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## Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity

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# TRANSGRESSIONS OF INEQUALITY: THE STRUGGLE FINDING LEGAL PROTECTIONS AGAINST WRONGFUL EMPLOYMENT TERMINATION ON THE BASIS OF THE TRANSGENDER IDENTITY

ANTON MARINO\*

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## I. INTRODUCTION

What defines a man or a woman? What are the differences between the two? Stereotypically, a man is seen as handsome, strong, instinctive, and assertive. In contrast, a woman is often described as beautiful, soft, patient, and understanding. Notwithstanding these archaic understandings of sex and gender-based stereotypes, who has the authority to say that a man cannot be whatever a woman is and that a woman cannot be whatever a man is?

How we each individually identify as human beings directly affects how

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we operate as a civilization, as a society, and as a species.<sup>1</sup> This core sense of “self” governs how we traverse through our daily lives.<sup>2</sup> What happens, however, when the way we construe our inborn identity is in direct conflict with the way others perceive our identity? To members of the transgender community, this conflict is inescapable, and the law has provided little protective recourse for such conflicts as they arise within the workplace—resulting in a gravely uncertain situation for transgender employees.<sup>3</sup>

For at least thirty-four years, members of the transgender community have struggled to assert legal protections that preclude employers from engaging in discriminatory conduct ultimately resulting in their termination.<sup>4</sup> This discriminatory conduct originates in the same sex-normative stereotypes—stereotypes that mandate how the male and female sexes are “supposed” to behave and how the bodies of a man and woman are “supposed” to appear—that have fueled the unequal treatment of not just transgender people, but also female, lesbian, gay, and bisexual people.<sup>5</sup>

As a result, the use of workplace restrooms, one of the last spaces segregated on the basis of a sexual binary,<sup>6</sup> has created glaring

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1. See Laurence H. Tribe, *Lawrence v. Texas: The “Fundamental Right” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1898 (2004).

2. See *id.*

3. See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007); *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977), *overruled by* *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

4. Compare *Etsitty*, 502 F.3d at 1218 (concluding that neither Title VII of the Civil Rights Act nor an Equal Protection argument brought under 42 U.S.C. § 1983 afforded a transgender individual any remedy at law against her former employer for terminating her on the basis of her transgender identity), and *Holloway*, 566 F.2d at 661 (affirming the district court’s grant of summary judgment to a transgender claimant’s former employer and holding that Title VII of the Civil Rights Act neither contemplates nor embraces transgender/transsexual discrimination), with *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (upholding the district court’s judgment in favor of a transgender individual wrongfully terminated from her workplace on the basis of gender stereotyping, and concluding that sex-based discrimination premised on “gender-nonconformity” is subject to the heightened scrutiny of the Equal Protection Clause of the Fourteenth Amendment).

5. Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 38 (2000); see Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation, and Transgender*, 54 ME. L. REV. 159, 179 (2002); see also *Anthony v. Alfieri, (Un)covering Identity in Civil Rights and Poverty Law*, 121 HARV. L. REV. 805, 812-13, 826-27 (2007).

6. Lara E. Pomerantz, Comment, *Winning the Housing Lottery: Changing University Housing Policies for Transgender Students*, 12 U. PA. J. CONST. L. 1215,

psychological and physical harms for members of the transgender community.<sup>7</sup> Moreover, because the discrimination faced by members of the transgender community is indelibly connected to the issues of gender and sex, workplace bathroom use and sex-specific workplace attire emphasize how innate identity and the way others perceive the trans-identity are in direct conflict.<sup>8</sup> Thus, transgender individuals' workplaces have developed into battlegrounds on which the fight for transgender equality has, in large part, been disastrous.<sup>9</sup>

Federal appellate courts are divided over whether an employer may terminate a transgendered employee's occupational post on the basis of his or her status as a transgender individual irrespective of protections that Title VII of the Civil Rights Act of 1964 may provide.<sup>10</sup> This split of

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1234 (2009).

7. See Chai R. Feldblum, *The Right to Define One's Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 129 (2006) [hereinafter Feldblum, *The Right to Define*]; Boaz I. Green, *Discussions and Expression of Gender and Sexuality in Schools*, 5 GEO. J. GENDER & L. 329, 333 n.30 (2004); Diana Elkind, Comment, *The Constitutional Implications of Bathroom Access Based on Gender Identity: An Examination of Recent Developments Paving the Way to the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 896 (2006).

8. Elkind, *supra* note 7, at 921; see also *infra* Part II and note 15.

9. See e.g., *Etsitty*, 502 F.3d at 1224; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993); *Goins v. W. Grp.*, 635 N.W.2d 717, 726 (Minn. 2001); see also *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 45-46 (N.Y. App. Div. 2005).

10. Compare *Glenn v. Brumby*, 663 F.3d 1312, 1321 (11th Cir. 2011) (concluding that sex-based discrimination premised on "gender-nonconformity" is subject to the heightened scrutiny of the Equal Protection Clause of the Fourteenth Amendment and further observing that, had the transgender plaintiff filed a claim under the Civil Rights Act, Title VII would have equally provided her a remedy at law), *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572, 574 (6th Cir. 2004) (reversing the district court's narrow statutory interpretation of Title VII of the Civil Rights Act because the Act contemplates instances of sex-discrimination on the basis of the claimant's "appearance and mannerism"), and *Cruzan v. Special Sch. Dist., No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (per curiam) (upholding the district court's finding that a school's policy of allowing a transgender employee to use the restroom of the gender with which she identified neither violated another teacher's religious freedoms nor any other actionable discrimination claim), with *Etsitty*, 502 F.3d at 1224 (holding that neither Title VII of the Civil Rights Act nor the Equal Protection Clause afforded a transgender employee any legal recourse against her former workplace for wrongfully terminating her on the basis of her status as a transgender person), *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (determining that discrimination against transgender persons does not fall within the ambit of Title VII), *Sommers*, 667 F.2d at 750 (affirming the District Court's finding that the plain meaning of the language in Title VII must be ascribed to the common meaning of the term "sex," which, it concluded,

authority originates from the judiciary's conflation and disaggregation of the meaning of sex and gender as well as its failure to recognize that gender operates as a continuum along which male and female represent the extremes, and not as a restrictive binary construct of male and female.<sup>11</sup> "Gender discrimination" is substantially more complex than conduct resulting in the disparate treatment of an individual premised on the prejudices regarding that person's sex. "Gender discrimination" attacks the very core of an individual's innate identity and that individual's ability to manifest his or her own destiny. Accordingly, "gender discrimination" is a violation of an individual's substantive due process right to liberty.<sup>12</sup>

This Article will proceed in five parts. Part II wrestles with the definitions of sex and gender and explains why the failure to explicate the complexity of these terms is particularly pernicious to the transgender individual. Part III traces the failure of the Supreme Court's "gender discrimination" jurisprudence to provide a workable standard that combats the legal disparities suffered by those whose identities are classified as "the others."<sup>13</sup> It provides a detailed examination and evaluation of why the Court's simultaneous conflation and disaggregation of sex and gender and its failure to recognize a gender continuum reaffirms the socially-created inferiority of women, homosexuals, bisexuals, and transgender people. Part IV examines the Court's understanding of innate identity. In particular, it assesses how the Court has addressed the legal disparities that

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provided no protections for trans-identifying individuals), and *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661 (9th Cir. 1977) (holding that Title VII fails to embrace transgender/transsexual discrimination), *overruled by* *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

11. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 11, 25, 40 (1995); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 12 (1995); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 359-60 (2000).

12. See Rebecca Brown, *Liberty, The New Equality*, 77 N.Y.U. L. REV. 1491, 1541 (2002); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749-50 (2011); cf. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Schlesinger v. Ballard*, 419 U.S. 498, 512 n.1 (1975) (Brennan, J., dissenting); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

13. See, e.g., *United States v. Virginia*, 518 U.S. 515, 555-56 (1996); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 733 (1982); *Craig v. Boren*, 429 U.S. 190, 210 (1976); *Frontiero*, 411 U.S. at 690-91 (plurality opinion).

the lesbian, gay, and bisexual communities face. Part V examines how Title VII might be applied to transgender employees seeking legal protection within the workplace. Finally, Part VI calls for a re-evaluation of what the Court currently considers “gender discrimination” and proposes a new standard by which the Court should apply protections.

