could not establish that her employer knew she was pregnant. *Id.* (quoting *Geraci v. Moody-Tottrup Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996)). The *Geraci* court reasoned that "it is counterintuitive to infer that the employer discriminated on the basis of a condition of which it is wholly ignorant." *Id.* at 581.

149. *Brennan*, 284 N.Y.S.2d at 82.

working environment that was biased in favor of gay employees.¹⁵⁰ The court found that Brennan's evidence was insufficient to support an inference that her supervisor created a hostile work environment for heterosexuals or that it supported an inference that her supervisor was biased against Brennan on the basis of her heterosexuality when he did not renew her contract.

The *Brennan* case had other weaknesses that may have influenced the court's decision,¹⁵¹ but the case is interesting because it raises the question about what kinds of evidence a plaintiff will need to put forward to support an inference of sexual orientation discrimination.¹⁵²

2. Gender Nonconformity as an Unsuccessful Proxy for Homosexual Sexual Orientation

Two other cases of alleged discrimination outside of the employment context show that courts are hesitant to use gender nonconformity as a proxy for lesbian or gay identity. These courts have reasoned that inferring homosexuality from gender nonconforming traits is inappropriate because it forces the fact-finder to rely on stereotypes about lesbian and gay men in order to reach an inference of sexual orientation discrimination.¹⁵³ Both cases raise important points about the potential dangers of conflating gender nonconformity with sexual orientation that may foreshadow similar situations in the employment context.¹⁵⁴

First, in *Harrington v. Northwest Airlines* a gay passenger brought a public accommodations discrimination claim against an airline carrier alleging that flight attendants treated him poorly because they perceived him as gay.¹⁵⁵ In

150. *Id.* at 83-88.

151. In addition to deciding that Brennan had failed to establish a prima facie case of discrimination, the court alternately held that Brennan failed to show that her employer's proffered reason for firing her was pretext for discrimination. *Brennan*, 284 N.Y.S.2d at 82. *Cf. Arthur v. Standard & Poor's Corp.*, No. 112547/99, 2005 WL 545582 (N.Y. Sup. Feb. 7, 2005) (applying same New York City law). In *Arthur*, a lesbian alleged she was subjected to repeated anti-gay harassment and that her poor performance reviews were a pretext for sexual orientation discrimination. *Arthur*, 2005 WL 545582, at *6. The court distinguished *Brennan*, stating that evidence of plaintiff's complaints about harassment raised an issue of fact about whether the defendants had knowledge of her sexual orientation, even though the plaintiff never affirmatively acknowledged her sexual orientation. *Id.*

152. *See infra* Part II.B (discussing the implications of this problem for gender nonconforming plaintiffs in particular).

153. *See infra* notes 155-67 and accompanying text.

154. *Johnson* and *Harrington* both pose different evidentiary situations than are likely to occur in an employment discrimination case because they involve short interpersonal encounters where gender nonconformity may be more readily used as a proxy for sexual orientation in the absence of other information. *See Johnson v. Campbell*, 92 F.3d 951(9th Cir. 1996); *see also Harrington v. Nw. Airlines, Inc.*, 2003 WL 22016032 (Minn. Ct. App. Aug. 26, 2003). However, these cases are instructive because the *Johnson* and *Harrington* courts' refusal to conflate gender nonconformity with gayness indicates a trend to disaggregate sexual orientation from gender identity. *See infra* notes 134-146 and accompanying text.

155. *Harrington*, 2003 WL 22016032 (applying California antidiscrimination law because the alleged discrimination took place over California air space). At the time of the decision in

analyzing whether the plaintiff made out the first showing of a prima facie discrimination claim—that the defendant had *knowledge* of the plaintiff's membership in a protected class—the court looked to evidence Harrington offered which was primarily based on his gender nonconforming appearance and mannerisms.¹⁵⁶

Harrington “testified . . . that he [was] a ‘flamboyant’ gay.”¹⁵⁷ As evidence of this characteristic, Harrington testified that he “crossed his legs when seated, gestured with his hands while speaking, held his hand in a downward position from the wrist, and wore tight blue jeans, a tight black shirt, and boots.”¹⁵⁸ Harrington believed that the flight attendants must have known he was gay based on his mannerisms, appearance, and “flamboyant behavior.”¹⁵⁹ However, the court of appeals concluded that inferring that the flight attendants knew Harrington was gay based on his “flamboyant behavior and dress” would be “an invitation to engage in stereotyping.”¹⁶⁰ The court concluded that Harrington failed to make a prima facie case of sexual orientation discrimination.¹⁶¹

In another case, *Johnson v. Campbell*, the Ninth Circuit Court of Appeals considered the permissibility of a peremptory jury challenge in voir dire questioning.¹⁶² The plaintiff's attorney argued that it was impermissible under California law for the defense to use a peremptory challenge against gay jurors.¹⁶³ As a basis for establishing that the defense knew the juror was gay and dismissed him on that basis, the plaintiff's attorney had the following exchange with the judge, which the Ninth Circuit reviewed:

THE COURT: [The juror does] not appear to fit into any [protected] category.

MR. YAGMAN: He does to me.

THE COURT: What is that?

MR. YAGMAN: He is gay.

THE COURT: How do you know that?

this case California law did not include gender identity protections so it was not possible to add a claim on that basis. The current California non-discrimination law defines “gender” as “sex and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.” CAL. GOV'T CODE § 12926(p) (2005) (amended Jan. 1, 2004 to include gender identity as defined in CAL. PENAL CODE § 422.56(c) (2005)).

156. *Harrington*, 2003 WL 22016032, at *3.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (emphasis added).

161. *Id.* at 4.

162. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996).

163. *Id.* at 953.

MR. YAGMAN: I believe, that based on my observations, just as I would observe a man to be a man, and a woman to be a woman. *I listened to his answers. I watched his mannerisms.* I believe him to be gay. . . .

THE COURT: Are you accusing, this gentleman excused him because he is gay? [*sic*]

MR. YAGMAN: It is not an accusation. I believe him to be gay. I believe we have a right to voir dire him on that, to find out if it is true or not. I believe there is sufficient evidence to demonstrate he is. I observe . . . gays as a protected class under the *Batson* standard.

THE COURT: First, this gentleman does not fit into a category of persons protected by *Batson*. There is no way the Court can define whether or not he is gay. And I don't think it is appropriate to make a *Batson* challenge. This is a peremptory challenge, which is permissible.

