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Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law

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COMMENT

Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law

Marvin Dunson III†

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I.

INTRODUCTION

David Warfield was an exceptional teacher. He developed an award-winning program for unmotivated students. He received a standing ovation from the district’s staff at its annual meeting, and also received the school’s Stand and Deliver Award for the teacher who most inspires students. But David Warfield was fired when he disclosed that he would be undergoing a sex change operation and would return to school as Dana Rivers. The School Board took this action even though it received only four negative responses to a letter sent to 1,500 families describing the situation.

Dana Rivers’s case illustrates the discrimination commonly faced by transgender individuals. Transgenders are affected daily by the prejudices many members of society hold regarding gender non-conforming appearance and behavior. Some are turned away from banks when seeking

2. Id.
3. Id.
4. Id.

5. The term “transgender” arose in the mid-1990s from the grassroots community of gender-different people. Unlike the term “transsexual,” it is not a medical or psychiatric diagnosis. In contemporary usage, “transgender” has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers (sometimes referred to as “transvestites,” “drag queens” or “drag kings”); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical. In its broadest sense, transgender encompasses anyone whose identity or behavior falls outside of stereotypical gender norms. Other current synonyms for transgender include “gender variant,” “gender different,” and “gender non-conforming.” See PAISLEY CURRAH & SHANNON MINTER, THE POL’Y INSTITUTE OF THE NAT’L GAY AND LESBIAN TASK FORCE & NAT’L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3 (2000).

In this Comment, I do not use the term “transgender” in its broadest sense, but instead use it to refer to those who typically self-identify as pre-operative, post-operative, and non-operative transsexuals, i.e. those who identify emotionally or psychologically with the sex other than their biological or legal sex at birth, and who present themselves on a daily basis as a member of that sex. I do not use the term in its broadest sense, for it would invoke sexual orientation, as non-heterosexuals, by definition, fall outside of stereotypical gender norms (i.e., men are attracted to women and women are attracted to men). Sexual orientation and gender identity are two separate classification spectra and to explore the intersection of the two would be another paper. For further reading on this topic, though, see 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).

a loan,7 others are denied housing,8 others are abused or denied their civil rights by government officials,9 others have their marriages questioned,10 and many are discriminated against in employment.11 Crime statistics, though, frame the problem most vividly: one transgender person is murdered in the United States each month.12 These murders are often cold-blooded and brutal.13

The many types of discrimination suffered by transgenders could provide ample material for a wide-ranging exposition. In this Comment, however, I will confine my examination to discrimination in employment—the hiring, promotion, and firing of transgenders. My primary goal is to determine how, as a matter of political strategy, we can best use law to prevent and remedy employment discrimination against transgender people. Toward this end, I examine both legislative and judicial strategies, evaluating their respective successes and failures, and exploring alternative explanations for the patterns I find. Through this examination, I identify the strengths and weaknesses of legislative and judicial approaches, and conclude that the approach most likely to succeed would be to advocate for legislation specifically including transgenders as a distinct category of persons entitled to protection under anti-discrimination laws.

Part II surveys Title VII caselaw pertaining to transgenders, including recent developments in the Ninth Circuit. Part III provides a parallel investigation of state law. Part IV examines employment anti-discrimination laws protecting transgenders in jurisdictions throughout the United States, including the only state that currently has a law protecting

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7. See Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (reinstating Equal Credit Opportunity Act claim on behalf of biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was not dressed in "masculine attire").

8. See generally Thomas v. Anchorage Equal Rights Comm’n, 220 F.3d 1134 (9th Cir. 2000) (en banc) (holding that a landlord’s free speech and free exercise challenges to state and municipal housing laws prohibiting discrimination on the basis of marital status were not yet ripe).


11. See, e.g., Nieves, supra note 1. The latest attempt to remedy transgender employment discrimination was successful in San Francisco, as that city recently became the first municipality in the U.S. to include sex-change procedures in the health benefits package for city employees. See Rachel Gordon, Profile: Clair Skiffington, New Health Benefits for Sex-Change Surgery Will Help One City Administrator on Journey to Life as a Woman, S.F. CHRON., May 14, 2001, at A1.

12. See CURRAH & MINTER, supra note 5, at iii.

transgenders as such.\textsuperscript{14} Part V uses a case study of a California bill, A.B. 2142, that would have prohibited discrimination in employment based on "gender," to illustrate a legislative approach to this topic.\textsuperscript{15} Part VI addresses some of the academic literature regarding the principles underlying anti-discrimination law and their application to protection for transgenders. Part VII concludes the piece by suggesting a strategy for future success.

II. THE TREATMENT OF TRANSGENDERS IN TITLE VII CASELAW\textsuperscript{16}

The inclusion of "sex" in the list of unlawful bases for discrimination under Title VII of the Civil Rights Act of 1964 was fortuitous. "Sex" was added by amendment to the list of "race, color, religion, or national origin" with the intention of discrediting and ultimately defeating the bill.\textsuperscript{17} Instead, the bill, with the term "sex" included, was passed by the House the next day.\textsuperscript{18} Thus, there was essentially no debate regarding the meaning of "sex" or Congress' intent in including the word in the list of unlawful bases of discrimination.\textsuperscript{19} This legislative fluke was the recipe for a casserole of litigation about the meaning of "sex" in Title VII,\textsuperscript{20} including cases involving transgenders.

\textit{Holloway v. Arthur Andersen & Co.}\textsuperscript{21} was one of the first cases to give meaning to Title VII's "sex" in a transgender context. Ramona Holloway, a male-to-female transsexual who transitioned during her\textsuperscript{22} tenure at the

\begin{footnotesize}
\begin{enumerate}
\item See infra notes 153 - 164 and accompanying text regarding the Minnesota statute. While Iowa is also considered to have protection in employment for transgender people, it is by virtue of an executive order, not by an enacted law. See Iowa Governor Vilsack's Exec. Order No. 7 (Sept. 14, 1999), http://www.state.ia.us/govemor/legal/exec_order_seven_final.pdf.
\item See infra note 168 and accompanying text regarding the definition of "gender" used in the bill.
\item Each case in this section is a testimony to the various ways that gender and gender identity discrimination exists in our society. Although some cases date as far back as the mid-1970s, there is little doubt that the same types of discrimination and its manifestations exist today.
\item Id.
\item Id.
\item The litigation on this topic varies from sexual harassment to pregnancy to bona fide occupational qualifications (bfoqs) to transsexuals to sexual orientation. I will confine my examination of the topic to cases involving transsexuals and transgenders. Significantly related to this area is litigation concerning the inclusion and exclusion of gender and gender stereotypes within Title VII's "sex." For a comprehensive examination of the Title VII "sex" case law concerning gender stereotypes, see Mary Anne C. Case, \textit{Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence}, 105 YALE L.J. 1 (1995).
\item 566 F.2d 659 (9th Cir. 1977).
\item For all plaintiffs, I will use the pronoun that matches plaintiff's desired gender. Most of the courts in these cases did the same. See Schwenk v. Hartford, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000) ("In using the feminine rather than the masculine designation when referring to Schwenk, we follow the convention of judicial decisions involving male-to-female transsexuals which refer to the transsexual
consulting firm Arthur Andersen, was fired soon after she requested that her employee records be changed to reflect her present first name. She sued the company, alleging that it had discriminated against her because of sex, in violation of Title VII. A split Ninth Circuit panel rejected Holloway's contention that "sex" as used in Title VII was synonymous with "gender," and that "gender" should be understood to encompass transsexuals. The court evaluated the meaning of "sex" in Title VII by noting the dearth of legislative history on the issue, consulting the Webster's Dictionary definition of "sex," and observing the "clear intent of the 1972 [Amendments to Title VII] ... to remedy the economic deprivation of women as a class." Ultimately, the court decided to give the statute its plain meaning and concluded "that Congress had only the traditional notions of 'sex' in mind... [and] has not shown any intent other than to restrict the term 'sex' to its traditional meaning." The court substantiated its decision to define "sex" narrowly by noting the failure of several bills intended to amend Title VII to prohibit discrimination based on "sexual preference."

Putting aside for the moment the court's conflation of atypical sexual orientation (née "preference") and transsexualism, the Holloway court cleverly avoided the need to evaluate Holloway's transsexualism in either a sex discrimination or a gender discrimination context. The court did this by framing the issue before it as "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation." In this context, if the court found that there was discrimination by the employer, it would only be discrimination based on Holloway's decision to undergo a sex change, not based on Holloway's being male or female (sex), or even man or woman (gender). In other words, the discrimination was based on something the plaintiff did, not on something the plaintiff was. Title VII protects against the latter, but not the former.

The court's conclusion reiterates this distinction:

Holloway has not claimed to have been treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex... A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class,
within the scope of Title VII."30

This, despite the court’s acknowledgment that Holloway’s supervisor stated in her affidavit that “Holloway was not terminated because of transsexualism, ‘but because the dress, appearance and manner he was affecting were such that it was very disruptive and embarrassing to all concerned.’”31 So, even though Holloway’s supervisor stated that Holloway was fired because of behavior that challenged gender stereotypes and consequently disrupted the workplace, the court somehow determined that the real reason for Holloway’s termination was her decision to transition, and that that reason was the one that should be evaluated under Title VII. Needless to say, the logic in this first federal appellate court decision to address Title VII’s “sex” in a transgender context is difficult to follow.

The Holloway court cited support for its decision with a few district court cases, all of which supported a narrow interpretation of “sex” under Title VII. In Smith v. Liberty Mutual Insurance Co.,32 a homosexual male plaintiff argued that an employer’s refusal to hire him because he appeared to be “effeminate” constituted an unlawful discrimination under Title VII.33 The Plaintiff pointed out that the employer’s decision to hire a female with presumably effeminate characteristics demonstrated that he was treated differently because he was a male.34 The judge disagreed, saying, “It appears that the defendant concluded that the plaintiff, a male, displayed characteristics inappropriate to his sex.”35 This conclusion, apparently, was enough to deny plaintiff’s sex discrimination claim, even though under today’s standards, it would be a classic case of gender discrimination, actionable under Title VII.36

The Smith court, in the vein of odd logic exhibited by Holloway, characterized plaintiff’s claim as wanting to include “sexual preference” as a protected category because plaintiff was considered by the defendant to be “effeminate.”37 In addressing plaintiff’s claim, the court noted that, “[t]he intent of the Civil Rights Act insofar as it applies to sex

30. Id. at 664.
31. Id. at 661 n.1.
33. Id. at 1099.
34. Id. at 1099 n.2.
35. Id.
36. See infra discussion beginning with note 73 and accompanying text.
37. Smith, 395 F. Supp. at 1099 (“Plaintiff argues that it is forbidden under present law for an employer to consider a job applicant’s affectional or sexual preference in hiring and that, therefore, the employer’s election not to employ plaintiff because applicant (a male) appeared to be ‘effeminate’ constituted an unlawful discrimination.”) (emphasis added); see also DeSantis v. Pacific Tel. Co., Inc., 608 F.2d 327, 332 (1979) (“Recently the Fifth Circuit similarly read the legislative history of Title VII and concluded that Title VII thus does not protect against discrimination because of effeminacy.”).
discrimination in employment is ‘the guarantee of equal job opportunity for males and females.’ Whether or not the Congress should, by law, forbid discrimination based upon “affectional or sexual preference” of an applicant, it is clear that the Congress has not done so.”