## II. THE COMPLEXITIES OF SEX AND GENDER DEFINED

The concepts of sex and gender are related to the very core of one’s own sense of identity.<sup>14</sup> Each individual maintains a particularized sex and gender. There are many, however, whose particularized sex and gender manifest in conflict, requiring us to engage in a thoughtful analysis about the meaning of both terms.<sup>15</sup> A failure to thoughtfully explore these definitions can produce substantially inconsistent applications of the law and can even undermine entire legal doctrines.<sup>16</sup>

Nevertheless, since 1973, the Supreme Court of the United States has struggled to define the concepts of sex and gender in its attempts to extend equal protection of the law under a theory of “gender discrimination.”<sup>17</sup> To a large degree, the Court has conflated the concepts of sex and gender by using the terms interchangeably, signaling inaccurately that every person’s

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14. See Feldblum, *The Right to Define*, *supra* note 7, at 124.

15. The terms “sex” and “gender” are encumbered with nuances and ambiguities that are not easily conveyed. Pomerantz, *supra* note 6, at 1221 (citing Judith Butler, *Gender Trouble: Feminism and Subversion of Identity* (1990)); see also Elaine Crain, *Trans-phobia and the Relational Production of Gender*, 18 HASTINGS WOMEN’S L.J. 137, 138-39 (2007); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 84 (2008); Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 256-58 (2005).

16. See, e.g., *Personnel Adm’r of Massachusetts v. Feeny*, 442 U.S. 256, 285 (1979) (Marshall, J., dissenting) (rejecting the Court’s perpetuation of discriminatory conduct it previously deemed invalid); *Schlesinger*, 419 U.S. at 511-12 (Brennan, J., dissenting) (rejecting the Court’s misconceived understanding of its previous opinion within *Frontiero*); *Geduldig v. Aiello*, 417 U.S. 484, 494 (1974) (concluding that pregnancy is not sex discrimination within the context of the Equal Protection Clause).

17. *Frontiero*, 411 U.S. at 690-91 (plurality opinion) (holding that classifications based on sex are inherently suspect and must be subjected to strict judicial scrutiny, and that statutes providing, solely for administrative convenience, that spouses of male members of the armed services are dependents for purposes of obtaining increased quarters allowances and medical and dental benefits, but that spouses of female members are not dependents unless they are in fact dependent for over one-half of their support, violate the Due Process Clause of the Fifth Amendment to the United States Constitution by requiring a female member to prove dependency of her husband).

sex is also that person's gender.<sup>18</sup> On other occasions, members of the Court have rejected this conflation, and, in turn, have derisively attempted to define the terms in a simplistic, disaggregated fashion.<sup>19</sup> Justice Antonin Scalia's dissenting opinion in *J.E.B. v. Alabama ex rel. T.B.*<sup>20</sup> provides such an example:

The word "gender" has acquired the new and useful connotation of cultural attitudinal characteristics (as opposed to physical characteristics) distinctive of the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male.<sup>21</sup>

Undoubtedly, to Justice Scalia, "cultural attitudinal characteristics,"<sup>22</sup> or what he defines as "gender," are neither what the Equal Protection Clause of the Fourteenth Amendment contemplates nor what the Equal Protection Clause intended to reach, because "attitudinal characteristics," by their very nature, are mutable.<sup>23</sup>

Neither of these definitions adequately describes the complexity of sex and gender. Indeed, defining sex solely based on the anatomical presence of a penis or a vagina or on one's chromosomal configurations is logically and scientifically insufficient.<sup>24</sup> Researchers hypothesize that between one

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18. See, e.g., *Feeny*, 442 U.S. at 274-75; *Craig*, 429 U.S. at 192; *Schlesinger*, 419 U.S. at 509-10; *Kahn v. Shevin*, 416 U.S. 351, 352 (1974).

19. See, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

20. 511 U.S. 127 (1994).

21. *Id.* at 156 n.1 (Scalia, J., dissenting).

22. *Id.*

23. Cf. *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 313-14 (1976) (citing *United States v. Carolene Products, Co.*, 304 U.S. 144, 152 n.4 (1938)) (viewing *Carolene Products* as providing guidance into the immutability component of heightened judicial scrutiny within the context of equal protection as defined as "discrete and insular" groups); *Lyng v. Castillo*, 477 U.S. 635, 638 (1975). The leading formulation for heightened scrutiny within the Equal Protection analysis derives from footnote four of *Carolene Products*, where the Court opined that "discrete and insular minorities" constitute what are now acknowledged as suspect classes. See *Carolene Products*, 304 U.S. at 152 n.4. In that regard, the Court oftentimes asks whether an offender's discriminatory conduct is based on an "immutable characteristic" of the suspect class. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

24. P.L. Chau & Jonathan Herring, *Defining, Assigning and Designing Sex*, 16 INT'L J.L. POL'Y & FAM., 327, 329-32 (2002); Franke, *supra* note 11, at 5, 40; Phyllis Randolph Frye, *The International Bill of Gender Rights vs. the Cider House Rules: Transgenders Struggle with the Courts Over What Clothing They are Allowed to Wear on the Job, Which Restroom They Are Allowed to Use on the Job, the Right to Marry, and the Very Definition of Their Sex*, 7 WM. & MARY J. WOMEN & L. 133, 168 (2000) (noting other chromosomal variations outside the scope of the generally accepted binary construction of XY and XX). See generally Jill Rebecca Oliver, A

and four percent of the world's population maintains chromosomal variations that are not in harmony with archaic understandings of how the judiciary and the Euro-American culture define man and woman—an understanding that totally disregards the existence of intersexuality.<sup>25</sup> Recent medical studies further demonstrate that a person's sex is comprised of a total of nine different factors.<sup>26</sup> Sex is biological, but it is entirely too complex a concept to reduce to genetic composition or the primary sex organs of an individual. Accordingly, sex is best described as the outside physical or perceived surface identity of a person.<sup>27</sup>

Gender, however, refers to a person's innate core identity: a person's true sense of self.<sup>28</sup> Gender-expression is the manifestation of one's inner self and is frequently equated with socially normative, dichotomous Euro-American stereotypes of what it means to be a man or a woman. But, a person's gender may reject this dichotomy or the socially normative roles the dichotomy belies. Although gender is connected to one's psyche, it is no less biological than sex because it influences one's sexual development.<sup>29</sup> But sole reliance on the biomedical sciences ultimately provides no formulaic means to completely distinguish sex from gender because they are interrelated.<sup>30</sup> Gender influences sexual development, and sex may assist one in understanding one's gender. Therefore, when the Court engages in a colloquy on the topic of what it calls "gender discrimination," it must neither assume that sex and gender are identical nor that sex and gender are severable.

As one wrestles with attempts to define the terms, one must be mindful that each person has a particularized sex and gender. In that regard, a large majority of the population maintains a gender that manifests itself correlative to one's sex. Alternatively, however, there are many whose gender manifests itself in conflict with their sex. These persons transcend and resist society's normative sex stereotypes, and identify as members of

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Multidimensional Model of Biological Sex (2011) (unpublished Ph.D. dissertation, University of Waterloo) (on file with University of Waterloo's Institutional Repository), *available at* [http://www.uwspace.uwaterloo.ca/bitstream/10012/6444/1/Oliver\\_Jill.pdf](http://www.uwspace.uwaterloo.ca/bitstream/10012/6444/1/Oliver_Jill.pdf).

25. Frye, *supra* note 24, at 147, 168.

26. *See* Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) (citing to the scientific findings of Dr. Wallace Bockting, a tenured associate professor at the University of Minnesota Medical School who specializes in what the court labeled "gender identity disorders"); Valdes, *supra* note 11, at 20 (citing elements that are considered in determining one's sex).

27. *Cf.* Franke, *supra* note 11, at 35; Frye, *supra* note 24, at 161.

28. Franke, *supra* note 11, at 35; Frye, *supra* note 24, at 169.

29. *See* Schroer, 577 F. Supp. 2d at 306; *see also* Franke, *supra* note 11, at 34-36.