MR. YAGMAN: *I base this on the following; the way he is—his affect; the way he projects himself, both physically and verbally indicate to me that he is gay.* The place where he lives is potential evidence of that. His marital status is potential evidence of that. What he has done for a living is potential evidence of that.

. . . .

I know we can't tell these things with certainty. I know it is common for people to point at people and say "these people are such and such." And you can't really know. The only way you can know is to inquire. . . .¹⁶⁴

The Ninth Circuit concluded that the circumstances surrounding the peremptory strike of the juror did not raise an inference of discrimination.¹⁶⁵ The court held that "the absence of any showing that the juror's sexual orientation was *known* to the defense" was enough to conclude that there was not an impermissible peremptory challenge.¹⁶⁶ The court reasoned that it was appropriate for the district court to refuse to directly question the juror about his sexual orientation since the plaintiff could not establish that the defense knew about the juror's sexual orientation at the time of the peremptory challenge.¹⁶⁷

Because of the limited evidentiary records in *Johnson* and *Harrington*, it is possible the outcomes would not have been different had gender identity protections been in place. On the other hand, the evidentiary records may have

164. *Id.* at 952.

165. *Id.* at 951.

166. *Id.* at 953 (noting that there was a neutral non-discriminatory reason the defense may have dismissed the juror).

167. *Id.* at 954.

been stronger if plaintiffs could have developed a record based on gender identity issues, rather than a “pure” sexual orientation case. One of the potential advantages of gender identity provisions is to open an evidentiary door to lesbian and gay plaintiffs who do not have an open-and-shut case of sexual orientation discrimination, but can show that an employer discriminated against them on the basis of gender nonconformity.

B. Implications for Federal Efforts to Ban Sexual Orientation Discrimination

Cases like *Brennan* and *Akoidu*, where plaintiffs were unsuccessful in establishing that an employer knew of their sexual orientation or perceived them as gay, echo the problems of establishing knowledge in other antidiscrimination contexts. Several federal circuit courts and the Supreme Court have held that in a disparate treatment case a plaintiff must put forth evidence that the employer had knowledge of the plaintiff’s membership in a protected class.¹⁶⁸ This rule has been applied in federal employment discrimination cases where a plaintiff’s protected class status may not be obvious, such as those involving religion, disability, and pregnancy discrimination.¹⁶⁹ *Brennan* and *Akoidu* demonstrate how this rule has complicated some state-level sexual orientation discrimination claims.¹⁷⁰ This raises the concern that the narrower Congress defines the protected class for sexual orientation, the more stringent courts will be in requiring plaintiffs to meet their initial burden of demonstrating a prima facie case of discrimination. Further, if gender nonconformity and lesbian and gay identity are disaggregated, a plaintiff may not be able to point to his/her gender nonconforming traits as evidence of an employer’s knowledge of the plaintiff’s real or perceived sexual orientation.

Also, cases like *Harrington* and *Johnson* demonstrate that lesbian and gay people may be victims of their own success. Through public education, lesbian and gay people have expanded public perceptions of what it means to be lesbian or gay. Gay men are no longer viewed as per se effeminate, and lesbian women are no longer viewed as per se “butch” or masculine. Even though *Harrington* and *Johnson* took place outside the employment context and involved gay plaintiffs who were not affirmatively “out,” the decisions signal a potential drawback to limiting antidiscrimination protections to sexual orientation: courts may be understandably hesitant to use gender nonconformity as a proxy for gayness in defining discriminatory behavior as illegal. The judges in both

168. See *Raytheon Co. v. Hernandez*, 540 U.S. 44, 55 (2003) (holding that absent proof of knowledge of the protected trait—in this case, disability—an employer could be liable only for disparate impact discrimination); see also *Geraci v. Moody-Tottrup Int’l, Inc.*, 82 F.3d 578, 582 (3d Cir. 1996) (finding that plaintiff did not demonstrate that pregnancy was known to employer); *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 932-33 (7th Cir. 1995) (holding that plaintiff did not demonstrate that his disability was known to employer).

169. See *id.*

170. See *supra* Part II.A.

opinions were reluctant to “engage in stereotyping” by linking lesbian and gay people with gender nonconforming traits.¹⁷¹ Ironically, to the extent courts refuse to rely on such stereotypes, gay and lesbian plaintiffs may find that they have a difficult time proving discrimination under a sexual orientation-only law.

The legal consequences of disaggregating gay and lesbian identity from gender nonconformity may seem befuddling to lesbian and gay workers whose identities are not so consciously parsed. For example, the butch lesbian who applies lipstick in the morning to adhere to her cocktail waitress job’s dress and appearance code is unlikely to consider whether the application of lipstick offends her sexual orientation or her gender identity. All she knows is that the policy is an imposition that potentially affects her job security if she refuses to comply, or, as Judge Kozinski inferred from Darlene Jespersen’s testimony, the policy “is degrading and intrusive.”¹⁷² Unlike the worker, the company lawyer is much more likely to parse the distinction between sexual orientation and gender identity, especially if Congress itself makes the distinction blatant by evidencing an intent to exclude gender identity provisions from a sexual orientation antidiscrimination law.¹⁷³

Another concern is that by focusing claims to constitutional rights on privacy interests, lesbian and gay people risk legally legitimizing the view that lesbian and gay identity is no more than a private expression of one’s sexuality. In *Lawrence v. Texas*, for example, gay rights lawyers primarily argued that the Texas sodomy law was unconstitutional because it interfered with the fundamental right to privacy.¹⁷⁴ The Court’s majority opinion reflected this argument by holding that the Texas statute violated the Due Process clause of the U.S. Constitution, which encompasses the right to privacy.¹⁷⁵ Because of its focus on private sexual conduct, the *Lawrence* decision may have limited utility in employment antidiscrimination cases where public status in the workplace, and not private conduct, is the primary issue.¹⁷⁶ This limited focus may be

171. *Johnson v. Campbell*, 92 F.3d 951 (9th Cir. 1996); *Harrington v. Nw. Airlines, Inc.*, No. A03-192, 2003 WL 22016032 (Minn. Ct. App. Aug. 26, 2003).

172. *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting).

173. When the House passed a non-inclusive bill instead of the bill that included gender identity provisions, *see supra* note 1, the action may have added legislative history that supports the canon of statutory interpretation *expressio unius est exclusio alterius*, or “the express mention of one thing excludes all others.” *See* BLACK’S LAW DICTIONARY (8th Ed. 2004).