The Holloway court also cited Grossman v. Bernards Township Board of Education. There, the male-to-female plaintiff lost her job after her sex change surgery. The court ruled that “she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex from the male to the female gender.” The court pointed to examples in case law of prohibited sex discrimination to distinguish plaintiff’s claim. “No facts are alleged to indicate, for example, that plaintiff’s employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, nor because of any condition common only to woman.”

Finally, the court interpreted Title VII’s “sex” as most other courts did at that time, saying, “In the absence of any legislative history indicating a Congressional intent to include transsexuals within the language of Title VII, the court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”

In Voyles v. Ralph K. Davies Medical Center, the last of the three district-level cases cited by Holloway, the court allowed an employer to fire a hemodialysis technician who intended to change sex, where the employer felt that “such a change might have a potentially adverse effect on both the patients receiving treatment at the dialysis unit and on plaintiff’s co-workers caring for those patients.” The court’s justification was that Title VII:

[S]peaks of discrimination on the basis of one’s “sex.” No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that “sex” discrimination was meant to embrace “transsexual” discrimination, or any permutation or combination thereof. . . . Furthermore, even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress’ paramount, if not sole, purpose in banning employment practices predicated upon an individual’s sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void

38. Smith, 395 F. Supp. at 1101 (internal citation omitted).
40. Id. at *9. Note that this is virtually the same illogic used in Holloway.
41. Id. at *9 (citations omitted).
42. Id. at *10.
44. Id. at 456.
the Court is not permitted to fashion its own judicial interdictions.\(^{45}\)

\textit{Holloway, Smith, Grossman,} and \textit{Voyles} typify judicial construction and interpretation of Title VII’s use of the term “sex” reflected in federal case law from the 1970’s and ‘80’s. Later-decided cases relied on the precedent of these four earlier cases to further perpetuate the pattern of illogical reasoning that originated in \textit{Holloway}.

\textit{Powell v. Read’s, Inc.}\(^ {46}\) permitted a restaurant supervisor to fire the plaintiff on her first day working as a waitress, after the supervisor was told by a customer that the plaintiff was a man.\(^ {47}\) The court reviewed the holdings in \textit{Smith, Grossman,} and \textit{Voyles,} and concluded that, “A reading of the statute to cover plaintiff’s grievance would be impermissibly contrived and inconsistent with the plain meaning of the words. . . . The gravamen of the [c]omplaint is discrimination against a transsexual and that is precisely what is not reached by Title VII.”\(^ {48}\)

\textit{Terry v. EEOC}\(^ {49}\) involved a claim by Barbara Lynn Terry, a male-to-female pre-operative transsexual, that Marc’s Big Boy Corporation discriminated against her by refusing to hire her as a waitress.\(^ {50}\) The court relied on \textit{Holloway, Smith, Voyles,} and \textit{Powell} to conclude that:

[N]either Title VII nor the due process and equal protection clauses prohibit the refusal of Marc’s Big Boy from hiring Terry as a waitress/hostess. He is still a male; at this point he only desires to be female. He is not being refused employment because he is a man or because he is a woman. Under these facts, Title VII and the constitution do not protect him. The law does not protect males dressed or acting as females and vice versa.\(^ {51}\)

In \textit{Sommers v. Budget Marketing, Inc.},\(^ {52}\) a male-to-female pre-operative transsexual was fired two days after being hired by Budget to perform clerical duties.\(^ {53}\) Budget alleged that Sommers was dismissed because she misrepresented herself as a female when she applied for the job.\(^ {54}\) Budget further alleged that the misrepresentation led to a disruption of the company’s work routine since a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel.\(^ {55}\) Although the court seemed to

\(^{45}\) \textit{Id.} at 457 (footnote omitted).
\(^{47}\) \textit{Id.} at 370.
\(^{48}\) \textit{Id.} at 371.
\(^{50}\) \textit{Id.} at *1.
\(^{51}\) \textit{Id.} at *7-8.
\(^{52}\) 667 F.2d 748 (8th Cir. 1982).
\(^{53}\) \textit{Id.} at 748.
\(^{54}\) \textit{Id.}
\(^{55}\) \textit{Id.} at 748-49.
express a bit more understanding about transsexualism than the courts in previous cases, it nonetheless rebuffed the plaintiff’s argument that she was discriminated against because of her status as a female by characterizing her as male. "[T]he court does not believe that Congress intended . . . to require the courts to ignore anatomical classification and determine a person’s sex according to the psychological makeup of that individual. . . . Plaintiff, for the purposes of Title VII, is male because she is an anatomical male." Then, after noting Holloway, Powell, Grossman, and Voyles, the court turned to plaintiff’s claim and found that ‘for the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise. . . . Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the protective purview of the Act.’

Ulane v. Eastern Airlines, Inc. saw the Seventh Circuit overturn a district court’s award reinstating a male-to-female transsexual as a flying officer with full seniority, back pay, and attorneys’ fees. The district court opined that “transsexuals . . . unlike homosexuals and transvestites, have sexual identity problems” and are covered under Title VII because “the term ‘sex’ does not comprehend ‘sexual preference,’ but . . . does comprehend ‘sexual identity.’” In a precursor to the judicial construction and recognition that for Title VII purposes, the term “sex” comprehends “gender,” the district court further reasoned that “‘sex is not a cut-and-dried matter of chromosomes,’ but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.”

This newly fashioned interpretation of Title VII’s “sex,” however, did not survive review in the Seventh Circuit, where the court stated:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual’s sex is

56. Id. at 749-50 (stating that “the Court is aware of plaintiff’s personal dilemma . . .” and “not unmindful of the problem Sommers faces.”).
57. Id. at 749.
58. Id. at 750.
59. 742 F.2d 1081 (7th Cir. 1984).
60. Id. at 1082.
61. Id. at 1084.
62. Id.
not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born. The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies.63

After evaluating this dearth, the court cautioned that:

Congress had a narrow view of sex in mind when it passed the Civil Rights Act, and it has rejected subsequent attempts to broaden the scope of its original interpretation. For us to now hold that Title VII protects transsexuals would take us out of the realm of interpreting and reviewing and into the realm of legislating. . . . This we must not and will not do. . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline . . . to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.64

Turning to Ulane’s claim that she was discriminated against based on her status as a female, the court put the final nail in the coffin. “It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”65

This entire line of cases and its odd reasoning stands in stark contrast to other Title VII cases that involve the interpretation of “sex” outside the transgender context. These cases concluded that employment decisions based on stereotyped characteristics of men and women are unlawful under Title VII.66 For example, in City of Los Angeles, Department of Water & Power v. Manhart,67 the Supreme Court invalidated a pension plan that required women to contribute more than men, based on a stereotypical assumption that women would live longer than men and thus receive more money.68 The Court noted in its analysis of the plan that, “[i]t is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”69 The Court’s acknowledgment of the prohibition of this stereotyping practice affirmed what the Seventh Circuit said in Sprogis v. United Airlines,70 in 1971, four years before the first transsexual Title VII case.

63. Id. at 1085.
64. Id. at 1086.
65. Id. at 1087.
68. Id. at 705, 717.
69. Id. at 707.
70. 444 F.2d 1194 (7th Cir. 1971).
In *Sprogis*, the court held that a policy against the employment of married women as stewardesses violated Title VII’s “because of . . . sex” provision. In applying the statute to United’s policy, the court determined that “[t]he scope of Section 703(a)(1) is not confined to explicit discriminations based ‘solely’ on sex. In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

With the holdings in *Manhart* and *Sprogis*, the Supreme Court and Seventh Circuit long ago approved an interpretation of “sex” under Title VII that would permit courts to consider stereotypes and characteristics other than the merely “anatomical.”

Given this interpretation, the notion that “sex” must be defined by its “plain meaning” (i.e., anatomical) is faulty. Likewise, decisions in transgender cases that were premised on this notion are flawed. Those courts could have used a definition of “sex” that included sexual stereotypes—stereotypes that always triggered the adverse employment action against the transgender plaintiff. Instead, those courts used convoluted logic to conclude that employers did not discriminate against transsexual employees based on their genitalia and corresponding gender characteristics (i.e., a person with a vagina should look and act like a woman or a person with a penis should look and act like a man), but instead discriminated based on just their gender characteristics. This gender-based discrimination is not what the act prohibits—it only prohibits discrimination based on genitals, i.e. “sex,” or so those courts said. By ignoring *Manhart* and *Sprogis* as precedent, each of the decisions in the *Holloway* line of cases was able to circumvent the well-established Title VII principle that discrimination based on stereotypes is unlawful.

A. Price Waterhouse v. Hopkins—*A Cause For Celebration?*

A new avenue of progress for transgenders seemed to open when the Supreme Court decided *Price Waterhouse v. Hopkins*. The Court recognized that plaintiff Hopkins’ rights under Title VII were violated when she was denied promotion to partnership at her accounting firm. In upholding the district court’s judgment in her favor, the Court determined

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71. Id. at 1198 (emphasis added).

72. Holt, supra note 66, at 300; cf. DeSantis v. Pacific Tel. Co., Inc., 608 F.2d 327, 332 (1979) ("[Appellant] claims that the school’s reliance on a stereotype that a male should have a virile rather than an effeminate appearance violates Title VII. . . . We . . . hold that discrimination because of effeminacy, like discrimination because of homosexuality or transsexualism (Holloway), does not fall within the purview of Title VII.") (referring to Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098 (N.D. Ga. 1975)).

73. 490 U.S. 228 (1989) (plurality opinion).

74. Id. at 237.
that the partnership decision was based, at least in part, on stereotypical notions of how a woman should act. Plaintiff was described as: "macho"; "unduly harsh"; "overly aggressive"; having "overcompensated for being a woman"; needing to "take a course at charm school"; "a lady using foul language"; and having "matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." One partner suggested that her chances for partnership would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." In other words, Hopkins was denied partnership, and thereby discriminated against, not because she was a woman per se, but because she was a woman who failed to exhibit the stereotypical characteristics expected of members of her sex.

The Court clarified its position regarding sex stereotyping by saying:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."

The Court added:

In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not, has acted on the basis of gender. . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.