30. *See* Franke, *supra* note 11, at 1-3.

the transgender community.<sup>31</sup>

Notwithstanding the complexities of these terms, the United States Supreme Court's development of "gender discrimination" jurisprudence demonstrates a failure to understand the complex interrelationship of sex and gender,<sup>32</sup> in turn, foreclosing constitutional protections to the transgender person. Indeed, the Court's acknowledgment of what it has deemed as the relevant differences between the male and female sexes eviscerates any possibility of truly achieving total gender equality.<sup>33</sup> As a result, the Court's failure to provide a viable standard to combat what it has titled "gender discrimination" has provided little legal remedy and no constitutional protections for the transgender individual in the workplace.<sup>34</sup>

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31. Many appellate courts have relied on the Diagnostic and Statistical Manual of Mental Disorders' fourth edition ("DSM-IV"). *See, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1083 (7th Cir. 1984). However, DSM-IV provides a perfunctory appreciation for members of the transgender community and trivializes the trans-identity by referencing it as "gender identity disorder." CHESTER W. SCHMIDT ET AL., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 532–33 (Michael B. First et al. eds., 4th ed. 1994). Further it completely dismisses an actual understanding of sex and gender incongruence by suggesting cursory examples of a mere "desire" to disassociate from normative sex stereotypical behavior as being clearly symptomatic of transgenderism. *Id.* at 533-34. This hasty evaluation of what it means to be transgender should be rejected. One can only hope that the relabeling of "gender identity disorder" to "gender dysphoria" in DSM-V—released in May 2013—presents a more favorable appreciation and deeper understanding of transgenderism and transsexuality. Camille Beredjick, *DSM-V to Rename Gender Identity Disorder 'Gender Dysphoria'*, ADVOCATE.COM (July 23, 2012, 8:00 PM), <http://www.advocate.com/politics/transgender/2012/07/23/dsm-replaces-gender-identity-disorder-gender-dysphoria>; *see also* Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS* 3, 4 (Paisley Currah, Richard M. Juang & Shannon Prince Minter eds., 2006).

32. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989); Meritor Sav. v. Vinson, 477 U.S. 57, 73 (1986); *see also* Franke, *supra* note 11, at 1; Valdes, *supra* note 11, at 20-21.

33. *See, e.g.*, Nyugen v. INS, 533 U.S. 53, 73 (2001); United States v. Virginia, 518 U.S. 515, 533 (1996); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 154 (1994) (Rehnquist, C.J., dissenting); *id.* at 157 n.1 (Scalia, J., dissenting).

34. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227-28 (10th Cir. 2007); Ulane, 742 F.2d at 1087; Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 664 (9th Cir. 1977); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994); Doe v. Boeing Co., 846 P.2d 531, 536 (Wash. 1993); K. v. Health Div., Dep't of Human Res., 560 P.2d 1070, 1072 (Or. 1977).

### III. THE FAILURE TO ACHIEVE GENDER EQUALITY FOR THE TRANSGENDER INDIVIDUAL UNDER THE EQUAL PROTECTION DOCTRINE

For nearly forty years, the Supreme Court has struggled to provide a standard capable of providing equal protection of the law and to address cases premised on issues of “gender discrimination.”<sup>35</sup> In the watershed opinion, *Frontiero v. Richardson*,<sup>36</sup> a plurality of the Court finally acknowledged the “long and unfortunate history of sex discrimination” within the United States.<sup>37</sup> Writing for the plurality, Justice William J. Brennan, Jr., traced the indoctrinated legal subjugation of the female sex back one hundred years to Justice Joseph P. Bradley’s concurring opinion in *Bradwell v. State of Illinois*.<sup>38</sup> Through Justice Brennan’s colloquy, the Court noted several examples of the legal injustices suffered by the female sex, including a woman’s inability to hold office, serve on juries, file legal claims in her own name, hold or convey property in her own name, or serve as legal guardians for her own children.<sup>39</sup> In recognizing that the legal subjugation of the female sex was based on “gross, stereotyped distinctions,” which, “in practical effect put women, not on a pedestal, but in a cage,”<sup>40</sup> a plurality of the Court invalidated a law that applied different standards for male and female service members’ spouses seeking to obtain increased quarter allowances.<sup>41</sup>

At first blush, the plurality’s holding in *Frontiero v. Richardson* appears to be a phenomenal victory, providing the applicable standard by which courts will analyze “gender discrimination” claims. The plurality, however, failed to state with particularity that the government’s unconstitutionally discriminatory conduct is not occasioned merely by the presence of certain rudimentary biological indicators.<sup>42</sup> Rather, the plurality actually reasoned its analysis on societal, normative sex-based stereotypes. To be sure, “gender discriminatory” conduct does not infringe merely upon the physicality of one’s person; it violates the very core of one’s conception of identity by categorically placing an individual within

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35. See, e.g., *Nguyen*, 533 U.S. at 73; *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (plurality opinion).

36. *Frontiero*, 411 U.S. at 684 (plurality opinion).

37. *Id.*

38. *Id.* at 684-85 (citing *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873) (Bradley, J., concurring)) (noting that it was contrary to the “law of the Creator” for a woman to adopt a distinct and independent career from that of her husband because the “paramount destiny and mission of woman” is that of mother and wife).

39. *Id.* at 685.

40. *Id.* at 684-85.

41. *Id.* at 678-79.

42. See generally *Frontiero*, 411 U.S. 577 (plurality opinion).

the traditionally constructed normative social roles of the male and female sexes.<sup>43</sup> But the plurality's cursory assessment of the origins of "gender discrimination" and its failure to clearly articulate the subtle distinctions between sex and gender inadvertently gave rise to the conflation of the two terms.

The Court subsequently affirmed this mistaken conflation of sex and gender in its review of *Kahn v. Shevin*,<sup>44</sup> *Schlesinger v. Ballard*,<sup>45</sup> *Personnel Administrator of Massachusetts v. Feeny*,<sup>46</sup> and *Craig v. Boren*.<sup>47</sup> Throughout the entirety of these opinions, the terms sex and gender are carelessly used interchangeably,<sup>48</sup> setting forth imprecisely reasoned discussions that occasionally resulted in what a majority (or plurality) of the Court considered an equitable result.

In contrast to the law that was previously struck-down in *Frontiero*, a majority of the Court in *Kahn v. Shevin* affirmed a Florida statute that provided greater tax exemptions for widows than it did widowers.<sup>49</sup> In an opinion authored by Justice William O. Douglas, the Court distinguished

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43. See Feldblum, *The Right to Define*, *supra* note 7, at 126; Franke, *supra* note 11, at 70; cf. Andrew Gilden, *Preserving Seeds of Gender Fluidity: Tribal Courts and the Berdache Tradition*, 13 MICH. J. GENDER & L. 237, 244 (2007); Yoshino, *supra* note 11, at 361-62.

44. 416 U.S. 351, 355-56 n.10 (1974) (holding that a Florida statute did not violate the Equal Protection Clause and was valid, and noting that "gender has never been rejected as an impermissible classification in all instances").

45. 419 U.S. 498, 509-10 (1975) (holding that the statutory scheme according to which women naval officers require a thirteen year tenure of commissioned service before mandatory discharge for want of promotion, while requiring the mandatory discharge of male officers who are twice passed over for promotion but who might have less than thirteen years of commissioned services, did not violate the Due Process Clause in light of the Court's failure to address the underlying discriminatory practice that prohibited the female sex to engage in combat and its application of a chauvinistic protection of the female sex based on archaic presumptions).

46. 442 U.S. 256, 281 (1979) (holding—through a very cursory assessment of the law's legal history and fallacious reasoning—that Massachusetts' veterans' preference statute providing that all veterans who qualify for state civil service positions must be considered for appointment ahead of any qualifying nonveteran did not deprive women of equal protection under the law, despite the statute's actual application).

47. 429 U.S. 190, 210 (1976) (holding that "gender-based" classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives, and that statistical evidence as to incidence of drunken driving among males and females between the ages of 18 and 21 was insufficient to support the "gender-based" discrimination arising from the Oklahoma statute in question).

48. See, e.g., *Feeny*, 442 U.S. at 267, 274; *Craig*, 429 U.S. at 200-03; *Schlesinger*, 419 U.S. at 506-07; *Kahn*, 416 U.S. at 354-53, 355 n.10.