174. *See Garner v. Texas*, Brief for the Petitioners, 2002 U.S. Briefs 102, 5 (“The fundamental rights question in this case turns on who has the power to make basic decisions about the specifics of sexual intimacy between two consenting adults *behind closed doors*.”) (emphasis added).

175. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). The Court’s opinion used the terms “privacy” or “private” twenty-nine times in characterizing the liberty interest at stake. *Id.* at 562-78.

176. The “conduct/status” distinction has long been relevant to, and potentially problematic for, gay rights claims. *See* Francisco Valdes, *Sexual Minorities in the Militia: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 384, 385-86 (1994) (observing that “the status/conduct distinction . . . may . . . be viewed as a given aspect of Fourteenth Amendment law, and also as specifically applicable to lesbian and gay

relevant in a statutory context because, as a matter of statutory interpretation, the Supreme Court has looked to how a class has been treated constitutionally to define the scope of protection in antidiscrimination statutes.¹⁷⁷

Further, ENDA itself gives no indication that its sexual orientation antidiscrimination provisions are intended to encompass more than narrow sexuality-based traits. Sexual orientation is defined in ENDA as “homosexuality, heterosexuality, or bisexuality.”¹⁷⁸ Also, unlike Title VII, ENDA excludes disparate impact claims,¹⁷⁹ which is a theory that prohibits an employer from using a facially neutral employment practice that has a discriminatory impact on members of a protected class.¹⁸⁰ ENDA’s exclusion of disparate impact claims makes it more difficult to argue that a “neutral” employer policy disfavoring gender nonconforming traits constitutes discrimination against lesbian and gay workers. Even if EEOC guidelines indicated that sexual orientation discrimination encompasses gender nonconformity, it is not certain—based on existing precedent under Title VII and limiting ENDA to disparate treatment claims—that courts will defer to such guidelines.¹⁸¹

Finally, because Congress opted to vote on a scaled-back version of ENDA instead of a bill that included gender identity provisions,¹⁸² courts could find congressional intent to justify reading ENDA’s sexual orientation provisions narrowly. Courts might understandably be resistant to including gender nonconformity discrimination as encompassed by a sexual orientation-only ENDA where a nearly identical bill that expressly prohibited this type of discrimination was passed over for consideration.¹⁸³

discrimination cases”); Cathy A. Harris, Note, *Outing Privacy Litigation: Toward a Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 252 (1997) (arguing that “privacy claims for gays and lesbians dilute and conflict with battles for free and equal public expression of their sexuality”).

177. See, e.g., *General Electric Co. v. Gilbert*, 429 U.S. 125, 133 (1976).

178. See Employment Non-Discrimination Act of 2007, H.R. 3685, § 3(8) (defining sexual orientation).

179. ENDA states: “Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.” Employment Non-Discrimination Act of 2007, H.R. 3685 (Engrossed as Agreed to or Passed by House), § 8(a)(1).

180. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court held that Title VII “proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.” *Id.* at 431.

181. See *infra* Part I. For an excellent discussion of EEOC guidelines and their under-enforcement by courts in the national origin context, see Lisa L. Behm, *Protecting Minorities Under Title VII: The Need for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin*, 81 MARQ. L. REV. 569 (1998) (reviewing courts that have rejected the EEOC’s approach to English-only rules).

182. See *supra* note 1 (explaining the House’s action in 2007 that led to a vote on a non-inclusive ENDA).

183. See *supra* note 173 and accompanying text (discussing rules of statutory construction).

III. WHAT IS AT STAKE: REBUTTING DE MINIMIS HARMS & REFOCUSING THE LGBT AGENDA

So far, this Article has focused on the puzzle of prohibiting trait-based discrimination by reviewing existing case law under Title VII and emerging case law under state-level sexual orientation antidiscrimination laws. This discussion has implied that sexual orientation antidiscrimination laws, especially when the protected class is narrowly defined in terms of sexual conduct, may not meet the challenge of eradicating significant types of discrimination against lesbian and gay people.

As the LGBT community gears up for the next congressional fight and picks up the pieces after a bruising inter-community battle in 2007, it is important to recognize what is at stake.¹⁸⁴ This discussion has both a broad and a narrow focus. First, it is critical to articulate the harms associated with trait-based discrimination that federal antidiscrimination law has neglected. The work of scholars in the race and national origin context is instructive in showing that underprotecting traits associated with race or national origin can exact more than the de minimis harms that courts assumed.¹⁸⁵ Similarly, taking the harms associated with gender nonconformity discrimination seriously requires shifting the dominant legal perception away from viewing gender nonconformity as only a matter of voluntary personal preference.

Second, it is important to consider the more immediate pragmatic stakes for the LGBT community. There are three primary concerns, each of which reflects growth and change either within the LGBT movement or societal change that the movement itself set in motion: 1) intuitively and pragmatically, gender nonconformity does not belong under a sexual orientation-only framework; 2) a broader antidiscrimination framework is needed in light of generational shifts because LGBT youth increasingly hold gender identity and sexual orientation as equally important identities; 3) settling on a sexual-orientation only framework undermines the stated goals of the LGBT movement.

A. Antidiscrimination Goals: Harms Associated with Trait-Based Discrimination

At the heart of concerns that a sexual orientation-only ENDA may not reach some pervasive types of discrimination against lesbian and gay people is a more fundamental question about the goal of American antidiscrimination law.

184. A gender identity inclusive Employment Non-Discrimination Act was reintroduced in the House and introduced for the first time in the Senate during the 111th Congress. *See* Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009) (introduced August 5, 2009); *see also* H.R. 2981, 111th Cong. (2009) (introduced June 16, 2009). Advocates have vowed to push forward a gender identity inclusive bill, but it is not clear there are enough votes to pass the legislation. *See* Andrew Harmon and Michelle Garcia, *ENDA Possible by Year's End*, THE ADVOCATE (Aug. 5, 2009), available at http://www.advocate.com/news_detail_ektid103460.asp.

185. *See infra* notes 189-93 and accompanying text.