After Price Waterhouse, it seems clear that the term "sex," as used in Title VII, encompasses more than just anatomy. It includes one's physical appearance, language, behavior, manner of interacting with others, and other characteristics that might be labeled "masculine" or "feminine."

Therefore, if a plaintiff exhibits feminine characteristics or has a feminine physical appearance, and if either (or both) is used as a reason for an

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75. Id. at 235.
76. Id.
77. See Holt, supra note 66, at 300.
78. Hopkins, 490 U.S. at 251 (quoting Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971) and City of Los Angeles, Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978)).
79. Hopkins, 490 U.S. at 251.
80. Holt, supra note 66, at 301.
adverse employment action, Title VII would be violated. With a female-to-male transgender plaintiff, like Ulane, that would be precisely the case. The anatomically male plaintiff would exhibit, and would be fired for exhibiting, feminine characteristics. Under Price Waterhouse, it would seem, transgenders should be protected against discrimination because of "sex."

James v. Ranch Mart Hardware, Inc. was the first of two Title VII transgender cases decided after Price Waterhouse. In Ranch Mart, Barbara Renee James claimed that she was fired after and because she notified her employer that she intended to begin living and working full time as a man. Surprisingly (or perhaps not), the court ignored Price Waterhouse and instead cited the Holloway line of cases to reiterate that employment discrimination based upon transsexualism is not prohibited by Title VII. In her complaint, though, James offered the "unique claim" that she was fired as a male, wanting to become female, but would not have been fired as a female, wanting to become male, and was thus subject to sex discrimination. On this claim, the court denied defendant's motion to dismiss, reasoning that it remained to be seen whether plaintiff could prove her case.

The basis of James's complaint was that, as a male-to-female transsexual, she was treated differently than a female-to-male transsexual would have been treated—a "unique claim" indeed. She did not make the traditional claim that she was being treated differently from other anatomical males because she was a transsexual. Strategically, this was a savvy move; the court did not hesitate to note, though, that Title VII does not prohibit discrimination based on transsexualism.

The court also took pains to clarify that James could not have an actionable claim as a female, even though James framed the complaint to indicate that she was anatomically male. The court relied on Holloway,

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81. The converse would also be true.
83. No. 94-2235-KHV, 1994 U.S. Dist. LEXIS 19102 (D. Kan. Dec. 23, 1994). This decision was in response to defendant's motion for judgment on the pleadings. A later decision was in response to defendant's motion for summary judgment and has the same case name. In that decision, the court dismissed plaintiff's claim.
84. Id. at *2.
85. Id. at *2-3.
86. Id. at *3.
87. Id.
89. Id. at *2-3 ("Plaintiff alleges discrimination 'due to her sex under circumstances in which a similarly situated female, living and working full time as a male, would not have been subjected.'" (citation omitted)). Thus, James' complaint designated James as male and compared him to a "similarly
Ulano, and Sommers to make its point. “Even if plaintiff is psychologically female, Congress did not intend ‘to ignore anatomical classification and determine a person’s sex according to the psychological makeup of that individual.’” This reference to anatomy as a way of defining Title VII’s “sex” ignores Price Waterhouse’s implicit recognition that sex discrimination is as much about the behaviors, actions, and outward appearance of a plaintiff as his/her genitals. The Price Waterhouse Court determined that Hopkins experienced sex discrimination based on her behaviors and actions, characteristics that constitute one’s “psychological makeup.” The Court’s consideration of Hopkins’ psychological makeup in determining whether she suffered sex discrimination under Title VII is exactly what the Ranch Mart and Sommers courts claim should not occur.

The second transgender case decided after Price Waterhouse was Broadus v. State Farm Insurance Co. There, a transitioning female-to-male transsexual claimed that his supervisor harassed him because he did not conform to a stereotype of how a woman should look. In evaluating defendant’s motion for summary judgment, the court recognized that Price Waterhouse found sexual stereotyping that plays a role in an employment decision to be actionable under Title VII. The court distinguished Price Waterhouse from the case it was deciding, however, by noting that Ann Hopkins was not a transsexual and that the current plaintiff was. Thus, the court determined, “[i]t is unclear... whether a transsexual is protected from sex discrimination and sexual harassment under Title VII.” The plaintiff ultimately lost, based on his failure to establish the elements needed for a hostile work environment claim.

Ranch Mart and Broadus presented the first opportunities for courts to utilize the Supreme Court’s decision in Price Waterhouse to evaluate a Title VII claim by a transgender plaintiff. Both decisions, however, failed to do so. Thus, all of the Title VII transgender jurisprudence interprets “sex” in a much narrower fashion than the Supreme Court did in Price Waterhouse.


92. The plaintiff referred to himself with a male pronoun, so I use the same pronouns here. Id. at *1 n.1.
93. Id. at *1.
94. Id. at *4.
95. Id.
96. Id. at *5-6.
97. Recall the numerous opportunities that the Holloway line of cases had in applying Manhart and Sprogis precedent.
B. Make Room For Schwenk

The Ninth Circuit recently questioned that approach, however, in a case brought by a male-to-female transgender prisoner. Crystal Schwenk brought suit against a Washington state prison guard, Robert Mitchell, who allegedly attempted to rape her.\(^9\) She filed under 42 U.S.C. § 1983,\(^{100}\) for a violation of her Eighth Amendment rights,\(^{101}\) and the Gender Motivated Violence Act (GMVA).\(^{102}\) To determine the meaning of “gender” as it is used in the GMVA, the court analogized to Title VII. It noted that “federal courts (including this one) initially adopted the approach that sex is distinct from gender, and, as a result, held that Title VII barred discrimination based on the former but not on the latter.”\(^{103}\) The court then clarified how courts have defined the two terms. “‘[S]ex’ in Title VII refers to an individual’s distinguishing biological or anatomical characteristics, whereas the term ‘gender’ refers to an individual’s sexual identity, or socially-constructed characteristics.”\(^{104}\) Recognizing the dichotomy and its consequences for transgenders, the court summarized the results in the Holloway line of cases. “Male-to-female transsexuals, as anatomical males whose outward behavior and inward identity did not meet social definitions of masculinity, were denied the protection of Title VII by these courts because they were the victims of gender, rather than sex, discrimination.”\(^{105}\)

Then, the court succinctly formulated what the Ranch Mart and Broadus courts failed to realize. “The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse.”\(^{106}\) The court recalled Price Waterhouse’s finding that Hopkins was discriminated against because “she failed to ‘act like a woman’—that is, to conform to socially-constructed gender expectations.”\(^{107}\) The court then encapsulated the overall meaning of Price Waterhouse:

What matters, for purposes of . . . the Price Waterhouse analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here [in Schwenk], for example, the perpetrator’s actions stem from

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\(^{9}\) Schwenk v. Hartford, 204 F.3d 1187, 1192 (9th Cir. 2000).
\(^{101}\) U.S. CONST. amend. VIII.
\(^{103}\) Schwenk, 204 F.3d at 1201 (citing Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977)).
\(^{105}\) Id. (footnote omitted).
\(^{106}\) Id. at 1201-02 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989)).
the fact that he believed that the victim was a man who “failed to act like” one. Thus, under Price Waterhouse, “sex” under Title VII encompasses both sex—that is, the biological differences between men and women—and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.108

The court then stated that the GMVA paralleled Title VII in that “both statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms ‘sex’ and ‘gender’ have become interchangeable.”109 The Ninth Circuit’s decision in Schwenk provides an example, albeit by analogy, of how a transgender’s Title VII claim should be analyzed. The court pointed to testimony that Mitchell knew Schwenk was a pre-operative transsexual and that Mitchell’s demands for sex began only after he discovered this.110 The court also noted that Schwenk testified that her appearance and mannerisms were very feminine, that Mitchell was aware of these characteristics, and that he offered to bring her makeup and other “girl stuff” in order to enhance the femininity of her appearance.111 The court concluded that “the evidence offered by Schwenk tends to show that Mitchell’s actions were motivated, at least in part, by Schwenk’s gender—in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor.”112

In short, the Schwenk court did everything right.113 It followed Supreme Court precedent, did not conflate sex with gender, avoided the trap of focusing on the plaintiff’s status as a transsexual instead of the defendant’s view of plaintiff’s gender, and used clear evidence of

108. Schwenk, 204 F.3d at 1202 (emphasis in original).
109. Id. Compare Justice Scalia’s criticism of such interchangeability in J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127 (1994): “Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution’s peremptories). The case involves, therefore, sex discrimination plain and simple.” Id. at 157 n.1 (Scalia, J., dissenting).
110. Schwenk, 204 F.3d at 1202.
111. Id.
112. Id.
113. One other recent case used analogies to Title VII case law to protect transgenders from discrimination. See Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (reversing the district court’s grant of a motion to dismiss a suit brought by a biological male wearing a female dress whose loan application was rejected. The plaintiff alleged discrimination under the Equal Credit Opportunity Act, and the court found a cognizable claim that could withstand a motion to dismiss. “It is reasonable to infer that Brunelle told Rosa to go home and change because she thought that Rosa’s attire did not accord with his male gender . . .”); cf. Broadus v. State Farm Ins. Co., 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000) (“It is unclear, however, whether a transsexual is protected from sex discrimination and sexual harassment under Title VII. In Price Waterhouse, the plaintiff was not a transsexual.”).
defendant’s motivation to determine that gender was a factor in defendant’s actions. If this type of analysis had been done in the Holloway line of cases, it is fair to say that most, if not all, of those plaintiffs’ claims would have succeeded. If this were the manner in which all federal courts examined transgenders’ Title VII claims, then transgenders with legitimate evidence that could establish liability under § 703(m) of Title VII (i.e., evidence that the employer used gender in making the contested employment decision) would almost certainly prevail. Under such an ideal model, attempts to modify existing statutes, like the California legislature’s attempt with A.B. 2142, would be unnecessary.

This is too rosy of a picture, of course, for if Manhart and Sprogis can be overlooked, so too can Schwenk. Additionally, all of the decision’s commentary regarding Title VII and its applicability to transgenders is dicta. The Schwenk decision, however, is a budding flower in the field of weeds that constitutes Title VII transgender case law. By applying the GMVA to a transgender plaintiff and simultaneously forming a successful analytical map for a future transgender plaintiff’s Title VII claim, the decision is an example of the triumph of legal principles espoused in Sprogis over Holloway’s strict constructionism. In the words of the unanimous Oncale decision declaring same-sex sexual harassment a Title VII violation, “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” The Schwenk decision, with its map for changes in Title VII transgender jurisprudence, is a fine example of this.