49. *Kahn*, 416 U.S. at 352.

the law from the one invalidated the preceding term by arguing that, unlike *Frontiero*, Florida had enacted the statute to “rectify the effects of past discrimination against women.”<sup>50</sup> The Court’s reasoning, however, was informed by archaic socio-cultural stereotypes of the female sex as less qualified and dependent on males, paternalistically asserting that “[g]ender has never been rejected as an impermissible classification in all instances.”<sup>51</sup> Consequently, the Court, much to the chagrin of Justice Brennan, defended the law on the very same sex-normative stereotypes and stigmatization that it rejected in *Frontiero*.<sup>52</sup>

By the time the Court deemed unconstitutional an Oklahoma statute setting the legal age of alcohol consumption of the male and female sexes at twenty-one and eighteen, respectively, the practice of conflating the terms sex and gender was deeply entrenched within the Court’s analysis.<sup>53</sup> The Oklahoma statute was premised on statistical evidence that allegedly supported findings that males under the age of twenty-one were more likely to drive recklessly under the influence of alcohol<sup>54</sup> than their female counterparts.<sup>55</sup> While the statistical findings of the Oklahoma legislature appeared to be premised solely on the basis of sex, the Court proceeded under an analysis that included references to gender expressive conduct closely associated with society’s sex-normative stereotypes:

The very social stereotypes that find reflection in age-differential laws, are likely substantially to distort the accuracy of these comparative statistics. Hence “reckless” young men who drink and drive are transformed into arrest statistics, whereas their female counterparts are chivalrously escorted home.<sup>56</sup>

Nonetheless, the greatest failure of the Court’s reasoning was its

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50. *Id.* at 356 n.8.

51. *Id.* at n.10.

52. *See id.* at 357 (Brennan, J., dissenting) (arguing that classifications based on either sex or gender, like classifications based on race, must be subject to strict scrutiny); *see also id.* at 361 (White, J., dissenting) (finding that “gender-based” classifications are inherently suspect); *accord Feeny*, 442 U.S. at 285 (Marshall, J., dissenting) (arguing that the plurality’s cursory assessment of a law that it deemed “gender-neutral” perpetuates what the Court had previously invalidated by limiting females to occupations previously regarded as falling into society’s sex-normative stereotypical roles); *Schlesinger*, 419 U.S. at 511 n.1 (Brennan, J., dissenting) (discussing the majority’s troublesome failure to address the larger issue of the Navy’s discriminatory practice in prohibiting females’ assignment to roles considered improper for the female sex).

53. *See Craig*, 429 U.S. at 190.

54. Admittedly deemed “nonintoxicating” 3.2% beer by the plurality. *Id.* at 191-92.

55. *Id.* at 200-01.

56. *Id.* at 202 n.14.

recognition of what it had come to understand as the “relevant differences” between the male and female sexes.<sup>57</sup> The recognition of these so-called relevant differences permitted the Court to build its “gender discrimination” jurisprudence on “the presumption, that on a fundamental level, males and females are not similarly situated.”<sup>58</sup> Consequently, the reasoning of the Court in *Craig v. Boren* solidified two striking malfeasances. First, by erroneously accepting that certain biological characteristics enable the law to regard the male and female sexes as totally different beings, the Court eradicated the possibility of ever achieving true equality amongst those who vary the established binary with regard to sex and gender.<sup>59</sup> This first malfeasance allowed the Court to essentially endorse “gender discriminatory” conduct by disaggregating the terms “sex” and “gender” to the benefit of certain moral whims.<sup>60</sup> In essence, it permitted biology to serve as “[an] excuse of cover for social practices that hierarchize individual members of” the male sex over members of the female sex or to serve as an excusable pretext for judicial application of Christian morals, affirming certain sex-normative stereotypes of the binary construct of male and female.<sup>61</sup> Second, the Court’s reasoning bolstered a “gender discriminatory” worldview in which members of the transgender community are a subhuman species because they fall neither physically nor psychologically into what the Court has recognized as the constructions of the male and female sexes.<sup>62</sup>

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57. *Id.* at 199 (citing *Stanley v. Illinois*, 405 U.S. 645, 658 (1972)).

58. Franke, *supra* note 11, at 11; *see, e.g.*, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (O’Connor, J., concurring) (“But to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact.”); *see also* *Schlesinger v. Ballard*, 419 U.S. 498, 507-08 (1975).

59. Franke, *supra* note 11, at 11.

60. *See* *Nguyen v. INS*, 533 U.S. 53, 73 (2001) (holding that a federal statute making it more difficult for a child born abroad out of wedlock to one United States parent to claim citizenship if that parent was the father did not violate the equal protection guarantee of the Fifth Amendment to the United States Constitution because of the Court’s “acknowledg[ment] of basic biological differences” between the sexes); *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986) (holding that a Georgia statute criminalizing sodomy was constitutional); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (finding no equal protection violation where a transsexual airline employee was terminated as a pilot); *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748, 748-49 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661 (9th Cir. 1977); *cf.* Yoshino, *supra* note 11, at 362, 373.

61. Franke, *supra* note 11, at 3; *see Hardwick*, 478 U.S. at 192 (“Proscriptions against [homosexual] conduct have ancient roots.”).

62. *See, e.g.*, *Ulane*, 742 F.2d at 1087; Currah & Minter, *supra* note 5, at 39; Yoshino, *supra* note 11, at 371.

## IV. THE FLAWED APPLICATION OF UNDERSTANDING OF IDENTITY

Much like the legal inequities suffered by individuals whose genders manifest directly in conflict with their sexes, members of the gay, lesbian, and bisexual communities have also struggled to attain constitutional protections against discrimination premised on their sexual orientation.<sup>63</sup> This struggle finds its origin within the first malfeasance indoctrinated into the “gender discrimination” analysis.<sup>64</sup>

*Bowers v. Hardwick* provides a glaring example of the Court’s erroneous understanding of identity within the context of its “gender discrimination” jurisprudence.<sup>65</sup> There, in a five-to-four ruling, the Court upheld the constitutionality of a Georgia sodomy law criminalizing oral and anal sex in private between consenting adults when applied to relations between homosexuals. Writing for the majority, Justice Byron R. White failed to recognize the interest respondent *Hardwick*<sup>66</sup> had at stake and contemptuously mischaracterized the issue in terms of what the majority merely considered reprehensible conduct.<sup>67</sup> As a consequence, Michael *Hardwick*’s sexual orientation—a facet of his innate identity—was distorted into nothing more than capriciously wicked conduct. By engaging in this mischaracterization, however, the Court—yet again—rendered its judgment on the basis of archaic socio-cultural, sex-normative stereotypes of the roles of the male and female sex.<sup>68</sup> To the *Bowers* Court,

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63. See *Lawrence v. Texas*, 539 U.S. 558, 564 (2003) (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain consensual intimate sexual conduct was unconstitutional as a violation of the Due Process Clause); *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding that an amendment to Colorado’s constitution that prohibited all legislative, executive, or judicial action designed to protect persons identifying as either homosexual or bisexual from discrimination was unconstitutional and violated the Equal Protection Clause); *Bowers*, 478 U.S. at 188-90; *Perry v. Brown*, 671 F.2d 1052, 1063 (9th Cir. 2012) (holding that California’s ban on same-sex marriage was unconstitutional under an equal protection and due process analysis).

64. See *supra* Part II.

65. *Bowers*, 478 U.S. at 188.

66. *Id.* at 188. A divided panel of the United States Court of Appeals for the Eleventh Circuit reversed the District Court of Georgia’s judgment and held that “the Georgia statute violated [*Hardwick*]’s fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation” in violation of the Due Process Clause of the Fourteenth Amendment, by relying on the Supreme Court’s decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Roe v. Wade*, 410 U.S. 113 (1973). See *id.* at 189 (citing *Hardwick v. Bowers*, 760 F.2d 1202 (11th Cir. 1985)).

67. *Id.* at 188, 190, 192-93; see also *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (likening homosexuality to “reprehensible” acts such as murder and cruelty to animals).

68. *Bowers*, 478 U.S. at 192.

rejecting discriminatory practices based on sexual orientation was perceived as an endorsement of homosexual conduct and an advancement in the Court's understanding of the "gender discrimination" doctrine that remained outside the comfort of the majority's moral compass.<sup>69</sup>

It would take the Court another seventeen years to adopt an analytical standard remotely similar to that which Justice Brennan originally alluded in *Frontiero*.<sup>70</sup> In reexamining the issue posed to the *Bowers* Court, on behalf of the Court's majority, Justice Anthony M. Kennedy explicitly acknowledged the Court's previous "failure to appreciate the extent of the liberty at stake."<sup>71</sup> Further, in rejecting its previous reasoning regarding the consensual acts between persons expressing the intimacy of a relationship, the Court embraced a more "transcendent[ly] dimension[ional]"<sup>72</sup> understanding of an individual's constitutionally protected liberty, stating:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mysteries of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>73</sup>

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69. See *id.* at 196-97 (Burger, C.J., concurring) (arguing that the "condemnation" of homosexuality is "firmly rooted in Judeo-Christian moral and ethical standards" and characterizing it as "'the infamous crime against nature' as an offense of 'deeper malignity' than rape, a heinous act 'the very mention of which is a disgrace to human nature,' and 'a crime not fit to be named'" (quoting, in part, 4 WILLIAM BLACKSTONE, COMMENTARIES \*215)); cf. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 848-51 (1992) (finding reliance in *Poe v. Ullman*, 367 U.S. 497, 543 (Harlan, J., dissenting)); Feldblum, *Rectifying the Tilt*, *supra* note 5, at 186.