Many scholars have criticized American antidiscrimination law as unduly assimilationist, where many courts uphold purportedly neutral employer policies that contain inherent biases towards a white, heterosexual, male model of workplace behavior and decision-making.¹⁸⁶ Indeed, cases such as *Rogers, Garcia v. Gloor*, and *Jespersen* are held out as quintessential examples of courts privileging assimilation over antisubordination goals.¹⁸⁷ Professor Kenji Yoshino, for example, argues that values of assimilation and rigid tests of what constitutes a protected trait undermine civil rights insofar as workers “cover” aspects of themselves that courts dismiss as voluntary choices expressing too much, or too little, of one thing such as, “too black,” “too ethnic,” or “too gay.”¹⁸⁸

Thus, the critical question becomes: should antidiscrimination law aim for formal recognition of pluralism, or should it protect workplace policies that seek to neutralize identity, even if those policies have non-neutral effects on certain groups? To answer this question in the trait discrimination context, it is critical to identify the specific individual and societal harms associated with trait-based discrimination against certain groups. This discussion focuses particularly on harms to racial and ethnic minorities and gender nonconforming people, including lesbian and gay people.

1. Individual & Societal Harms

Legal scholars have articulated the fairness, personal dignity, and social equality concerns at stake in cases involving sex, race, and national origin trait discrimination. For example, with regard to harms experienced by people of color, Professor Camille Gear Rich asks:

“Why should a person be required to shed passively acquired racially or ethnically marked mannerisms when they have no bearing on her potential

186. See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006); Barbara Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 *YALE L. J.* 2009 (1995) (arguing that Title VII should incorporate a pluralist model); Herma Hill Kay, *Models of Equality*, 1985 *U. ILL. L. REV.* 39; Kimberly Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 *GEO. WASH. L. REV.* 365 (2006).

187. See Levi, *Clothes Don't Make the Man (or Woman)*, *supra* note 66, at 97; Rich, *Performing Racial and Ethnic Identity*, *supra* note 30, at 1213, 1225; Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 890-897 (2002); Yuracko, *Trait Discrimination as Race Discrimination*, *supra* note, 186 at 412-13.

188. KENJI YOSHINO, *COVERING*, *supra* note 186, xi (Random House 2006). Yoshino observes:

Covering is a hidden assault on our civil rights. If we look closely, we will see that covering is the way many groups are being held back today. The reason racial minorities are pressured to “act white” is because of white supremacy. The reason women are told to downplay their child-care responsibilities in the workplace is because of patriarchy. And the reason gays are asked not to “flaunt” is because of homophobia. So long as such covering demands persist, American civil rights will not have completed its work.

Id.

performance of the job at issue? [O]nce a heavily-marked job seeker is denied an opportunity because of these passive traits and behaviors, she faces an important decision. Now that she is aware that her community's practices are undesirable, she must decide whether to shed these attributes, a decision that may be experienced as a truly traumatic betrayal of her concept of self. The question is: Is this how we want to reward people who are willing to leave ethnic and racial enclaves and socialize in a wider cultural context?"¹⁸⁹

Rich emphasizes that racial and ethnic minorities who grow up in poor, highly segregated neighborhoods tend to be disproportionately affected by rigid legal rules governing trait discrimination claims because they may have "few cross-cultural contacts."¹⁹⁰ To the extent courts dismiss these workers' race-based trait discrimination claims because their traits are "voluntary," Rich worries that "many of these workers simply will withdraw and lose interest in [the] further cross-cultural interaction" that could help these workers be successful.¹⁹¹

Professors Devon Carbado and Mitu Gulati, two of the first scholars to put an antidiscrimination lens on the problem of "negotiating" identity in the workplace, argue that there are both opportunity costs and psychic costs to an employee who has to "perform" identities that are not his or her own (that is performing "straight," "white," "male," etc.).¹⁹² Professor Kimberly Yuracko echoes this critique, noting that employer policies that serve no legitimate business purpose but require workers to change their appearance and mannerisms unless they can prove immutability serve real harm that "may be personally costly even if physically painless."¹⁹³

With regard to the harms of coerced gender conformity, there is increasing evidence that gender identity and expression are central to an individual's sense of self, which means that demanding a person to suppress or hide their gender identity can be harmful.¹⁹⁴ Additionally, some psychological evidence on gender identity and expression show correlative findings regarding sexual orientation

189. Rich, *supra* note 30, at 1163.

190. *Id.*

191. *Id.* at 1164.

192. Devon Carbado and Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1260-63, 1276-78 (2000).

193. Kimberly Yuracko, *Trait Discrimination as Race Discrimination: An Argument about Assimilation*, 74 GEO. WASH. L. REV. 365, 375 (2004).

194. The arguments in this research have been almost exclusively illuminated in the legal context by transgender plaintiffs, where courts have been increasingly sympathetic to harms experienced by these plaintiffs. *See, e.g., supra* note 97. *See also* Levi, *supra* note 68, at 99-104, 110-12. Professor Jennifer Levi argues that non-transgender litigants who experience similar harms of forced gender conformity should look to cases where, in contrast to *Jespersen*, transgender litigants have been better able to convince courts of the harm of "forced [gender] conformity." Levi, *supra* note 68, at 97. Levi specifically argues that successful integration of disability claims into cases brought by transgender litigants have enabled courts to understand "why someone cannot conform to a gender stereotype . . . in language a judge can understand." *Id.* at 104.

that are relevant to understanding the importance of antidiscrimination protections for gender nonconforming gay and lesbian individuals. For example, researchers have found that boys and girls who showed substantial gender variant behavior in childhood were more likely to identify as gay or lesbian as adults.¹⁹⁵ There are also numerous personal accounts of harms faced by LGBT people because of their gender nonconformity.¹⁹⁶ Finally, scientific studies of gender expression in people and other animals have called into question the popular notion that male/masculine, female/feminine dichotomies are inherent or biologically necessary.¹⁹⁷

Professor Jennifer Levi suggests that LGBT and some heterosexual people are particularly concerned about gender-based dress and grooming codes because they limit their ability to find or maintain a job.¹⁹⁸ Thus, the harm of enforcing them is evident. Levi argues that “until courts understand the inelasticity of gender for most individuals alongside its social construction, sex discrimination claims [especially regarding dress codes] will have limited utility.”¹⁹⁹

Trait discrimination can also undermine social equality by “attacking and denigrating traits that are associated with group identity” because “people often define themselves as individuals and as group members through the traits they adopt.”²⁰⁰ This stigmatization frustrates the goal of antidiscrimination law: to achieve social equality for historically disenfranchised groups. At the same time, empirical research suggests that allowing individuals to signal membership in particular groups helps reduce prejudice, even when such signals highlight differences between groups.²⁰¹

Expanding antidiscrimination law to encompass more trait discrimination claims raises valid concerns about line-drawing (that is, which traits to protect) and about reinforcing group-based stereotypes that essentialize identity.²⁰²

195. Charlotte J. Patterson, *Sexual Orientation Across the Life Span: Introduction to the Special Section*, 44 DEVELOPMENTAL PSYCHOL. 1, 1-2 (2008) (summarizing findings correlating gender variance in childhood and adult same-sex sexual orientation).