III.
THE TREATMENT OF TRANSGENDERS IN STATE ANTI-DISCRIMINATION CASELAW

Not surprisingly, many state decisions in cases involving transgender plaintiffs adopt Holloway’s reasoning. A few, on the other hand, reject this approach and treat the statute being applied as broadly as possible, usually

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114. The same can be said for gender non-conformists, who would probably be successful by simply using Price Waterhouse. Accord Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[J]ust as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”). Also, under a theory that homosexuality is gender non-conformity in and of itself, homosexual plaintiffs might also prevail more frequently, but that is another article entirely. But see Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000) (“[W]e have no basis in the record to surmise that Simonton behaved in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.”).

by interpreting the legislative history of the statute more liberally than have federal courts interpreting Title VII.

A. State Cases Refusing To Extend Protection To Transgenders

Andria Adams Dobre, a male-to-female Amtrak employee, filed a lawsuit under Title VII and the Pennsylvania Human Rights Act (PHRA),\(^\text{116}\) claiming that Amtrak had discriminated against her once she began receiving hormone injections.\(^\text{117}\) Specifically, she was: (1) told that a doctor’s note was required in order to dress as a female; (2) required to dress as a male; and (3) not permitted to use the women’s restroom.\(^\text{118}\) Moreover, Dobre’s supervisors referred to her by her male name and moved her desk out of public view.\(^\text{119}\)

To interpret “sex” under the PHRA, the Dobre court deferred to the findings in Wood v. C.G. Studios, Inc.\(^\text{120}\) There, a hermaphrodite sued her employer under the PHRA’s “sex” discrimination provision after the employer fired her upon learning of her gender-corrective surgery.\(^\text{121}\) Attempting to define “sex” under the PHRA,\(^\text{122}\) the court looked at the time frame in which the PHRA was amended to include “sex” and determined that it was added because of Pennsylvania’s adoption of the Equal Rights Amendment (ERA).\(^\text{123}\) Since the ERA’s clear purpose was to achieve equality between the sexes, the court reasoned that in the employment context, prohibiting “sex” discrimination meant providing women with the same opportunities as men.\(^\text{124}\) The court substantiated its reasoning by noting that PHRA case law had evaluated “sex” discrimination as discrimination against women because of their status as females, including cases involving stereotypic concepts about a woman’s ability to perform a job or conditions common to women alone.\(^\text{125}\)

Taken together, the court decided there was “no showing that the Act was intended to remedy discrimination against individuals because they have undergone gender-corrective surgery.”\(^\text{126}\) “In the absence of such a

\(^\text{116}\) 43 PA. CONS. STAT. ANN. § 955(a) (2000).
\(^\text{118}\) Id.
\(^\text{119}\) Id.
\(^\text{121}\) Id. at 176.
\(^\text{122}\) The federal court noted that “[n]o Pennsylvania court has addressed the issue of whether discrimination against a person who has undergone gender-corrective surgery could expose an employer to liability for sex discrimination under the PHRA,” so the court had to interpret the statute. Id. at 177.
\(^\text{123}\) Id..
\(^\text{124}\) Id.
\(^\text{125}\) Id.
\(^\text{126}\) Id.
showing,” stated the judge, “I cannot conclude that the Supreme Court of Pennsylvania would give the term ‘sex’ as used in the Act anything but its plain meaning.”127 The court defined the plain meaning of “sex” as encompassing discrimination against women because of their status as females and discrimination against males because of their status as males.128 The court also was persuaded by cases excluding transsexuals from Title VII coverage, and in light of the similar language in Title VII and the PHRA, reiterated its conclusion that the plaintiff would not be covered under the PHRA.129

The Dobre court followed Wood and determined that Dobre could not make a claim of discrimination based on transsexualism and that her claim of discrimination based on sex failed.130 “[T]he acts of discrimination alleged by the plaintiff were not due to stereotyped concepts about a woman’s ability to perform a job nor were they due to a condition common to women alone. If the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become a female.”131 This analysis and conclusion parallels the flawed logic of Holloway.132

In Underwood v. Archer Management Services,133 a male-to-female plaintiff sued her employer under the District of Columbia Human Rights Act (DCHRA) after the employer eliminated her position.134 The court looked to an administrative rule that defined “sex” in the DCHRA as “the state of being male or female and conditions associated therewith. It includes the state of being a member of a sub-group of one sex, such as a pregnant female.”135 Applying that definition, the court concluded that

Ms. Underwood fails to allege any discrimination on the basis of her being a woman, in that she merely indicates that she was discriminated against because of her status as a transsexual—that she transformed herself into a woman—but alleges no facts regarding discrimination because she is a woman.”136

The court also recognized that courts had ruled that Title VII did not protect transsexuals and that Title VII case law is persuasive authority for interpreting the DCHRA.137 The court denied defendant’s motion to

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127. Id.
128. Id.
129. Id. at 177-178.
131. Id. at 287.
132. See supra note 31 and accompanying text.
134. Id. at 97.
135. Id. at 98 (citing D.C. MUN. REGS. tit. 4, § 599)
136. Id.
137. Id.
dismiss plaintiff's claim of discrimination based on personal appearance, however.\textsuperscript{138}

A Connecticut court deferred to federal precedent as well in dismissing a male-to-female transsexual's claim of sex discrimination under Connecticut's Fair Employment Practice Act.\textsuperscript{139} "Given the weight of outside authority holding that Title VII and similar state statutes do not prohibit discrimination against transsexuals and the absence of any Connecticut legislative intent to cover discrimination against transsexuals, it is the court's opinion that General Statutes 46a-60(a)(8) does not prohibit discrimination against transsexuals."\textsuperscript{140}

\textbf{B. State Cases Extending Protection To Transgenders}

A few cases have upheld or refused to dismiss claims brought by transgender plaintiffs under state anti-discrimination laws. In \textit{Maffei v. Kolaeton Industry, Inc.},\textsuperscript{141} a female-to-male transsexual sued her employer under Title VII, New York's comparable statute, and New York City's comparable ordinance.\textsuperscript{142} He claimed that, once he completed his transformation operation, the president of the company harassed him to the point of creating a hostile working environment for him.\textsuperscript{143}

The court reviewed the federal case law, including the \textit{Holloway} line, and found it to be "unduly restrictive" and inappropriate for guidance in interpreting the city statute.\textsuperscript{144} After dismissing further federal case law on this topic,\textsuperscript{145} the court turned to the city statute:

Our New York City law is intended to bar all forms of discrimination in the workplace and to be broadly applied. Accordingly, I find that the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status creates discrimination based on "sex", just as would comments based on the secondary sexual characteristics of a person.\textsuperscript{146}

Defendant's motion to dismiss was denied.\textsuperscript{147}

Following in \textit{Maffei}'s footsteps, a male-to-female transsexual filed suit

\begin{itemize}
  \item \textsuperscript{138} Id. at 98-99.
  \item \textsuperscript{140} Id. at *19.
  \item \textsuperscript{141} 626 N.Y.S.2d 391 (Sup. Ct. 1995).
  \item \textsuperscript{142} Id. at 392. The court noted that the city ordinance included "gender" and "sexual orientation," unlike its state and federal counterparts. \textit{Id.}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} Id. at 394-95.
  \item \textsuperscript{145} Id. at 395-96 ("Because Congress may have chosen not to include the term 'sexual orientation' in Title VII does not mean that it has considered and declined coverage to transsexuals.").
  \item \textsuperscript{146} Id. at 396.
  \item \textsuperscript{147} \textit{Id.}
\end{itemize}
under New York’s statute and New York City’s ordinance after she was terminated by her employer and was not reimbursed for medical expenses related to her transformation operation.\textsuperscript{148} The court rejected defendant’s motion to dismiss after noting that the plaintiff’s complaint evidently tracked the language in \textit{Maffei}, concluding that harassment because of a sex change was discrimination based on sex.\textsuperscript{149} “Any ambiguity as to the plaintiff’s protected status is therefore merely reflective of the present state of the law, and the complaint clearly alleges membership in what at least one court has found to be a protected class under city and state law.”\textsuperscript{150}

This last comment by the court is perhaps the best part of the opinion, for it clarifies an ambiguity in the \textit{Maffei} opinion. In \textit{Maffei}, the court explicitly stated that plaintiff had a claim under the \textit{city} statute’s category of “sex”, but did not decide whether the \textit{state}’s category of “sex” could also be a legitimate basis for plaintiff’s claim. The \textit{Rentos} decision confirmed the applicability of the state law. The \textit{Rentos} court cited \textit{Maffei}'s allusions to the more expansive application of the state law, as compared with Title VII, as evidence of an equivalent conclusion that the state law similarly outlaws discrimination against transsexuals as a form of unlawful “sex” discrimination.\textsuperscript{151}

These state employment anti-discrimination statute cases demonstrate the ease with which the Holloway method of analyzing transgender claims perpetuated itself in successive transgender cases. These cases also show how “sex” has not been defined in state anti-discrimination statutes, assuring that the term and its meaning would be subject to judicial interpretation. Like the Title VII cases described in Part I, these cases reflect how courts have interpreted the term narrowly. The last two cases, however, are reminders that there are still at least a few judges who can use sound logic in contexts such as these, and not confuse transsexualism with sexual orientation and/or gender and/or sex.\textsuperscript{152} Like \textit{Schwenk}, they provide hope that transgender employment discrimination caselaw may soon change course for the better.

Until courts begin to interpret statutes more favorably, transgenders must rely on statutes and ordinances that explicitly protect them. In the next section, I examine some trends in the legislative line of attack on transgender employment discrimination, and look at some of the arguments regarding the drafting and word choice for this type of legislation.


\textsuperscript{149} \textit{Id.} at *25-*26 (quoting \textit{Maffei} v. Kolaeton Indus., Inc., 626 N.Y.S. 2d 391 (Sup. Ct. 1995)).

\textsuperscript{150} \textit{Id.} at *26

\textsuperscript{151} \textit{Id.} at *26 n.3.

\textsuperscript{152} Although the \textit{Maffei} court does slightly conflate gender identity with sex ("as a result of an operation an employee changed his or her sexual status"). \textit{Maffei}, 626 N.Y.S.2d at 396.
IV. STATE STATUTES AND LOCAL ORDINANCES

In 1975, the first statute prohibiting discrimination against transgender people was passed in Minneapolis, Minnesota. By 1990, only three additional cities had passed similar ordinances. By the beginning of 2001, however, the number of local ordinances had increased over sevenfold. In August 2000, Portland, Oregon became the 33rd locality to enact a transgender-protective law.

In 1993, Minnesota became the first state to enact an anti-discrimination law that includes express protections for transgenders in employment, housing, education, and public accommodations, as well as enhanced penalties for hate crimes committed against transgenders. In 1999, the governor of Iowa became the first to issue an executive order prohibiting discrimination against state employees based on gender identity. In 2000, bills that would create statewide non-discrimination law for transgenders were introduced in the legislatures of at least seven states. By March 2000, over 9.5 million people, or 3.8% of the nation’s population, lived in jurisdictions with some kind of transgender-inclusive law.