70. See *Lawrence v. Texas*, 539 U.S. 558, 577-78 (2003) ("*Bowers* was not correct when it was decided, it is not correct today, and is hereby overruled."). For other efforts by the Court to broaden the scope of its "gender discrimination" jurisprudence, see *United States v. Virginia*, 518 U.S. 515, 519, 545 (1996) (holding that Virginia failed to show an "exceedingly persuasive" justification for excluding women from the citizen-soldier program at the Virginia Military Institute, and, therefore, violated the Equal Protection Clause); *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding that a Mississippi statute that terminated a mother's parental rights and precluded her ability to file an appeal on the basis of an astronomical preparation fee was in violation of the Equal Protection Clause); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128-29 (1994) (applying the reasoning of *Batson* to efforts of precluding members of the female sex from sitting as panelists on a jury); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 719 (1982) (holding that a Mississippi statute that excludes males from enrolling in a state-supported professional nursing school violates the Equal Protection Clause).

71. *Lawrence*, 539 U.S. at 567.

72. *Id.* at 562.

73. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851).

In essence, by affirming the Court's reasoning initially imparted in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>74</sup> the Court promulgated within its interpretation of the Due Process Clause of the Fifth and Fourteenth Amendments an "interweaving of autonomy and dignity" interests<sup>75</sup> that safeguards one's individual right to determine and express one's core identity.<sup>76</sup>

The Court additionally recognized in *Lawrence* that the Texas statute did more than criminalize what the Court had previously deemed "homosexual sodomy."<sup>77</sup> In that regard, the Court rejected arguments trivializing the disparate treatment suffered by individuals convicted for violating Texas' criminal statute, noting that those convictions would permanently remain on the individuals' records and carry a collateral consequence of forever being condemned as sexual offenders.<sup>78</sup> Indeed, in the eyes of the majority, the statute criminalized a portion of an individual's core identity and promoted discrimination against persons whose identities failed to comport with what some members of the *Bowers* Court had considered "normal."<sup>79</sup>

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74. 505 U.S. 833, 845-46 (1992) (holding that the doctrine of *stare decisis* requires reaffirming *Roe v. Wade*'s central conclusion recognizing a woman's right to choose an abortion before fetal viability notwithstanding its rejection of the trimester framework and adoption of an undue burden test). The matter to which the Court referenced was its prior recognition of the right of the individual to make "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" found within the penumbras of the Constitution. *Id.* at 847-51.

75. Feldblum, *The Right to Define*, *supra* note 7, at 124.

76. Pomerantz, *supra* note 6, at 1217 (arguing that universities should permit transgender students to choose a gender-specific dorm based on gender identity rather than their biological sex).

77. *Lawrence*, 539 U.S. at 567 (2003) (referencing *Bowers v. Hardwick*, 478 U.S. 190, 192 (1986)).

78. *Id.* at 575-76. One need not look far to see the social injustices faced by members of the lesbian, gay, and bisexual communities. A conviction of criminalized "homosexual conduct" had grave consequences, many of which were the result of Anita Bryant's Save Our Children coalition, which propounded conservative Christian beliefs regarding the sinfulness of homosexuality and the perceived threat of homosexual recruitment of children through child molestation. Further, efforts by other public activists throughout the 1960s and 1970s would have banned members of the lesbian, gay, and bisexual communities and their supporters from working within public schools. See CRAIG RIMMERMAN, FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES 131 (Temple U. Press 2008); see also, e.g., *Odorizzi v. Bloomfield Sch. Dist.*, 246 Cal. App. 2d 123 (1966).

79. *Bowers*, 478 U.S. at 192; *id.* at 196-97 (Burger, C.J., concurring); see *Lawrence*, 349 U.S. at 567, 575 (Scalia, J., dissenting) (noting that criminalizing conduct common in homosexual relationships would invite discrimination even if the statute was held unenforceable on equal protection grounds); cf. *Romer v. Evans*, 517 U.S. 620, 636, 652 (1996) (Scalia, J., dissenting) (arguing that discrimination against homosexuality is not as reprehensible as racial discrimination, and portraying those

Thus, by appreciating an individual's liberty interest in self-identification, the Court repudiated the criminal statute for bolstering a social stigmatization that infringed on the dignity of the individual's identity. It observed that the stigma wrongly created portrayals of John Lawrence, Tyron Garner (his sexual companion), and others who identify as lesbian, gay, and bisexual as part of a subhuman species.<sup>80</sup>

Although the Supreme Court's recognition of an individual's liberty interest in one's core identity provided tremendous leaps toward a greater understanding of the right to self-autonomy, *Lawrence* equally functions as a missed opportunity to bridge the remaining gap in the Court's development of "gender discrimination" jurisprudence. In reaching its conclusion, the Court relied heavily on its previous decisions in *Roe v. Wade*<sup>81</sup> and *Planned Parenthood of Southern Pennsylvania v. Casey*, but it failed to acknowledge the nexus among the three.<sup>82</sup> *Roe*, *Casey*, and *Lawrence* all maintained one striking similarity to the Court's decision in *Frontiero*: the infringements on the individual's right to self-identify and to manifest his or her own destiny were premised on a rejection of sex-normative stereotypes about the roles of the male and female sexes.<sup>83</sup> Therefore, the unconstitutional violation of substantive due process within the cases all fundamentally comport with "gender discriminatory" conduct.<sup>84</sup>

For example, much like the social stigmatization of gays, lesbians, and bisexuals through the criminalization of same-sex physically intimate conduct,<sup>85</sup> the stigmatization that members of the female sex face through the criminalization of abortion are equally adverse.<sup>86</sup> In his concurring opinion within *Casey*, Justice Harold A. Blackmun recognized the inherent

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who would acknowledge the existence of an individual liberty interest in self-identity for members of the lesbian, bisexual, and gay communities as villainous).

80. *Lawrence*, 539 U.S. at 575; see also *supra* Part II (discussing the second malfeasance created by the Court's acceptance of the relevant differences doctrine).

81. In *Roe v. Wade*, the Court held that a Texas criminal abortion statute prohibiting a woman's right to abort a pregnancy at any stage except to save the life of the mother was unconstitutional. 410 U.S. 113, 164 (1973).

82. *Lawrence*, 539 U.S. at 565, 573-74.

83. See Brown, *supra* note 12, at 1505; Ginsburg, *supra* note 12, at 375; Tribe, *supra* note 1, at 1902-04.

84. See, e.g., *Lawrence*, 539 U.S. at 565 (discussing *Roe v. Wade*, 410 U.S. 113 (1973)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part); *Casey*, 505 U.S. at 929 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part).

85. *Lawrence*, 539 U.S. at 575.

86. See Brown, *supra* note 12, at 1505, 1541; Tribe, *supra* note 1, at 1902-04, 1926-27.

gender-discriminatory suffering of females who reject the archaic sex-normative stereotypical role of motherhood:

A state's restrictions on a women's right to terminate her pregnancy also implicates constitutional guarantees of gender equality . . . . By restricting the right to terminate pregnancies, the State conscripts women's bodies into service, forcing women to continue their pregnancies, suffer the pains of childbirth, and, in most instances, provide years of maternal care. The State does not compensate women for these services; instead, it assumes that they owe this duty as a matter of course.<sup>87</sup>

Indeed, throughout Justice Blackmun's concurrence in *Casey*, and throughout the majority opinion he authored in *Roe v. Wade*, Justice Blackmun emphasized the social stigmatization of females who faced unwed motherhood.<sup>88</sup> While unwed motherhood would not commonly result in the collateral consequence of being labeled a sex offender, it could result in the collateral consequence of bearing society's badge of shame, comparable to the proverbial "scarlet letter."<sup>89</sup>

Ultimately, the stigmatization suffered by Hardwick, Lawrence, and Roe derives directly from the archaic socio-normative stereotypes that mandate how the male and female sexes are "supposed" to behave by presuming that males and females are fundamentally different.<sup>90</sup> The violative government conduct that infringed upon the right to self-identify operates under the following two theories: (1) males engaging in "immoral" homosexual sodomy violate "biological" and "natural" law by participating in non-procreative sex;<sup>91</sup> and (2) females who sought to abort their pregnancies violated "natural" law by rejecting the "biological" role of

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87. *Casey*, 505 U.S. at 928 (Blackmun, J., concurring in part, concurring in judgment, and dissenting in part); *see also* *Gonzales v. Carhart*, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting) ("As *Casey* comprehended, at stake in cases challenging abortion restrictions is a woman's 'control over her [own] destiny.' . . . There was a time, not so long ago, when women were 'regarded as the center of home and family life, with attendant special responsibilities that precluded full and independent legal status under the Constitution.'") (internal citations omitted).