196. See, e.g., GENDERQUEER: VOICES FROM BEYOND THE SEXUAL BINARY (Joan Nestle, Clare Howell, & Riki Wilchins eds., 2002); DAPHNE SCHOLINSKI, THE LAST TIME I WORE A DRESS (1997); LESLIE FEINBERG, STONE BUTCH BLUES (1993); RIKI WILCHINS, READ MY LIPS: SEXUAL SUBVERSION AND THE END OF GENDER (1997).

197. See JOAN ROUGHGARDEN, EVOLUTION’S RAINBOW: DIVERSITY, GENDER, AND SEXUALITY IN NATURE AND PEOPLE (2004). Roughgarden points out that “To a biologist, ‘male’ means making small gametes [sperm] and ‘female’ means making large gametes [eggs] . . . Beyond gamete size, biologists don’t recognize any other universal difference between male and female.” *Id.* at 23. Thus, there is considerable variety in what constitutes “masculine” or “feminine” traits in many species. *Id.* at 43-49. For example, in many species, such as fish, females are physically larger. *Id.* at 27. In others, females have XY chromosomes and males have XX chromosomes. *Id.* Sex roles are also diverse; one example is the male seahorse, which becomes “pregnant” after a female seahorse places eggs in the male’s pouch. *Id.* at 45.

198. See Levi, *supra* note 80, at 94-95.

199. *Id.* at 91.

200. *Id.*

201. Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 401-12 (2008).

202. See Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1805-06 (2000).

However, advocating for statutory provisions that separately protect gender identity and sexual orientation would instead seem to lessen the risk of essentialism. This is because disaggregating gender nonconformity and lesbian and gay identity eliminates the need to rely on stereotypes about “gay” or “lesbian” traits in order to find an inference of discrimination.

B. Refocusing the LGBT Antidiscrimination Agenda

1. A Pragmatic Approach: Gender Nonconformity Does not Belong Under a Sexual Orientation Antidiscrimination Rubric

There are good reasons for the disaggregation of lesbian and gay identity from gender nonconformity in antidiscrimination law. First, not all lesbian and gay people diverge from traditional expressions of gender identity in their appearance, dress, or mannerisms.²⁰³ Likewise, plenty of heterosexual people display gender nonconforming traits. Arguably, American culture is loosening with respect to heterosexuality and gender nonconformity, with notable examples in popular culture among straight-identified men.²⁰⁴ However, courts are still resistant to effeminate men with sex stereotyping claims, especially outside of the sexual harassment context.²⁰⁵ Therefore there is concern that a sexual orientation-only framework that conflates gender nonconformity and homosexuality may underprotect gender nonconforming heterosexuals.²⁰⁶ Yet, the harms associated with discrimination and harassment based on gender nonconformity cut across sexual orientations.²⁰⁷ Given these harms and the imperfect practical “fit” between gender nonconformity and gay and lesbian identity, courts should be hesitant to adopt a framework that conflates gender nonconformity with actual or perceived homosexuality.

To illustrate why courts might view sexual orientation as legally distinct from gender identity, it is helpful to imagine how a court would analyze a sexual orientation claim based on gender nonconformity brought by a bisexual employee under a sexual orientation-only antidiscrimination law. Will a court impute gender conforming (heterosexual) or gender nonconforming (homosexual) traits to the plaintiff? Some advocates argued during the 2007

203. Indeed, some lesbian and gay gender identities are decidedly gender conforming, such as the “butch” gay man or the “femme” lesbian.

204. For example, Hollywood seems to be loosening with respect to the ability of straight actors to play gay roles, such as Heath Ledger’s performance in *Brokeback Mountain* and Sean Penn’s Academy-award winning performance in *Milk*. In addition, Pete Wentz, the heterosexual lead singer for a popular music group, Fall Out Boy, openly discusses his displays of gender nonconformity, referring to his eyeliner as “guyliner” and acknowledging that he wears some women’s clothes. See Neda Ulaby, *Fall Out Boy Rewrites the Gender Roles of Rock* (National Public Radio 2007), <http://www.npr.org/templates/story/story.php?storyId=16699161>.

205. See *supra* Part I.B (federal cases) and Part II (state cases).

206. See, e.g., *Akoidu v. Greyhound Lines*, No. BC 215328, 2002 WL 399476, at *5 (Cal. Ct. App. Mar. 15, 2002), see also *supra* notes 135-143 and accompanying text.

207. See *supra* Part III.A.

ENDA debate that plaintiffs should easily be able to defeat an “end-run” around a sexual orientation-only bill, where discrimination on the basis of gender nonconformity is used as a proxy for discrimination on the basis of homosexuality.²⁰⁸ While bisexuality does deviate from mainstream heterosexual expectations, the argument that discrimination on the basis of gender nonconformity is a proxy for discriminating against a bisexual person is not a clear fit. In reality, a bisexual employee who is discriminated against for gender nonconformity does not fit neatly into a sexual orientation-only framework.²⁰⁹ Since bisexuals make up a significant percentage of the LGBT community,²¹⁰ some argue that laws should not continue to rely on gay/straight, male/female dichotomies.²¹¹ Federal legislation that excludes gender identity as a protected category, at best, forces lesbians and gay men facing workplace discrimination to make arguments that perpetuate stereotypes, and at worst, precludes valid claims by heterosexual and transgender plaintiffs.