In 1975, the city of Minneapolis amended the definition of “affectional preference” in its local non-discrimination law to include the phrase “having or projecting a self-image not associated with one’s biological maleness or one’s biological femaleness.” St. Paul later adopted similar language for its local law, as did Minnesota’s legislature a few years later. But of course, not all transgender-inclusive ordinances are created equal. Much depends on the type of language used in the ordinance, as that language will be scrutinized by politicians and legislators, and will be interpreted by judges for years to come. Thus, one of the most important

153. See CURRAH & MINTER, supra note 5, at 15.
154. See id. (Harrisburg, Pennsylvania; Seattle, Washington; and St. Paul, Minnesota).
155. See id.; see also Human Rights Campaign, Jurisdictions that Prohibit Employment Discrimination Based on Gender Identity, at http://www.hrc.org/worknet/asp_search/results_covered.asp?W=2 (providing a fairly updated list of ordinances protecting transgenders). The list includes ordinances passed after TRANSGENDER EQUALITY was published.
157. CURRAH & MINTER, supra note 5, at 15.
159. CURRAH & MINTER, supra note 5, at 15 (California, Georgia, Illinois, Iowa, Michigan, Missouri, and Vermont).
160. Id. at 16.
161. Id. at 19.
162. Id.
aspects of a good ordinance or statute is the resilience of its language, especially the language used to describe transgenders.

Some ordinances are amended to include the transgender community under an already existing category, while others create an entirely new category. Still others might do both, just to be sure that transgenders will be protected. Of the 33 localities with transgender inclusive non-discrimination laws, 15 of them have amended the current law to include transgender people under an existing category and 18 have created an entirely new category. Among the latter group, there is variation as to what to call that new category. Some have labeled it “gender identity”, while others have said “transgender”, and others have said “transgender and transsexual.” Whatever the category is called, it’s usually defined in a separate section of the ordinance.

California’s A.B. 2142 would have added transgender protections to the existing category of “sex” in California’s Fair Employment and Housing Act (FEHA). Six localities have amended their laws to include transgenders under the term “sex.”

There is considerable debate about amending the term “sex” to provide protection for transgender people. On the one hand, it may be more politically feasible to pass a law that amends an existing category and does not add another category to an already long list. On the other hand, amending an existing category to include a new subgroup within that category counters the efforts of those who are trying, sometimes successfully and sometimes not so successfully, to convince the courts that the subgroup was already contained within the category and should thus be protected under existing laws.

The strategy of adding a new category altogether is also not without its detractors. Many consider this strategy less politically feasible than altering an already existing category, whether through judicial decision-making or by legislative amendment. These critics are often followers of the incremental approach to lawmaking—willing to take small steps in the hopes of achieving their ultimate legislative goal, which would have been one large step. The non-incrementalists prefer to lobby for the passage of a comprehensive law, and only that law, until it is actually passed. They are

163. For a list of statutes and ordinances and their citations, see CURRAH & MINTER, supra note 5, at 42-50. Since the publication of TRANSGENDER EQUALITY, at least 5 localities have passed statutes or ordinances protecting transgenders. These localities include Decatur, Georgia; DeKalb, Illinois; Portland, Oregon; Multnomah County, Oregon; and Madison, Wisconsin. See Human Rights Campaign, Jurisdictions that Prohibit Employment Discrimination Based on Gender Identity, at http://www.hrc.org/worknet/asp_search/results_covered.asp?W=2.

164. See CURRAH & MINTER, supra note 5, at 42; Human Rights Campaign, Jurisdictions that Prohibit Employment Discrimination Based on Gender Identity, http://www.hrc.org/worknet/asp_search/results_covered.asp?W=2 (Harrisburg, Pennsylvania; Cambridge, Massachusetts; City of Santa Cruz, California; County of Santa Cruz, California; Pittsburgh, Pennsylvania; and De Kalb, Illinois).
often unwilling to compromise on the contours of the law they want passed, for the principle of equality and non-discrimination behind the law is so strong and fundamental that they refuse to accede to any retreat from the law's goal.

Given the diversity of language used in statutes and ordinances to include transgenders as a group protected from employment discrimination, it would be instructive to explore an example of such a statute, or an attempt to enact one. In the next part, I describe California Assembly Bill 2142 (A.B. 2142) and the arguments advanced for and against it. The attention to detail serves not only to illustrate the political arguments surrounding transgender protection in employment discrimination law, but also introduces various issues concerning the legal manipulation of statutory language, which are discussed in Part VI, below.

V. CALIFORNIA ASSEMBLY BILL 2142: A CASE STUDY

California Assembly Member Fred Keeley introduced A.B. 2142 on February 23, 2000.165 The bill attempted to amend California Government Code section 12926, part of FEHA.166 Specifically, Assembly Member Keeley sought to amend the definition of the term “sex” in that section of the Code167 to include “gender” as a prohibited basis of discrimination. The bill defined “gender” to mean “a person’s actual sex or the perception of a person’s identity, appearance, or behavior, regardless of whether different from that traditionally associated with the person’s sex at birth.”168

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166. CAL. GOV’T CODE § 12926 (West 2001). California’s Fair Employment and Housing Act (FEHA) is officially codified beginning at CAL. GOV’T CODE § 12900 et seq. (West 2001). FEHA makes illegal employment and housing discrimination based upon race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, sexual orientation or age.


168. A.B. 2142, as amended, Legislative Counsel’s Digest, 1999-2000 Reg. Sess. (Cal. 2000), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2101-2150/ab_2142_bill_20000404_amended_asm.html. The definition of “gender” was taken from a section of California’s hate crimes law, codified at CAL. PENAL CODE § 422.76 (West 2001), and introduced as legislation only a year earlier. Section 422.76 states that “gender” means the victim’s actual sex or the defendant’s perception of the victim’s sex, and includes the defendant’s perception of the victim’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally
The bill passed through the Assembly’s Labor and Employment Committee on a vote of six to three\(^{169}\) and the Appropriations Committee on a vote of fourteen to seven\(^{170}\). The bill passed on the Assembly floor forty-one to thirty\(^{171}\) and then moved to the Senate’s Judiciary Committee. There, the bill lost steam. Although the vote was four to three to move it out of committee, a majority of the Committee—five of nine—was needed to do so.\(^{172}\) Two Senators, both Democrats, either abstained or were absent from the vote.\(^{173}\) Although the Committee voted eight to none to reconsider the bill at a later hearing,\(^{174}\) that hearing was never held, and the legislative session ended soon thereafter.\(^{175}\)

Despite the bill’s failure to get out of committee, some of its supporters were still optimistic. Boyce Hinman of the Lambda Letters Project\(^{176}\) commented on the swift progress the bill made,\(^{177}\) especially in comparison

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\(^{173}\) Id.


\(^{175}\) See Greg Lucas & Lynda Gledhill, Davis, Legislators Reach Deal on Race-Profiling Measure, S.F. CHRON., Sept. 1, 2000, at A1. The Committee voted on Aug. 8 to reconsider and the legislative session ended Aug. 31.


to other queer-related bills. "A total of 46 state legislators voted for the bill. The bill also drew support from over 26 religious bodies, labor unions, and lobbying organizations representing people of color. It took almost 18 years to pass A.B. 1001, the bill that bans sexual orientation discrimination in California."\(^{178}\)

A.B. 2142 did have support from a number of national, state, and local organizations, including the A.C.L.U., the California State Employees Association, the Mexican American Legal Defense and Educational Fund, and the National Organization for Women.\(^{179}\) The number of organizations actively opposing the bill was quite small.\(^{180}\) Despite this favorable ratio, the bill did not pass.

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A. Why The Bill Was Introduced In The First Place

Many proponents of A.B. 2142 viewed the bill as a "no-brainer." Recent California and federal case law,\(^{181}\) it was argued, recognized that gender discrimination is unlawful. Assembly Member Keeley argued that the legislature would simply follow the logic of those decisions and explicitly codify their conclusion that gender discrimination is illegal.\(^{182}\)

\(^{178}\) Katie Szymanski, Lesbian Kills TG Bill; Handful of Gay Bills Pass CA Legislature, BAY AREA REPORTER, Sept. 7, 2000, at 5.

\(^{179}\) Senate Judiciary Committee, Bill Analysis—A.B. 2142, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2101-2150/ab_2142_cfa_20000816_121143_sen_comm.html at p. 9. The supporters were: American Association of University Women, California chapter; American Civil Liberties Union; American Federation of State, County, and Municipal Employees; California Alliance for Pride and Equality; California Child, Youth & Family Coalition; California Labor Federation, A.F.L.-C.I.O.; California School Employees Association; California State Employees Association; California Teachers Association; Central United Methodist Church; California Women Lawyers; Chalice Unitarian Universalist Congregation; City of Los Angeles; Equal Rights Advocates; Friends Committee on Legislation of California; Japanese American Citizens League (Northern California-Western Nevada-Pacific District); L.A. Gay & Lesbian Center; Mexican American Legal Defense and Educational Fund; Northern California Nevada Conference of the United Church of Christ; Planned Parenthood Affiliates of California; Professional Engineers in California Government; The Lambda Letters Project; San Francisco Women Lawyers' Alliance; Trinity Cathedral Church; Ventura County Parents, Families and Friends of Lesbians and Gays; National Organization for Women; and "Individuals."

\(^{180}\) Id. The opposers were: California Employment Law Council; California Manufacturers and Technology Association; Committee on Moral Concerns; Traditional Values Coalition; Campaign for California Families; Good News Fellowship; and Fremont Evangelical Free Church.

\(^{181}\) See discussion supra Sections II and III. Although there are no California cases interpreting the F.E.H.A.'s definition of "sex" with respect to transgenders, California courts generally interpret the F.E.H.A. the same way federal courts interpret Title VII. See, e.g., Janken v. GM Hughes Electronics, 46 Cal. App. 4th 55 (2d. App. Dist. 1996). Additionally, California courts that have interpreted F.E.H.A. have recognized that "sex" discrimination for purposes of the Act includes "gender" based discrimination. See Vibeke Cloud v. Casey, 76 Cal. App. 4th 895 (1999) ("[G]ender discrimination in employment is unlawful and actionable."). See also Schmoll v. Chapman Univ., 70 Cal. App. 4th 1434 (Ct. App. 1999); Thomas v. Dep't of Corr. 77 Cal. App. 4th 507 (Ct. App. 2000), which contain judicial discussions of sex and gender discrimination, using the terms synonymously.