88. *See Casey*, 505 U.S. at 923; *Roe*, 410 U.S. at 153 ("In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.").

89. Indeed, much like Nathaniel Hawthorne's character, Hester Prynne, many of Roe's unwed female contemporaries would bear and beget children that would serve as the embodiment of a badge of sin and shame for all to see. *See* NATHANIEL HAWTHORNE, *THE SCARLET LETTER* 3, The Modern Library (Ross C. Murin ed., Boston 1991); *see also Casey*, 505 U.S. at 852 ("[A female's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of history and our culture.").

90. *See Franke, supra* note 11, at 11; *cf. Currah & Minter, supra* note 5, at 38.

91. *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

preserving the continuation of the human species through the assumed roles of spouse and mother.<sup>92</sup>

But while the Supreme Court has invalidated government action that operates under the erroneous assumptions of the acceptable roles of the male and female sexes, the Court has failed to recognize that these unconstitutional violations of substantive due process constitute “gender discriminatory” conduct.<sup>93</sup> Because the Court has failed to fully realize that safeguards to one’s individual right to determine and express one’s core identity<sup>94</sup> are synonymous with safeguards against gender discrimination, lower courts continue to operate under a defective equal protection analysis, erroneously assessing claims arising out of government action or out of an action of private citizens that infringes on a claimant’s Fourteenth Amendment rights.<sup>95</sup> Consequently, the Court’s failure precludes the achievement of true equality among the sexes and the gender variant.<sup>96</sup> Accordingly, federal appellate courts will continue their debate as to what “gender discrimination” is and whether jurisprudence evaluating the subject extends to members of the transgender community.<sup>97</sup>

#### V. THE CONFLICT DEFINED: THE UNCERTAINTY OF PROTECTIONS AFFORDED UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The Supreme Court has yet to hear a case relating to the constitutional rights of transgender individuals outside the scope of the Eighth Amendment’s protection against cruel and unusual punishment.<sup>98</sup> As a

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92. See *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (invalidating a state statute that required prior written consent of the spouse of a pregnant female seeking an abortion unless the abortion was necessary to protect the life of the mother); *Roe*, 410 U.S. at 142-43 (documenting the American Medical Association Committee on Criminal Abortion’s views in the nineteenth century on abortion when the life of the mother was not in danger).

93. See Ginsburg, *supra* note 12, at 386.

94. Pomerantz, *supra* note 6, at 1217 (noting the Court’s failure to adequately protect the transgender culture and positing that universities should allow students to self-identify with a particular gender in accordance with due process).

95. The Fourteenth Amendment to the United States Constitution, provides, in relevant part, that no “State [shall] deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend XIV, § 1.

96. See Franke, *supra* note 11, at 11.

97. Compare *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), *Smith v. City of Salem, Ohio*, 378 F.3d 566, 567-68 (6th Cir. 2004), and *Schwenk v. Hartford*, 204 F.3d 1187, 1192-93 (9th Cir. 2000), with *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007), and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

98. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994) (holding that “prison officials

result, lower courts continue to debate the meaning of “gender discrimination” and whether the doctrine’s jurisprudence extends to members of the transgender community suffering prejudicial conduct ultimately leading to the wrongful termination of their employment.<sup>99</sup> Further, the Court’s conflation and disaggregation of the terms “sex” and “gender” and its mistaken recognition of the “relevant differences” between the male and female sexes have provided lower courts free range to deny constitutional protections by using outdated biological concepts as a scathing pretext.<sup>100</sup>

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may be held liable under the Eighth Amendment for denying humane conditions of confinement only if they know that an inmate faces substantial risk of serious harm and disregard that risk by failing to take reasonable measures to abate it”). In fact, Dee Farmer’s transgender status was ancillary to the Court’s interpretation of its previous understanding of the Eight Amendment, and the only sentiment the majority imparted regarding Farmer’s status was the belief that those who are transgender suffer “[a] rare psychiatric disorder in which a person feels persistently uncomfortable about his or her anatomical sex’ and who typically seeks medical treatment including hormonal therapy and surgery, to bring about a permanent sex change.” *Id.* at 829 (citing AM. MED. ASSOC., *ENCYCLOPEDIA OF MEDICINE* 1006 (1989); AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 74-75 (3d rev. ed. 1987) [hereinafter DSM-III]).

99. See generally *Glenn*, 663 F.3d at 1316; *Etsitty*, 502 F.3d at 1218; *Smith*, 378 F.3d at 567-68; *Cruzan v. Special Sch. Dist.*, No. 1, 294 F.3d 981 (8th Cir. 2002) (per curiam); *Ulane*, 742 F.2d at 1085; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 748-49 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661 (9th Cir. 1977), *overruled by Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

100. See *Etsitty*, 502 F.3d at 1218 (holding that the dismissal of a transgender individual’s claims was permissible); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995) (holding that a transgender inmate’s allegation that some prisoners were given hormone therapy when others were not was not sufficient to state a claim for which relief could be granted under a theory of equal protection); *Creed v. Family Express Corp.*, No. 3:06-CV-465, 2009 WL 35237, at \*5, \*9-11 (N.D. Ind. Jan. 5, 2009) (denying Ms. Creed protections under Title VII and concluding that the Supreme Court’s reasoning in *Price Waterhouse v. Hopkins* did not extend to sex-specific dress codes); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 45-46 (N.Y. App. Div. 2005) (concluding that the denial of a transgender claimant’s right to use the women’s restroom did not amount to gender discriminatory conduct); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 998-1000 (N.D. Ohio 2003) (concluding that the discharge of a transgender employee after she refused to use the men’s room did not amount to a violation of Title VII of the Americans with Disabilities Act); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*1 (E.D. La. Sept. 16, 2002) (disdainfully referring to plaintiff as a “cross-dresser” and denying Title VII protections); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993) (stating that the transgender community is not protected under Title VII in claims instigated by employers who forbid transgender plaintiffs from using women’s restrooms); *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001) (holding that plaintiff was not to be permitted to use the women’s restroom because she was not “biologically female”).

While not the first court to address whether Title VII extends constitutional protections to a transgender individual, the United States Court of Appeals for the Seventh Circuit's reasoning in *Ulane v. Eastern Airlines, Inc.*,<sup>101</sup> has become the leading rationale in denying Title VII's extension of constitutional safeguards to transgender persons in order to combat incidents of workplace discriminatory conduct brought on by private citizens.<sup>102</sup> In Judge Harlington Wood, Jr.'s deplorably brief six-page opinion, he demonstrates a conspicuous perpetuation of the "gender discrimination" jurisprudential deficiencies by disaggregating sex from gender.<sup>103</sup> Through his authorship, the court adopts a fallacious presupposition that sex is biologically defined solely by the fundamental presence of "chromosomes, internal and external genitalia, hormones, and gonads" that are generally correlative to one sex in Euro-American society's binary construction of male and female.<sup>104</sup> Thus, the court failed to engage in any inquiry that may have engendered an understanding that sex is purely a perceived identity related to, but not determinative of, one's innate gender.<sup>105</sup>

Rather, the court institutionally denigrated a person's transgender status as "[a] rare psychiatric disorder,"<sup>106</sup> or as an existence comprised of paltry, unaccepted "cultural attitudinal characteristic[s]."<sup>107</sup> Even more

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101. 742 F.2d 1081 (7th Cir. 1984).

102. While the Equal Protection and Due Process Clauses of Section 1 of the Fourteenth Amendment are self-executing against government action, Section 5 of the Amendment as well as Clause 3 within Section 8 of Article I of the United States Constitution provide the special role of Congress in promulgating constitutional protections against private conduct. *Heart of Atlanta Motel, Inc., v. United States*, 379 U.S. 241, 244-45 (1964) (upholding congressional regulation of private conduct under the Article I, Section 8, Clause 3); *Katzenbach v. McClung*, 379 U.S. 294, 301-04 (1964) (delineating, further, congressional power to regulate private conduct under the combined functions of Article I, Section 8, Clause 3 and Section 5 of the Fourteenth Amendment). *See generally* *The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (denying regulation solely under Section 5 of the Fourteenth Amendment).