2. Shifting Generational Identities

It is also important to ensure that LGBT antidiscrimination legislation includes gender identity given the growing generational shift within the LGBT community involving self-identity and expression. Increasingly, LGBT or “queer”—an increasingly common self-identifier among many younger LGBT people—youth claim both a gender identity and sexual identity as equally essential to self-expression.²¹² Recent developments indicate that LGBT youth

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208. See Statement of Congressman Barney Frank in Response to a Recent Press Release by Lambda Legal Raising Questions About ENDA (Oct. 3, 2007), <http://www.house.gov/frank/pressreleases/2007/10-03-07-enda.html>.
209. This potential problem echoes other conceptual gaps under Title VII involving bisexuality. In particular, courts have been stumped about how to resolve sexual harassment cases involving bisexual harassers and “equal opportunity harassers.” For example, in *Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977), the D.C. Circuit noted that “in the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.” Even though the Supreme Court recognized that same-sex sexual harassment can be actionable under Title VII in *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998), the Court did not address *Oncale*’s applicability to bisexual sexual harassment. See also Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 442-43 (2000). At least one court held after *Oncale* that equal opportunity sexual harassment is not cognizable under Title VII. See *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000).
210. See Kinsey Institute, *Frequently Asked Sexuality Questions to The Kinsey Institute*, <http://www.kinseyinstitute.org/resources/FAQ.html> (last visited Sep. 21, 2009) (summarizing the available literature studying the prevalence of certain sexual behavior, including bisexuality).
211. See generally YOSHINO, *Bisexual Erasure*, *supra* note 209; see also Ronald Turner, *Title VII and the Inequality-Enhancing Effects of the Bisexual and Equal Opportunity Harasser Defenses*, 7 U. PA. J. LAB. & EMP. L. 341 (2005).
212. This shift has been documented in cultural studies, public health research, and mainstream news media. See, e.g., GENDERQUEER, *supra* note 196; QUEER YOUTH CULTURES (Susan Driver ed., 2008); *The Invisible Body of Queer Youth: Identity and Health in the Margins of Lesbian and Trans Communities*, in CHALLENGING LESBIAN NORMS 43, (exploring how complexity in gender and sexual identity affects health outcomes for queer youth); Alissa

are empowered like never before to claim a queer gender identity as a significant aspect of their sense of self.²¹³

This shift may be attributed to many factors including the growing visibility of a transgender rights movement,²¹⁴ the trickle-down effect of academic scholarship on gender and queer theory,²¹⁵ and the remarkable progress of women in combating gender stereotypes. There is also the practical reality that many youth report alarming rates of harassment and bullying in schools because of gender nonconforming traits. One recent study found that two of the top three reasons students said their peers were most often bullied at school were actual or perceived sexual orientation and gender expression.²¹⁶ The

Quart, *When Girls Will Be Boys*, N.Y. TIMES MAGAZINE, Mar. 16, 2008, available at <http://www.nytimes.com/2008/03/16/magazine/16students-t.html?scp=1&sq=when+girls+will+be+boys.&st=nyt> (exploring the lives of transgender and gender queer students at women's colleges). There are a number of youth-oriented resources for those who identify as "genderqueer." See GenderQueer Revolution, <http://www.genderqueerreolution.com/> (last visited Sep. 21, 2009).

213. See generally QUEER YOUTH CULTURES (Susan Driver, ed. 2008). Some of this shift also may be attributed to the limits of language and the desire to distinguish personal identity from political and legal rhetoric that is used to advance libertarian or privacy arguments in favor of LGBT rights. Because efforts to remove social disapproval of homosexuality using the rhetoric of "privacy" and resisting governmental interference in private sexual behavior have been relatively successful, see *supra* note 176, LGBT youth today are using a new language to describe themselves. This language focuses much less on sexual conduct and focuses much more on the public social practice of queerness. Articulating a non-traditional gender identity is one common way to express and describe the social practice of queerness. *Id.*
214. It appears that lesbian and gay youth may feel more solidarity with transgender rights concerns than older lesbian and gay people. Many lesbian and gay youth view combating gender identity discrimination as equally as important as combating sexual orientation discrimination. When the 2007 debate over ENDA erupted, LGBT student groups were among the first to withdraw support for a non-inclusive bill. See Open Letter from Ethan Blustein, Safe Schools Coalition, to Ellen Kahn, Human Rights Campaign (Mar. 18, 2008), available at <http://www.safeschoolscoalition.org/minutes/alettertoTheHumanRightsCampaign-fromSafeSchoolsCoalition.pdf>.
215. A few paradigmatic works on this point include JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 7 (2d ed. 1999) (arguing that sex is socially constructed "with the consequence that the distinction between sex and gender turns out to be no distinction at all") and MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 168 (2000) (lamenting the LGBT movement's "retreat from its history of radicalism into a new form of post-liberationist privatization").
216. GLSEN & HARRIS INTERACTIVE, FROM TEASING TO TORMENT: SCHOOL CLIMATE IN AMERICA 56 (2005), available at <http://www.glsen.org/cgi-bin/iowa/all/library/record/1859.html> [hereinafter FROM TEASING TO TORMENT]. This bullying starts at a young age, before youth have developed a sexual identity. Take, for example, the recent cases of two 11-year-old boys in Massachusetts and Georgia, both of whom killed themselves after reporting bullying and harassment for "acting gay" despite neither boy apparently identifying as such. See Christian Boone & Katie Leslie, *At Vigil for Jaheem, Mother Weeps over His Suicide*, ATLANTA J. CONST., Apr. 21, 2009, http://www.ajc.com/metro/content/metro/dekalb/stories/2009/04/21/boy_suicide_bullying_d_eatur.html. Recent educational campaigns and films have also strived to show how "gender policing" amongst youth affect all students, not just LGBT students. See STRAIGHTLACED: HOW GENDER'S GOT US ALL TIED UP, (Groundspark, Respect for All Campaign 2009) (information on this documentary is available at <http://groundspark.org/our-films-and>

top reason was physical appearance.²¹⁷ Given the generational shift towards queer identity and the prevalence of violence directed at youth who are gender nonconforming, it is imperative that advocates work to enact legislation that directly addresses the type of discrimination they face. Protections are especially important because queer identity is to some extent a “choice” that would carry little legal weight under existing antidiscrimination doctrine that tends to only protect immutable traits.²¹⁸

3. A Non-Inclusive ENDA is at Odds with LGBT Equality Goals

a) Social Equality

Federal antidiscrimination legislation protecting lesbian and gay workers should tangibly contribute to the social equality of these workers. Social equality can be defined in many ways, including actual reduction of discrimination,²¹⁹ the ability of lesbian and gay workers not to be “ghettoized” in certain jobs, and the freedom of lesbian and gay workers to be “out” without having to cover aspects of themselves that are perceived as “too gay.” An ENDA that excludes gender identity protections impedes these goals in several ways.