\(^{182}\) Senate Judiciary Committee Bill Analysis, supra note 179, at 3. Presumably, Assembly Member Keeley realized that although judicial decisions recognizing gender discrimination can serve as
Assembly Member Keeley also stated that another salutary purpose of A.B. 2142 was to make the F.E.H.A. consistent with related provisions in the California codes. Additionally, Keeley framed his bill using broad, principled language that suggested the bill would benefit all Californians:

Gender stereotypes are harmful to all people. They stifle individual initiative, destroy careers, and prevent men and women from living up to their full potential. As a society, our toleration of those stereotypes sends a particularly destructive message to young people, who learn to devalue and even to punish those whose appearance or characteristics are seen as “different” from stereotypical gender norms in some way. Sadly, in fact, almost every family includes some family members who have been hurt or suffered discrimination because of gender stereotypes—whether it is a brother or son who has been ridiculed as a “sissy,” a sister or mother who has been discouraged or perhaps even prevented from pursuing a traditionally “masculine” career, or a daughter or granddaughter who has been denied housing or harassed on the job because of stereotypical beliefs about women.

The bill’s supporters followed in lockstep. California’s chapter of N.O.W. stated:

A.B. 2142 would prohibit discrimination based on gender characteristics that have no relevance to the person’s qualifications as an employee or tenant. For example, this bill would protect women who are perceived to be “too masculine” because they act aggressively, don’t wear makeup, or have a muscular build or a deep voice. It would also apply to men who are perceived as feminine because of a soft voice or slight stature. A.B. 2142

persuasive, and perhaps controlling precedent for a case, a statute explicitly prohibiting such discrimination would be much more authoritative and helpful to a claimant. See supra notes 66-72 and accompanying text for an example of courts not adhering to precedent; but see infra note 146 and accompanying text for an example of a court noting the statutory intention.

183. Senate Judiciary Committee Bill Analysis, supra note 179, at 3. Along with the addition of the gender definition in the hate crimes statute of California’s penal code, the sexual harassment provisions in California’s Civil Code § 51.9 was updated only a year ago to include liability for conduct of a hostile nature based on gender. These two changes were “prior related legislation” to A.B. 2142. Furthermore, in 1993, CAL. GOV’T CODE § 12940(h)(3)(C) (West 2001) was amended to clarify that “harassment because of sex” under FEHA includes, but is not limited to, sexual harassment, gender harassment, and harassment on the basis of pregnancy. The amendment also expressed the California Legislature’s findings that the legal prohibitions against harassment because of sex have always included sexual harassment, gender harassment, and pregnancy harassment, and that explicitly listing sexual harassment, gender harassment, and pregnancy harassment in the FEHA will more clearly identify them, for purposes of education and training, as harassment because of sex. A.B. 675, 1993 Stats. Ch. 711 § 2 (codified at CAL. GOV’T CODE § 12940(h)(3)(C) (1993)).

184. Senate Judiciary Committee Bill Analysis, supra note 179, at 3. I have included many of these block-quoted excerpts to show some of the political arguments made on both sides of this issue. Rather than discuss these arguments in the body of the Comment, I thought it best to present them in the context of what would have been legislative history. Also, for an in-depth discussion of the political arguments on this issue, see CURRAH & MINTER, supra note 5.

185. Further information about the California chapter of the National Organization of Women can be found at http://www.canow.org/.
would help to ensure equal opportunities for all Californians by protecting against discrimination based on gender stereotyping.\textsuperscript{186}

The Trinity Cathedral Church\textsuperscript{187} added, "Given the types of discrimination that take place against males and females who don't fit usual stereotypes, [the] bill is timely. The Episcopal Church is on record as supporting such legislation precisely because it protects the dignity of every human being."\textsuperscript{188}

The California State Employees Association,\textsuperscript{189} however, did not use such a broad brush to describe who would be affected by this bill. Notably, it seemed to single out the transgender community as the bill's beneficiary, saying:

This measure would simply clarify the definition of "gender" for purposes of the California Fair Employment and Housing Act to be the person's actual sex or the perception of a person's identity. No one should have to suffer discrimination at the workplace or in housing. This bill would allow a relatively small group of people one recognized legal protection, at no cost to the state\textsuperscript{190} or the private sector and with no moral judgement.\textsuperscript{191}

In contrast to the few allusions the bill's supporters made to the bill's effect on the transgender community, the opposition focused almost completely on this issue. The Committee on Moral Concerns\textsuperscript{192} stated:

Existing law already covers sexual orientation. This bill would give cross-dressers, transsexuals, opposite sex impersonators, and comedians special protection. Everyone is entitled to equal protection under the law. However, persons with gender identity difficulties should not be entitled to more than equal protection.

[M]isunderstanding something as basic as one's own gender is as serious a mistake as a person could make. Giving extra legal protection to gender-confused individuals is dangerous and unwise. A person with a chromosome defect that may cause biological gender-related malformation

\begin{footnotes}
\item[186] Senate Judiciary Committee Bill Analysis, \textit{supra} note 179, at 4.
\item[187] Further information about the Trinity Cathedral Church can be found at http://www.trinitycathedral.org/.
\item[188] Senate Judiciary Committee Bill Analysis, \textit{supra} note 179, at 4.
\item[189] Further information about the California State Employees Association can be found at http://www.calcsea.org.
\item[190] Indeed, according to the Assembly Appropriations Committee's analysis, the only fiscal effect of the bill was a minor, absorbable enforcement cost to the Department of Fair Employment and Housing. Assembly Committee on Appropriations, \textit{A.B. 2142 Bill Analysis}, page 1, http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2101-2150/ab_2142_cfa_20000502_111658_asm_comm.html.
\item[191] Senate Judiciary Committee Bill Analysis, \textit{supra} note 179, at 3.
\item[192] Further information about the Committee on Moral Concerns can be found at http://www.moralconcerns.org/. Their mission statement is "...to follow the Biblical command to love our neighbor by minimizing human suffering through promotion of social welfare, fighting crime and juvenile delinquency, maintaining and improving both the moral standards and the quality of life in California."
\end{footnotes}
is covered under the existing legal category of disability. Gender mis-
identity, as addressed by this bill, is a serious mental confusion. These poor 
souls need help, not legal affirmation.193

The Traditional Values Coalition194 was concerned that the bill would 
"prohibit businesses from applying dress codes concerning cross-dressing," and that, "the bill would result in compromising an uncomfortable and 
hostile environment situation primarily for women, [because] all employees 
would be forced to share their women's bathroom with men dressed like 
women."195 The Coalition also commented that "A.B. 2142 is designed to 
include transgendered, transvestite, cross-dressers, drag queens, she-males, 
etc."196 Taking a different tack, the California Manufacturers and 
Technology Association197 opposed the bill based upon their concern that, 
"A.B. 2142 ... would make almost any comment, look, or action between 
workers a potentially prohibited act under the Government Code."198

The Senate Committee's analysis addressed the oppositions' concerns. Answering the opposition's contention that the bill would allow an 
employee to file a claim for any behavior by a fellow employee that they 
believe offended them, the Committee's analysis pointed to the traditionally 
high standard for a harassment suit under the F.E.H.A.199 The Committee 
cited the standard articulated in Meritor Savings Bank v. Vinson200 and 
reiterated in Oncale v. Sundowner Offshore Services201 of behavior that is 
"so objectively offensive as to alter the 'conditions' of the victim's 
employment."202 Based on such a standard, the Committee reasoned that it 
would not be "difficult for courts and juries to ferret out the legitimate 
claims of victims of gender-based discrimination from 'cross-dressers, 
opposite sex impersonators, or comedians,' (as one opponent put it) seeking 
protections beyond those afforded coworkers."203

193. Assembly Committee on Labor and Employment, A.B. 2142 Bill Analysis, page 3, 
http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_2101-2150/ab_2142_cfa_20000411_125338_asm_ 
comm.html.
194. Further information about the Traditional Values Coalition can be found at 
http://www.traditionalvalues.org/. The description of the organization on the website is "With an 
emphasis on the restoration of the values needed to maintain strong, unified families, Traditional Values 
Coalition focuses upon issues such as education, homosexual advocacy, family tax relief, pornography, 
the right to life and religious freedom."
195. Senate Judiciary Committee Bill Analysis, supra note 179, at 6.
196. Id. at 7.
197. Further information about the California Manufacturers and Technology Association can be 
found at http://www.camfg.com/.
198. Senate Judiciary Committee Bill Analysis, supra note 179, at 6.
199. Id.
202. Id. at 81.
203. Senate Judiciary Committee Bill Analysis, supra note 179, at 7.
Addressing the oppositions' concern regarding dress codes, the Committee stated:

This opposition seems overwrought. As the Oncale court suggests, employees may still be required to wear appropriate attire, e.g. business, professional, or dungaree, pursuant to the employer's dress code policy. However, this bill will protect persons who are in the process of changing their sexual identity, a.k.a. gender, along with men and women facing traditional sex discrimination and sexual harassment. The protection anticipated in A.B. 2142 is consistent with the purposes of the existing prohibition against discrimination on the basis of sex.\footnote{Id.}

The Committee's analysis neglected to address the oppositions' concern regarding bathrooms and the coverage of transsexuals under the category of disability.

Contrasting the supporters' positions and talking points with the opposition's illustrates the political maneuvering that typically occurs with bills that protect transgenders. The supporters avoided, it seems, explicitly mentioning the protections transgenders would have received under this bill. Instead, they referred in broad terms to the protection that everyone would be afforded under the bill. While this "Trojan Horse" strategy does seem appealing, it ultimately failed to mask the underlying purpose of the bill, as the opposition's focus on transgenders made obvious. The bill itself failed to mention transgenders, as did the supporting literature for the bill. The drafters of A.B. 2142 wanted to include transgenders under a broader community of people defined by "sex," instead of explicitly protecting the transgender community on its own. The opposition saw right through this veil, and the approach failed, at least this time around.