103. *Ulane*, 742 F.2d at 1083-84.

104. *Id.* at 1083 n.5-6.

105. *Id.* at 1083 n.6, 1084.

106. *See Farmer v. Brennan*, 511 U.S. 825, 829 (1994); *Ulane*, 742 F.2d at 1083 n.3 (relying on AM. MED. ASSOC., *supra* note 98, at 1006); *see also* DSM III, *supra* note 98, at 261-63.

107. *Ulane*, 742 F.2d at 1084-86 (reviewing congressional intent of the 1964 Act with respect to rights of transgender individuals); *see also* *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 158 n.1 (1994) (Scalia, J., dissenting). Individuals who identified as homosexual suffered a similar institutional stigmatization of a mental disease until the sexual orientation was declassified as such during early 1986. *See* RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (2d ed. 1987). Indeed, some scholars have completely rejected applications of the "gender

reprehensible, however, is the court's overtly contemptuous portrayal of Karen Ulane's efforts to correct the world's perception of her identity by conforming her outward appearance to her core identity:

[I]t may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide the case. If Eastern [Airlines] had considered Ulane to be female and had discriminated against her because she was female . . . then the argument might be made that Title VII applied . . . but that is not this case. It is clear from evidence that if Eastern did discriminate against Ulane, it was not because she is female."<sup>108</sup>

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discrimination" doctrine to members of the transgender community. *See, e.g.*, *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005); Elkind, *supra* note 7, at 904. Instead, these scholars suggest that "considering transgenderism as a disorder may more easily facilitate protections," either under an application of the Americans with Disabilities Act or a broader equal protection analysis. *See, e.g.*, *Estate of Bruno*, 792 N.Y.S.2d at 47; Elkind, *supra* note 7, at 903.

Nevertheless, these propositions are misconceived. First, within the scope of a broader equal protection claim, the Supreme Court has noted that discrimination resulting from mental disability or illness is not subjected to a heightened standard of scrutiny. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 454 (1985) (requiring the government to propound merely a rational basis for the discriminatory conduct). Second, framing transgender identity as a mental disability acquiesces to arguments that the transgender identity is a serious medical and psychological problem that constitutes a serious medical need. *See, e.g.*, *Brown v. Zavaras*, 63 F.3d 967, 970 (10th Cir. 1995); *White v. Farrier*, 849 F.2d 322, 325 (8th Cir. 1988); *Meriwether v. Faulkner*, 821 F.2d 408, 413 (7th Cir. 1987). Additionally, it continues to perpetuate a negative stigma on the transgender identity that only furthers animus. *Cf. Pomerantz, supra* note 6, at 1225 ("This medicalization has permeated American jurisprudence, which reflects the tending to pathologise transgenderism and ignore the complexities of transgender identity.").

Continued reliance of the medicalization of the transgender identity only reaffirms a misunderstanding between the transgender identity and contrasting genitalia. This misunderstanding and reliance on the false binary construct of the male and female sexes additionally reifies notions that if a transgender individual is provided any constitutional protection, it will be only after he or she undergoes gender corrective surgery. Phyllis Frye notes many problems with relying on the surgical standard: "The most common reason for delaying surgery is the cost, which can run from \$3,000 to \$40,000 depending on whether the person is [a male-to-female] or [female-to-male] and the type of corrections desired." Frye, *supra* note 24, at 160 n.118. The presence of "genitalia is not the sole indicator of sex." *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*6 (D. Ariz. June 3, 2004), *aff'd*, 325 F. App'x 492 (9th Cir. 2009). Further, demanding details about the transgender individual's genitalia implicates an individual's right to privacy in personal information. *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (describing two kinds of privacy interests: informational privacy and decisional privacy). Mostly importantly, it completely distorts the cognizable issue: "gender discrimination."

108. *Ulane*, 742 F.2d at 1087 (relying on *Holloway v. Arthur Anderson & Co.*, 566

Embracing the Supreme Court's second malfeasance,<sup>109</sup> the Seventh Circuit's opinion portrays Ulane as nothing more than a subhuman species precluded from any constitutionally based protections under Title VII because—in the eyes of the court—she was neither male nor female, but, rather the scientific creation of accomplished doctors.<sup>110</sup> In sum, Judge Wood's malign discussion of Ulane's plight effectively removed Ulane's humanity and thus eviscerated the humanity of the transgender identity.<sup>111</sup>

While much of *Ulane's* reasoning has been presumably overruled,<sup>112</sup> many courts encountering similarly situated claimants continue to espouse a bereft assessment of the terms sex and gender and derisively use the medicalization of the transgender identity to deny any and all legal recourse.<sup>113</sup> As recently as 2009, the United States District Court for the District of Indiana declined to grant Title VII protections to a transgender claimant wrongfully terminated from her employment because she refused to conform to a male sex-specific physical presentation while working.<sup>114</sup> Without question, the workplace has maintained its status, since the Seventh Circuit's decision in *Ulane*, as a battleground on which the fight for transgender equality continues to be overwhelmingly disastrous.<sup>115</sup>

Notwithstanding the Supreme Court's explicit extension of Title VII claims to discriminatory conduct premised on archaic, sex-normative

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F.2d 659 (9th Cir. 1987), *overruled by* Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000)).

109. See *supra* Part II.

110. *Ulane*, 742 F.2d at 1087 (relying on *Sommers v. Budget Mtkg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam), and *Holloway*, 566 F.2d 659, *overruled by* *Schwenk*, 204 F.3d 1187); see also Currah & Minter, *supra* note 5, at 39.

111. See generally Susan Etta Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L.L. REV. 329, 345 (1999).

112. See *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (declining to follow *Ulane* and arguing the Supreme Court's opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 190 (1989) (redefining the protections afforded under Title VII of the Civil Rights Act of 1964), eviscerates discriminatory practices against transgender individuals by concluding the archaic conduct of sex-stereotyping unconstitutional).

113. *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007); *Brown v. Zavaras*, 63 F.3d 967, 971 (10th Cir. 1995); *Creed v. Family Express Corp.*, No. 3:06-CV-465, 2009 WL 35237 (N.D. Ind. Jan. 5, 2009); *Johnson v. Fresh Mark., Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002); *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 284 (E.D. Pa. 1993); *Goins v. W. Grp.*, 635 N.W.2d 717 (Minn. 2001); *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S.2d 43, 52 (N.Y. App. Div. 2005).

114. See *Creed*, No. 3:06-CV-465, 2009 WL 35237, at \*1, \*10 (N.D. Ind. 2009).

115. See, e.g., *Johnson*, 337 F. Supp. 2d at 1000; *Dobre*, 850 F. Supp. at 287; *Goins*, 635 N.W.2d at 725; *Estate of Bruno*, 792 N.Y.S.2d at 52.

stereotypes,<sup>116</sup> lower courts have continued to use the disaggregation of sex and gender in addition to the false binary construct to deny transgender employees any legal remedy.<sup>117</sup> Most notably, the Court of Appeals for the Tenth Circuit's recent decision in *Etsitty v. Utah Transit Authority*<sup>118</sup> provides yet another case that chronicles the very conduct the Supreme Court invalidated in *Frontiero*<sup>119</sup> and *Price Waterhouse*,<sup>120</sup> particularly within the context of discriminatory conduct against transgender persons in the workplace.

Krystal Etsitty presented the appellate court with two Title VII claims of wrongful termination.<sup>121</sup> First, she averred that she was wrongfully terminated on the basis of her transgender status.<sup>122</sup> Second, she contended that she was wrongfully terminated for refusing to conform to Utah Transit Authority's "expectations of stereotypically male behavior," in that she used women's bathrooms along her assigned bus routes.<sup>123</sup> The court rejected Etsitty's first claim by adopting the Seventh Circuit's reasoning in *Ulane* that unlawful sex discrimination must only be viewed as the "unlawful . . . discriminat[ion] against women because they are women and men because they are men,"<sup>124</sup> thereby disaggregating sex from gender once more. Much like the Seventh Circuit, the Tenth Circuit failed to extend any constitutionally based protections under Title VII to Etsitty because she did not comport with the illusory binary construct of male and female recognized in the Supreme Court's long-standing "gender discrimination" jurisprudence.<sup>125</sup>

In addition, the appellate court declined to abide by the Supreme Court's explicit extension of Title VII claims to discriminatory conduct premised

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116. In *Price Waterhouse v. Hopkins*, the Supreme Court concluded that Title VII's prohibit of sex discrimination included discriminatory conduct based on an individual's rejection of the sex-normative stereotypes that have traditionally defined the acceptable behavior and roles of the male and female sexes. 490 U.S. 228, 260 (1989).