First, to reduce discrimination against lesbian and gay people, the protected class needs to include prohibitions on the types of discrimination that affect them. Evidence shows that many Americans are moving away from conscious biases towards lesbian and gay people.²²⁰ Yet, as in the race, national origin, and sex contexts, unconscious bias likely remains.²²¹ A sexual orientation-only ENDA would reach many conscious biases, such as a total refusal to hire lesbian and gay employees or pervasive anti-gay harassment. However, given the narrow, sexuality-based definition of the protected class in ENDA, the exclusion of disparate impact claims, and the limited reach of sex discrimination protections, there is a concern that unconscious negative associations with lesbian and gay people remain unchecked. I fear that many of these negative associations have to do more with gender identity than with sexual orientation per se. For example, an employer engaged in a lot of face-to-face customer service may be queasy about hiring a masculine lesbian or may believe that a

campaigns/straightlaced (last visited Sept. 22, 2009)).

217. FROM TEASING TO TORMENT, *supra* note 216, at 194.

218. *See supra* Part I.

219. *See* M.V. LEE BADGETT ET AL., BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf> (summarizing current statistical evidence of sexual orientation discrimination).

220. For example, recent polling demonstrates a remarkable shift in favor of same-sex marriage. *See* Jennifer Agiesta & Alec MacGillis, *Poll: Rising U.S. Support for Social Issues, Such as Gay Marriage*, WASH. POST, Apr. 30, 2009, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043001640.html> (last visited May 1, 2009).

221. *See generally* Christine Jolls & Cass Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969 (2006).

“flamboyant” gay man will disrupt a staid corporate environment.

Second, banning gender identity discrimination potentially lifts lesbian and gay workers out of “ghettoized” jobs in a way that sexual orientation protections do not. To the extent lesbian and gay workers feel their job choices are limited because of the way they express their gender identity, banning sexual orientation discrimination is irrelevant in reducing that pressure.²²² For instance, if Darlene Jespersen had been out as lesbian or bisexual at Harrah’s and sexual orientation protections were in place, it is doubtful the outcome of the case would have been different. This is because Jespersen would have a difficult time convincing the court that the dress and grooming policy placed an undue burden on her as a lesbian or a bisexual woman and thus constituted sexual orientation discrimination. In practical terms she would have still needed to find a job where her gender identity was not an issue.

One might imagine a world where workers did not have to assume that some jobs are off limits because of their gender identity. For instance, ideally the law should facilitate situations in which an effeminate gay man feels free to apply for a job on a decidedly masculine police force, or a masculine lesbian is not impeded from selling makeup at the Clinique counter at Macy’s. The goal of antidiscrimination law should be to integrate workplaces and combat assumptions about the types of jobs lesbians and gay men can fill because their gender identity (as distinct from sexual orientation) does not match what historically has been viewed as valuable for these jobs.

At the same time, these workers should not be asked to “cover” while on the job. American culture has historically pressured lesbians and gay men to pass, cover, and even convert. As Professor Kenji Yoshino has argued, “we should not buy an equality conditioned on such assimilation at the price of our souls.”²²³ The offer of such an equality is arguably already on the table. Increasingly, corporate employers are taking actions that seem to welcome lesbians and gay men into the fold.²²⁴ However, the welcome mat may extend the furthest to those lesbians and gay men who can assimilate the easiest into the

222. Some research has been done regarding work environment and voluntary disclosure of lesbian and gay identity but unfortunately I did not find any social science research regarding the experience of gender nonconforming non-transgender employees in the work environment. See M.V. Lee Badgett, *Employment and Sexual Orientation: Disclosure and Discrimination in the Workplace*, in *PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY AND BISEXUAL EXPERIENCE*, (L. Garnets & D. Kimmel eds., 2003); Theo G. M. Sandfort et al., *Lesbians and Gay Men at Work: Consequences of Being Out*, in *SEXUAL ORIENTATION AND MENTAL HEALTH: EXAMINING IDENTITY AND DEVELOPMENT IN LESBIAN, GAY, AND BISEXUAL PEOPLE* (A. Omoto & H. Kurtzman eds.).

223. YOSHINO, *supra* note 186, at 107.

224. See HUMAN RIGHTS CAMPAIGN, *CORPORATE EQUALITY INDEX (2009)*, available at http://www.hrc.org/documents/HRC_Corporate_Equality_Index_2009.pdf (reporting that almost half of the Fortune 500 companies rated received 100% scores on an index that measures whether an employer has non-discrimination policies for LGBT workers, health benefits, and other measures of support for LGBT concerns).

workplace.²²⁵

Legal loopholes that continue to allow employers to disfavor gender nonconforming employees have a real danger of replicating and validating harmful hierarchies based on both sexism and homophobia. This concern is especially real within the lesbian and gay community, where there is already a complicated history of devaluing or silencing gender nonconformity.²²⁶ Even for lesbians and gay men who do not experience difficulty conforming to gender norms, employer actions penalizing gender nonconformity send messages that could contribute to internalized homophobia.

b) Transgender Rights are Gay and Lesbian Rights

This Article has intentionally left transgender issues out of the discussion in order to respond to a specific legislative debate about the federal Employment Non-Discrimination Act, namely, whether gender identity protections are an exclusively transgender concern or not. As a legal matter, the answer appears to be “no.”²²⁷ This reality may be reason enough to advocate for an inclusive piece of federal legislation, but there are additional political and cultural reasons.

First, as a political matter, recent public polling data of self-identified lesbian, gay, and bisexual Americans indicates that most LGB people understand the crucial connection between fighting for antidiscrimination laws that protect gay people and fighting for those that protect transgender people. A May 2008 poll released by the City University of New York found that sixty percent of a nationally representative sample of LGB respondents believed it was wrong to remove transgender protections from ENDA to achieve the votes necessary to pass the bill.²²⁸ This is remarkable considering the vote on ENDA in November 2007 was the first time a gay antidiscrimination bill had passed either chamber of Congress. The fact that 60 percent of LGB people preferred a strategy that did not involve jettisoning protections for transgender people should commit leaders

225. Professor Yoshino observes: “Gays who counteract [gender nonconforming] stereotypes by ‘acting straight’ are more likely to win straight acceptance. ‘I don’t even think of you as gay’ is a compliment reserved for gay men who outjock the jocks or lipstick lesbians who outfemme the femmes. *As individuals and as a group, gays can be exquisitely self-conscious about self-presentation along this dimension.*” YOSHINO, *supra* note 186, at 80 (emphasis added).

226. *See* YOSHINO, *supra* note 186, at 81 (noting that some gay men fetishize masculinity, where, for example, personal ads decry gay male “femmes”); Minter, *supra* note 14, at 143 (recounting the history of gays and lesbians, especially white, middle class gays and lesbians, distancing themselves from and criticizing gender nonconformity within the community).