**VI. THEORY TROUBLE: SEX, GENDER, AND TRANSGENDER CATEGORIES**

By the time A.B. 2142 was introduced, numerous attempts had been made in the executive,\footnote{See Iowa Governor Vilsack's Exec. Order No. 7 (Sept. 14, 1999), http://www.state.ia.us/governor/legal/exec_order_seven_final.pdf.} judicial, and legislative branches of local, state, and federal government to obtain protection for transgenders under a sex discrimination rationale. The results of such attempts have been mixed, but the academic critique of the results has not. Almost all commentators have argued that transgenders should be protected under existing sex discrimination jurisprudence and theory.\footnote{See, e.g., Patricia A. Cain, *Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law*, 75 DENV. U. L. REV. 1321, 1356-1359 (1998); Hilary S. Axam & Deborah}
Many legal scholars have written about the relationship between gender and sex. Francisco Valdes argues that although sex and gender are conceptually distinct, neither can exist in culture or law without the other. Ultimately, then, discrimination based “solely” on gender must necessarily also be discrimination based on sex.\textsuperscript{207} Katherine Franke makes the more radical claim that gender determines sex, not the other way around. Her argument rests on the idea that only through a process of social construction do anatomic differences have meaning; in and of themselves, they are irrelevant.\textsuperscript{208} Mary Anne Case recognizes that gender and sex have distinct meanings, but illustrates the imperfect disaggregation in the law of gender from sex, and contends that this disaggregation can lead to acceptable discrimination against the stereotypically feminine.\textsuperscript{209} She also argues for a reconceptualization of existing law and statutory language that would provide protection against gender-based discrimination, particularly against effeminate men and feminine women.\textsuperscript{210} Richard Epstein offers a distinctly different view, objecting to using the term “gender” because it connotes greater fluidity than “sex,” which he believes to be fixed.\textsuperscript{211} He further argues that prohibiting discrimination based on “gender” would outlaw practices and policies that appropriately differentiate.\textsuperscript{212}

Generally, these scholars agree that gender and sex are intertwined, although they may disagree as to the exact specifications of the connections between the two concepts. These scholars also generally agree that Title VII’s protection against sex discrimination should include protection against gender discrimination, and these scholars focus on the conceptual underpinnings of and logic behind sex discrimination jurisprudence to illustrate how that logic can be extended to include gender. Although the scholars draw connections between gender and sex to argue that gender discrimination should already be protected under Title VII, a few also argue that there should be a concomitant analytical distinction between sex and gender. In other words, for the purposes of including protection against gender discrimination under Title VII, there should be an aggregation of sex and gender, but at the same time, there should be a disaggregation of sex and gender as distinct concepts and categories. There is an inherent tension in this framework, and this tension is further complicated when gender

\textsuperscript{208} See Valdes, \textit{supra} note 5.
\textsuperscript{209} See Franke, \textit{supra} note 6, at 32.
\textsuperscript{210} Case, \textit{supra} note 20, at 2-3.
\textsuperscript{211} See Case, \textit{supra} note 20, at 4.
identity is added to the mix.

Some of the academic literature tries to evaluate such a mix and comments on whether the transgender community should be protected under sex discrimination jurisprudence. Ulane gave scholars precisely such an opportunity for commentary and analysis. The Ulane court’s interpretation of Title VII was an example of the courts’ focus on biological (i.e., “sex”) differences as opposed to gender differences for transgenders, and gave some scholars an opportunity to argue that courts were reading the term “sex” too narrowly, excluding the social trappings of masculinity and femininity that constitute gender and affect transgenders. For example, Franke argues for “[a] more interesting and expansive reading of sex discrimination[ ] bias against the plaintiff because her gender (her inside core identity) did not match what others believed about her body (her outside or surface identity)—which is to say that a woman could have a biologically male body.”

Franke therefore believes that transgender plaintiffs like Ulane should be protected from discrimination under Title VII’s category of “sex”.

Franke also writes, “sexual equality jurisprudence has uncritically accepted the validity of biological sexual differences. By accepting these biological differences, equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology.” It is this normative gender ideology that transgenders consistently defy, because, by definition, they challenge gender norms by changing their gender. Given the acceptance in the jurisprudence of biological sexual differences and the courts’ focus on biological characteristics, not gender, for determining the existence of discrimination, it’s not surprising that courts reasoned that transgenders are not encompassed in Title VII’s protection against sex discrimination. Hopkins came along, however, and changed part of that by considering gender characteristics as a basis for discrimination. The problem remains, however, that no court besides Schwenk has applied Hopkins’ analysis to transgenders. Instead, courts continue to focus on biological difference, as Franke observes.

In contrast to Franke’s approach to transgender inclusion under Title VII’s construct of “sex,” sociologist Janice Raymond argues that transsexualism is itself trapped within the logic of gender, and constitutes an acquiescence to social stereotypes rather than a rejection of them. Taking her argument an extra step, one can argue that transgenders wanting protection under sex and gender discrimination law because of their

213. See Franke, supra note 6, at 35.
214. See id. at 2.
215. This is Professor Raymond’s terminology, not mine.
violation of gender stereotypes are hypocritical, for transgenders "acquiesce" to gender stereotypes in the formation of their "new" gender. That is, they use gender stereotypes to demonstrate to society that they have changed their gender. For transgenders to then claim protection under Title VII's "sex" category because they've suffered discrimination based on gender stereotypes would allow transgenders to have their cake and eat it too.

Therefore, while Franke presents a cogent rationale for including transgenders under current sex discrimination law, Raymond also sensibly theorizes the contradictions resulting from transgender inclusion under Title VII. Like the tension arising in academic discussions of gender, sex, and their intertwining, the desire to include transgenders under current law conflicts with the desire to recognize and regard transgenders as outside the current construction of sex and gender. Valdes hints at this new conception of transgenders in his plea for deconstruction of the conflation of sex, gender, and sexual orientation. But, he doesn't go far enough. I suggest that gender identity, which distinguishes transgenders from all other sexes, genders, and sexual minorities, is another construct whose conflation should be deconstructed. One need only look at the cases described above to see the ease with which courts have conflated the gender identity of the transgender plaintiffs with the plaintiffs' sex, gender, and sexual orientation.

In any event, my suggestion challenges Franke's desire to address the problem of discrimination against transgenders under the analytical framework of current sex discrimination jurisprudence. A paradox emerges between the goal of protecting transgenders as soon as possible under existing sex discrimination laws, whether by statutory redefinitions of "sex" or through judicial interpretation of existing law, while at the same time, not sacrificing the concept of gender identity, which necessarily separates transgenders from everyone else. While Franke advocates the aggregation of gender and gender identity with sex, Valdes urges the deconflation of these categories, and Raymond counsels against the utilization of gender and sex as protection for transgenders. Clearly, the academy has yet to reach consensus on how best to protect transgenders from discrimination.

A. Principles Of Anti-Discrimination Law Help To Fashion The Best Method For Protecting Transgenders

Given the cacophony of conflicting academic, political, and judicial voices urging different approaches to protecting transgenders, I add my own take on the problem with some trepidation, mindful that any practical

217. See generally Valdes, supra note 5.
proposal should be solidly grounded in a coherent theoretical framework. To that end, I now turn to some of the academic literature on antidiscrimination law in general, highlighting principles that support my conclusion that adding gender identity as a distinct category in discrimination law is the best way to protect transgenders.

Robert Post argues that what anti-discrimination law seeks to uncover is an apprehension of "individual merit" and actualization of the normative principle that "individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."\(^\text{218}\) At the same time, however, Post argues that Title VII should not be interpreted as obliterating gender conventions and stereotypes. He claims that it makes "far more sense to interpret the statute as seeking to alter the particular meaning of [gender] conventions as they are displayed in specific contexts . . . and to negotiate the ways in which it [the statute] will shape and alter existing gender norms."\(^\text{219}\) So, while adding "gender identity" to a statute would accord with Post's characterization of individual merit as a general anti-discrimination principle, it seems that he would draw the line at altering gender conventions and stereotypes, thus cautioning against the addition of "gender identity" as a category.

It is this altering of existing norms singled out by Post, and more specifically the effects of such alteration, that Linda Hamilton Krieger has addressed in some of her work. Krieger suggests that core normative principles underpinning any transformative law\(^\text{220}\) must be connected to key "legacy values" if the law is to succeed in changing social norms.\(^\text{221}\) In one example, Krieger notes that one legacy value reflected in a Santa Cruz ordinance prohibiting personal appearance discrimination was "You can't (and by implication, should not) judge a book by its cover."\(^\text{222}\) Adding "gender identity" to a statute to protect transgenders would also invoke this value of not judging a book by its cover. This value is connected to Post's construction of anti-discrimination law as evidencing the normative principle of an individual's "intrinsic worth."\(^\text{223}\) With these connections, adding "gender identity" to a statute would adhere to Krieger's suggested foundation for a transformative law that could change social norms.

Anti-discrimination law also is usually premised on some notion of


\(^{219}\) Id. at 20.


\(^{221}\) Id. at 502.

\(^{222}\) Id.

\(^{223}\) Post, supra note 218, at 10 ("[T]he Civil Rights Act of 1964, Congress intended to attack these stereotyped characterizations so that people would be judged by their intrinsic worth.").
equality or equity, generally conceived. This notion relates to Post’s intrinsic worth principle, as well as to the norm of “not judging a book by its cover.” Viewed through this lens, then, it seems clear that the central point of contention implicated in the dispute over extending legal protection against discrimination to transgenders is whether transgender status affects one’s intrinsic worth or merit. In other words, is transgender status “the book,” or is it “the cover?” Proponents of laws like A.B. 2142 must confront these issues head on, and convince key constituencies that transgender status does not degrade one’s individual worth or merit. But this is not what happened with A.B. 2142. One finds a glaring absence of any of these concerns in the bill’s legislative history. The opposition seized upon this absence of meaningful and principled discussion and filled the resulting void by arguing that the bill would make others feel uncomfortable in the workplace (because of the altering of existing gender norms, naturally), and that transgenders “should not be entitled to more than equal protection,” with nary a retort from the bill’s proponents.

In future attempts at protecting transgenders, these principles of anti-discrimination law should be advanced, especially in light of what was learned from the mistakes of A.B. 2142. As discussed in the next part, it would make sense to use these principles as substantive arguments for adding “gender identity” to the list of categories. In other words, protecting citizens who are judged unfairly and without consideration of individual merit is a central goal of anti-discrimination law. Adding transgenders to the list of those protected would further this goal.

VII. PRAXIS AND PRACTICALITY

While both Title VII and California’s FEHA include “sex” as a basis for unlawful discrimination, the courts have almost uniformly refused to interpret the term to include a prohibition of discrimination against transgenders. This has occurred despite the fact that the Supreme Court, in Price Waterhouse, clearly stated that Title VII prohibits the use of sex stereotypes in employment decisionmaking. Transgenders, by definition, challenge sex stereotypes (namely, the stereotype that if one has a vagina, one must present as a woman). Those stereotypes are almost always used in making adverse employment decisions in relation to transgenders. Yet federal and state courts have been almost universally unwilling to recognize this reality.

The problem of protecting transgenders from employment

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225. Supra note 193 and accompanying text.
discrimination is compounded by the courts’ conflation of gender and sex throughout transgender and gender non-conformity caselaw.\(^{226}\) Although it may be more simple and less politically volatile to amend employment discrimination laws to include “gender” versus “gender identity,”\(^{227}\) there is a legitimate concern that courts could then interpret “gender” to simply mean “sex,” as they have traditionally defined it.\(^{228}\) Such a turn of events would utterly frustrate the intention motivating the amendment. But considering *Holloway*, its predecessors, and its progeny, we can reasonably expect that courts would interpret any amendment using ambiguous language in precisely this way.

In other words, even if “gender” were added to an employment discrimination law, there is still a substantial probability that courts would simply exclude transgenders from the amended law’s protection. Akin to the logic in *Holloway*, where the court reasoned that plaintiff was discriminated against because of her transsexual status not her sex, it is not unreasonable to foresee a judicial decision, or even a trend, that dismisses a plaintiff’s claim of “gender” discrimination because the court believes that the employer fired plaintiff because of her transgender status, not her gender. For example, the *Hopkins* Court concluded that gender discrimination was exhibited against a plaintiff like Ann Hopkins based on her failure to act like a woman (since she was anatomically a female, and should thus act like a woman). If Ann Hopkins were a pre-operative male-to-female transgender, however, a court could say that she was fired simply for being transgender (anatomically a male, who should act like a man, but who has instead acted like a woman), not simply for failure to act like a man. The original Ann doesn’t live up to gender stereotypes, but the transgender Ann actively challenges gender stereotypes by acting like a woman. Thus, a court could rule that there is no gender discrimination where a man intentionally and affirmatively acts like a woman—a situation

\(^{226}\) See, e.g., *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) ("Because Congress intended that the term ‘sex’ in Title VII mean simply ‘man’ or ‘woman,’ there is no need to distinguish between the terms ‘sex’ and ‘gender’ in Title VII cases. Consequently, courts, speaking in the context of Title VII, have used the term ‘sex’ and ‘gender’ interchangeably to refer simply to the fact that an employee is male or female... While it may be useful to disaggregate the definition of ‘gender’ from ‘sex’ for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman."); see also *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-330 (9th Cir. 1979) ("Following *Holloway*, we conclude that Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") (footnotes omitted and emphasis added).

\(^{227}\) As A.B. 2142 tried to do, presumably to focus more on the bill’s effect on the broader community and decrease the attention paid to the bill’s effect on the transgender community.

\(^{228}\) See *Schwenk v. Hartford*, 294 F.3d 1187, 1202 (9th Cir. 2000) ("Indeed, for purposes of these two acts, the terms ‘sex’ and ‘gender’ have become interchangeable."); see also id. at 1205 ("[W]hat constitutes the requisite gender motivation and gender animus is... not so readily apparent from the language of the statute.").
distinct from a man who simply does not live up to gender stereotypes of how a man should act. There is a conceptual difference between discrimination based on transgender status and discrimination based on gender, and we cannot expect or rely on courts to ignore it.

Some commentators have argued that transgenders are already protected, or should be protected, by existing sex discrimination laws. On a theoretical level, I agree. On a practical level, however, I would argue that the Holloway line of cases demonstrates the sad reality that transgenders are not protected under current sex discrimination law. Furthermore, despite the recent Schenk decision and its possibilities for redirecting Title VII transgender jurisprudence, I am skeptical that such a redirection will occur. One need only witness the disregard of Manhart and Sprogis in the Holloway line of cases, as well as the distinguishing of Price Waterhouse in Broadus, to justify this skepticism. Additionally, I am skeptical of a movement toward a separate "gender" discrimination model, where "gender" as a category in discrimination law can provide the basis for protecting transgenders. I fear that it may suffer the same fate as the plaintiff in Holloway, who, in the court's view, was fired not because of her "sex," but because she was a transsexual.229

Given this skepticism, I urge that adding "gender identity,"230 or some similar transgender-identifying category, to employment discrimination statutes is the best strategy for successfully protecting transgenders in the written law, in practice, and in the courts. Although some may validly argue that it will be more politically difficult to explicitly add a clearly defined category rather than surreptitiously amending a well-accepted one, there is ample reason to believe that the legislation I propose can eventually become law.231 And political expediency does not always trump the overriding principle behind anti-discrimination law.

The strategy of explicitly adding "gender identity" to existing anti-
discrimination laws serves a dual purpose. Not only would the law explicitly protect transgenders, but it would also explicitly recognize the transgender community as a separate and identifiable class of people, not just a subset of the larger class of “gendered” people, i.e. every member of society. In other words, the addition of “gender” in employment discrimination law only modifies the current jurisprudence to recognize that every male and female (anatomical sex) has a set of corresponding stereotypes that accord with what it means to be a “man” or “woman,” respectively, and that the failure to act in accord with those stereotypes is not a legal grounds for adverse employment action. This does not recognize, however, those who are anatomically male or female and who actively and knowingly challenge those stereotypes by exhibiting the gendered stereotypes of their opposite anatomical sex. It is the difference between Ann Hopkins saying, “I am a woman who happens to not conform with certain stereotypes of what a woman should do, but I’m still a woman,” and a male-to-female pre-operative transsexual Ann Hopkins saying, “I am a woman who chooses to conform to certain stereotypes of what a woman should do, and that makes me a woman.” It therefore serves a greater purpose to add “gender identity” as a separate, distinct category than to sneak transgenders in under “gender.”

By treating transgenders as a distinct class of people, recognized by law, legitimacy is added to their collective and individual struggles to be accepted and treated fairly and equally in society. Classifying transgenders under a larger “gender” class permits the normative idea of gender to persist, where actions based on failure to conform to gender stereotypes are the only types of gender discrimination. A separate “gender identity” class, however, explicitly recognizes that there are those who actively challenge that normative idea of gender and gender stereotypes, and they should not fear reprisal from their employer. This allows for a distinction between those protected from discrimination based on gender and those protected from discrimination based on gender identity, as they are distinct forms of discrimination.

There is a difficult problem, though, in defining exactly who should be included in this “gender identity” category. Certainly, it should include post-operative transsexuals, but what about pre-operative transsexuals? Should inclusion in the category be contingent upon receiving a gender identity disorder (GID) diagnosis? What about those cross-dressers who only dress up on a Friday night, or the drag queen who doesn’t really

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232. See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 532-33 (4th ed. text revision 2000) (GID is defined as “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex” accompanied by a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.”).
identify as a woman when he’s in drag, but is seen as a woman by others? Should such a distinction even matter?

One might argue that the best way to define the category is to limit inclusion to those whom society would judge as deserving of inclusion, so as to avoid socio-legal backlash. Thus, we should examine what section(s) of the transgender community, if any, people perceive as being unfairly and unequally treated and thus deserving of inclusion. Furthermore, we should determine whether people will blame the unfair and unequal treatment on society or on the transgenders themselves. This second question is important because research shows that people are generally less willing to help a stigmatized group who people feel are responsible for their own predicament.\(^2\) Given this research, it is fair to assume that people may favor inclusion in the category for those who are seen as having no control over their gender identity—i.e., that they were born transgender or have had transgender feelings for a significantly long time. This categorization would fit with a GID diagnosis, so establishing inclusion in the category may be determined by such a diagnosis.

Moreover, the portrayal of transgenders in the media and in popular culture will influence who people will view as deserving of inclusion in the category, and for that matter, deservedness for transgenders as a prima facie matter. With such media personalities as RuPaul and Dame Edna, and such media portrayals of transgenders as Boys Don’t Cry and Hedwig and the Angry Inch becoming more and more common,\(^2\) the media could become more of a factor than both the transgender community and politicians would expect.

In defining the category, others will likely argue that the transgender community may not be willing to participate in such an inclusion/exclusion in the category dynamic. There are many who view cross-dressers and drag queens as much a part of the transgender community as post-operative transsexuals, and would not be willing to “sacrifice” the rights of the former for the latter. While politics and the passing of legislative bills can sometimes be an all-or-nothing, zero-sum game, it can also be a situation requiring compromise, where change is effected incrementally. In this case, it could be a GID diagnosis that initially defines the “gender identity” category, but the definition of that category can be later amended. An example of this can be found in the various statutes and ordinances that have redefined the category “sex” to include gender and/or gender identity. Essentially, the definition of a “gender identity” category will be a game of

\(^{233}\) Krieger, supra note 220, at 512.

\(^{234}\) See Patti Hartigan, Once Despised or Invisible, Transgendered Characters Are Showing up All over Popular Culture. What Are They Telling Us About the Complications of Gender Identity? Crossing Over, BOSTON GLOBE, Mar. 11, 2001, at N1.
politics, the outcome of which is not easily predicted.

Still, some may maintain that adding a category to anti-discrimination laws to protect transgenders is an example of having one's cake and eating it too. Because, the argument would go, transgenders by definition challenge categorizations of gender and sex, yet seek an additional category in anti-discrimination law to protect their inherent challenges to established categories. The difficulties inherent in defining who is to be included in the category, one might claim, substantiate the argument. While this argument seems valid, the principles of anti-discrimination law also seem to outweigh any concerns regarding the irony of the transgender community's attempts at being protected against unfair and unequal treatment. Admittedly, categorization for transgenders is a difficult endeavor, but the broader goal of protecting the transgender community against discrimination should receive priority over principled, but ultimately unproductive assaults on the validity of categorization itself.

Although defining the transgender category may be difficult, it has substantial utility. Given Post's critique of the function of anti-discrimination law, especially with respect to gender, it is advantageous to specifically recognize the classification of "gender identity" because this specific category is becoming more socially salient and meaningful. If added as a separate category, it will also provide an opportunity for the stories of transgenders to develop within this category, instead of having to fight to be recognized in the much broader category of "gender" or "sex." With the ability of these transgender stories to develop and be recognized, there will be a corresponding recognition by the rest of society about these stories and a consciousness about transgenders as a community will begin to develop. This consciousness-raising should assist in justifying the addition of a separate category, for society will be more familiar with transgenders as a category of people, and will be more familiar with their stories, especially those stories involving employment discrimination. With society's conscience then attuned to the discrimination faced by transgenders, there is a greater likelihood of avoiding a backlash against the laws protecting them. It also follows that adding "gender identity" should signify to courts that the law is meant to provide protection for transgenders, who actively challenge gender norms, and not just protect those like Ann Hopkins, who fail to adhere to gender norms—the current conceptualization of federal law.

There certainly remains significant potential for backlash against the addition of "gender identity" to any state statute or local ordinance. In one sense, backlash has already begun, as evidenced by the opposition to A.B.

235. See supra notes 215-16 and accompanying text.
But including transgenders under a "gender" definition, presumably in an attempt to mask their inclusion, can only make such a backlash more likely to emerge and more powerful if it does emerge, as opponents recognize the attempted masking and call the bill's supporters to task for it. I would argue that the use of "gender identity" would actually decrease the law's vulnerability to backlash, as the bill's introduction could be accompanied by a powerful set of normative arguments, through which the bill's proponents can capture the moral high ground. Furthermore, an explicit "gender identity" category would eliminate the danger that judges might interpret the term "gender" as excluding transgenders from protection, based on a Holloway-like illogic. We have already witnessed the systematic use of such illogic, and we should be cognizant that history can and often does repeat itself, especially in a legal system based on consistency with precedent.

Ultimately, there are various methods for protecting transgenders from employment discrimination, and some of those methods have proven more effective than others. I conclude that adding "gender identity" to statutory and ordinance law, thus specifically identifying transgenders as a protected class, is the best method, especially given the generally meager results of other methods.

236. See supra notes 192-98 and accompanying text.
237. See supra text accompanying note 204.
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