227. *See supra* Parts I & II.

228. PATRICK J. EAGAN, ET AL., CITY UNIVERSITY OF NEW YORK, FINDINGS FROM HUNTER COLLEGE POLL OF LESBIANS, GAYS AND BISEXUALS 24 (2008), *available at* http://www.hrc.org/documents/Hunter_College_Report.pdf. Interestingly, when LGB respondents were asked to prioritize “transgender rights” amongst a list of LGBT goals (like securing adoption rights and marriage for example), the goal came in dead last. Thus, at least in the employment discrimination context it may mean that LGB people would like to include transgender issues within the fabric of LGB-specific concerns, not as stand-alone issues.

in the LGBT movement to advocate for inclusive laws that combat job discrimination.

Second, as much as some lesbian and gay commentators try to distance themselves from transgender concerns, the cultural history of the LGBT movement in the U.S. supports the view that the LGB rights movement should indeed concern itself with transgender people.²²⁹ As Shannon Minter, a leading LGBT litigator, has observed:

While some issues raised by transgender people may be new [to the LGB rights movement], conflict over the relationship between gay identity and gender nonconformity is not. Changes in the social meaning of gayness have been entangled with changes in the social meaning of gender for at least the past hundred years.²³⁰

Therefore, legally and otherwise LGBT people appear to be part of the same struggle. Ignoring that reality at this point in the LGBT movement seems unwise, if not counterproductive.

CONCLUSION

As this Article demonstrates, Title VII's protections are generally weaker for race, sex, or national origin traits not tied to a fundamental right or to immutability. As a result, courts have narrowly construed Title VII's protections to exclude significant types of trait-based discrimination. This reality, coupled with an increasing disaggregation of gender nonconformity and sexual orientation, calls for new thinking regarding federal efforts to ban anti-gay job discrimination. This new thinking is also needed in light of the potential individual and societal harms caused by some forms of trait-based discrimination. Whether the stakes are personal dignity, equal employment opportunity, or social equality more generally, it is critical to think about how antidiscrimination law will or will not demand LGBT workers to cover core aspects of identity.

Lesbian and gay people will find it difficult to demonstrate trait-based discrimination under existing judicially created rules where protections are conditioned on whether a certain trait can be characterized as immutable. The biological origins of sexual orientation are still being contested and

229. See Minter, *supra* note 14, at 144-50 (recounting the history of a transgender presence since the beginning of the LGBT movement).

230. *Id.* at 143. One sobering illustration of how transgender and gay identity are wrapped up together in the minds of many people is to consider some of the evidence in hate crimes cases against transgender individuals. In the recent trial of Angie Zapata, a Colorado transgender teen brutally murdered, the prosecution introduced the recorded jailhouse telephone calls of her alleged killer, Allen Andrade. In them, Andrade is recorded saying that "It [s] not like I . . . killed a law-abiding straight citizen." *Jurors Hear Defendant's Jailhouse Calls*, CNN, Apr. 20, 2009, <http://insession.blogs.cnn.com/2009/04/20/jurors-hear-defendants-jailhouse-calls/>.

researched.²³¹ Even if the matter were settled, some LGBT activists and scholars do not consider immutability a legitimate basis on which to condition LGBT civil rights.²³² Further, sexual orientation alone does not encompass gender nonconforming traits that are central to many lesbian and gay people.

A gender identity-inclusive ENDA may hold hope for a new vision of LGBT antidiscrimination law by definitively connecting gender identity with sexual orientation, so that gender identity protections are understood as protecting all workers, not just transgender individuals. Admittedly, gender identity protections are not a panacea, especially since the entire concept of gender identity as separate and distinct from gender (or sex) may be new and arguably misunderstood even by the LGBT community's strongest advocates. Also, even the inclusive ENDA currently includes language permitting appearance and dress codes in the workplace, which may curb some protections.²³³

Whatever "work" gender identity protections do for lesbian and gay discrimination claims, it is clear that more may be needed to protect gender nonconforming workers than the definition of sexual orientation as it existed in the House-passed version of ENDA in 2007.²³⁴ At the very least, it seems important to stop cabining gender identity provisions as though they were an exclusively transgender concern.

It is also hard to imagine that the LGBT community would not be unified in its quest to ensure that lesbian and gay people who are gender nonconforming are covered in the LGBT movement's premier antidiscrimination bill. I believe that most lesbian and gay people care deeply about gender nonconformity discrimination and want it prohibited. What is probably occurring, however, is confusion (and perhaps denial) about the importance of gender identity provisions to lesbian and gay people in particular.

Unfortunately, the key players involved in moving legislation forward to protect lesbian and gay workers have been slow to recognize the importance of gender identity provisions for these individuals.²³⁵ Yet, exhaustion and frustration with the long and arduous road to a Presidential signature cannot justify ignoring legal and community-wide developments that make gender

231. See, e.g., CHERYL WEIL, *NATURE'S CHOICE: WHAT SCIENCE REVEALS ABOUT THE BIOLOGICAL ORIGINS OF SEXUAL ORIENTATION* (2008) (summarizing available scientific literature on sexual orientation).

232. See generally Halley, *supra* note 46.

233. Employment Non-Discrimination Act of 2009, S. 1584, H.R. 2981, 111th Cong. (2009).

234. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

235. Some version of a sexual orientation antidiscrimination bill has been proposed in Congress since 1974, when Congresswoman Bella Abzug (D-N.Y.) first introduced legislation in the House. In 1994, ENDA was scaled back to an employment-only bill. Many thought that would increase the bill's chance of passing and becoming law. When ENDA was brought up for a vote in 1996 in the Senate, it lost by one vote. See Chai Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* (John D'Emilio et al. eds., 2002).

identity protections important for any LGBT workplace antidiscrimination goal.

Just because many in the LGBT community have been fighting for federal antidiscrimination legislation for nearly a generation does not mean that the legislation worth fighting for is the one with provisions that are a generation old. While Congress has been stalling, LGBT people have had a generation to evolve, transform, and now, transcend old conceptions of themselves. For better or worse, courts will take notice of this evolution; as we have seen, many already have. Earlier generations of activists deserve enormous credit for bringing about the conditions that enable us to create new visions of what it means to be LGBT and free in this country. Yet it is the next generation that must be the focus of congressional efforts to achieve lasting social equality. Therefore, the next chapter in ENDA's history must open with an unequivocally inclusive bill that addresses both gender identity and sexual orientation job discrimination.