117. See, e.g., *Etsitty*, 502 F.3d at 1220; *Brown*, 63 F.3d at 971; *Creed*, No. 3:06-CV-465, 2009 WL 35237, at \*6; *Johnson*, 337 F. Supp. 2d 996; *Oiler*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*6; *Dobre*, 850 F. Supp. at 284; *Goins*, 635 N.W.2d at 725; *Estate of Bruno*, 792 N.Y.S.2d at 54.

118. See *Etsitty*, 502 F.3d at 1215.

119. *Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion).

120. *Price Waterhouse*, 490 U.S. at 256.

121. *Etsitty*, 502 F.3d at 1220-21.

122. *Id.* at 1218-19.

123. *Id.* at 1218, 1224.

124. *Id.* at 1221 (relying on *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)).

125. See *supra* Part II.

on archaic, sex-normative stereotypes.<sup>126</sup> Although the court acknowledged that “use of a restroom is an inherent part of one’s identity,”<sup>127</sup> it dismissed any argument that Etsitty’s transgender status inherently did not conform with sex-normative stereotypes.<sup>128</sup> Instead, the court extended the false binary construct of biological sex by concluding:

Etsitty may not claim protection under Title VII based upon her transsexuality *per se*. Rather, Etsitty’s claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes. However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women’s restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.<sup>129</sup>

The Tenth Circuit’s judgment is erroneous. Even though the court suggested that bathroom access—whether in or outside the workplace—for the transgender individual is fundamentally related to an individual right to liberty, it nevertheless unreasonably concluded that discrimination against a transgender individual—because his or her innate gender is incongruent with a perceived sex or the normative, stereotypical roles of that sex—is outside the ambit of “gender discrimination” jurisprudence.<sup>130</sup>

In contrast, other federal appellate and lower courts have determined that “all persons, whether transgender or not, are protected from discrimination on the basis of” sex-normative stereotypes.<sup>131</sup> Although these courts adopted the Supreme Court’s reasoning within *Price Waterhouse*<sup>132</sup> to extend protections to transgender persons, the vast majority of these courts did so through a misunderstanding of the transgender individual’s

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126. *Etsitty*, 502 F.3d at 1224-25 (discussing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-52 (1989)).

127. *Etsitty*, 502 F.3d at 1226.

128. *Id.* at 1224-25.

129. *Id.* (incorrectly relying on *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 875 n.7 (9th Cir. 2001)).

130. *Id.* at 1224-26, 1228.

131. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566, 572 (6th Cir. 2004); *Nichols v. Azteca Rest. Enter.*, 256 F.3d 864, 874 (9th Cir. 2001); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, No. Civ.A 05-243*, 2006 WL 456173, at \*8 (W.D. Pa. Feb. 21, 2006); *Kastl v. Maricopa Cnty. Comty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004), *aff’d*, 325 Fed. Appx. 492 (9th Cir. 2009); *Tronetti v. Healthnet Lakshore Hosp.*, No. 03-CV-0375E(SC), at \*4 (W.D.N.Y. Sept. 26, 2003). *But see* *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011).

132. 490 U.S. at 256 (1989).

interests.<sup>133</sup> Because these courts continue failing to fully appreciate the liberty interests at stake, they produce an ideology that similarly regards the transgender identity as inherently inferior.<sup>134</sup>

The Court of Appeals for the Sixth Circuit's opinion in *Smith v. City of Salem, Ohio*,<sup>135</sup> demonstrates this predicament. Despite the court's extension of Title VII's constitutionally-based protections to Smith through an adoption of the *Price Waterhouse* analysis, the court failed to recognize Smith's transgender identity by improperly referring to Smith with masculine pronouns throughout its opinion.<sup>136</sup> Admittedly, this failure to recognize Smith's transgender identity in large part arises out of the manner in which Smith pled the case before the federal district and appellate courts.<sup>137</sup> Admittedly, this begs the question whether Smith chose to portray herself as a male because she believed that an adoption of the *Price Waterhouse* analysis would have otherwise been foreclosed.

An evaluation of other lower court opinions overwhelmingly suggests that, had Smith presented the claim on the basis of nonconformity with the assumed sex that is in comport with her innate gender, the presiding court would have likely declined an extension of Title VII protections under the Supreme Court's analysis in *Price Waterhouse*.<sup>138</sup> Therefore, an application of *Price Waterhouse* suggests that a transgender claimant must assume the sex in conflict with his or her gender in order to be provided any constitutionally based protections. It appears that the transgender claimant is required to embrace the second malfeasance within "gender discrimination" jurisprudence by falsely accepting the incorrect presumption that manifestations of his or her innate identity are merely a rejection of the employer's binary construct of sex and gender.<sup>139</sup>

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133. See, e.g., *Barnes*, 401 F.3d at 729; *Smith*, 378 F.3d at 566; *Rosa*, 214 F.3d at 213; *Schwenk*, 204 F.3d at 1187.

134. See generally Alfieri, *supra* note 5, at 828.

135. See *Smith*, 378 F.3d at 572.

136. *Id.* at 566.

137. See, e.g., Plaintiff's Response to the Court's Show of Cause Order at 1, *Smith v. City of Salem, Ohio*, No. 4:02CV1405, 2003 WL 25720984 (N.D. Ohio Feb. 26, 2003), *rev'd*, 378 F.3d 566 (6th Cir. 2004).

138. See, e.g., *Barnes*, 401 F.3d at 737-38; *Rosa*, 214 F.3d at 215-26; *Lopez v. River Oaks*, 542 F. Supp. 2d 653, 660-61 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A 05-243, 2006 WL 456173, at \*2 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at \*4 (W.D.N.Y. Oct. 21, 2003).

139. See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000) ("What matters for purposes of this part of the Price Waterhouse analysis, is that [in] the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator's actions stem from the fact that he believed the victim was a man who 'failed to act like' one."); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C.

Accordingly, even sympathetic lower courts extending protections to transgender individuals partake in an erroneous analysis of the true interests at stake. “Gender discrimination” is substantially more complex than conduct resulting in the disparate treatment of an individual premised on one’s sex. “Gender discrimination” offends the very core of an individual’s inborn identity. But without explicit recognition from the Supreme Court that “gender discrimination” is premised on more than conduct resulting in the disparate treatment of one’s sex, the possibility of consistent extensions of constitutional protections to transgender persons remains nebulous. Is it possible, however, that another branch of the United States government may provide the requisite understanding to safeguard the transgender person’s rights?

#### VI. REDEFINING “GENDER DISCRIMINATION” AND BROADENING THE SCOPE OF PROTECTION

On April 20, 2012, the Equal Employment Opportunities Commission (EEOC) released an administrative adjudicatory opinion explicitly providing Title VII’s protections to members of the transgender community.<sup>140</sup> Many advocates have begun to argue that the EEOC has handed transgender claimants a breakthrough victory that provides reliable legal protection.<sup>141</sup> To be sure, an administrative agency such as the EEOC is not precluded from announcing new principles in an adjudicative proceeding,<sup>142</sup> and courts generally defer to an agency’s conclusion when Congress has not directly addressed the precise issue.<sup>143</sup> But transgender advocates should view the agency’s decision with at least some trepidation. Although the Supreme Court has recognized the EEOC’s guidance in interpreting Title VII, the Court has nonetheless determined that the EEOC’s guidelines are not binding authority.<sup>144</sup> In addition, the EEOC’s

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140. Macy, EEOC Decision No. 0120120821, 2012 WL 1435995, at \*16 (April 20, 2012).

141. See Morgan Lewis, *EEOC Broadens and Clarifies Scope of Title VII Enforcement*, JD SUPRA LAW NEWS (Apr. 30, 2012), <http://www.jdsupra.com/legalnews/eec-broadens-and-clarifies-scope-of-tit-74169>; Chris Geidner, *Transgender Breakthrough: EEOC Ruling That Gender-Identity Discrimination Is Covered by Title VII Is a “Sea Change” That Opens the Doors to Employment Protection for Transgender Americans*, METRO WEEKLY (Apr. 23, 2012, 10:38 PM), <http://www.metroweekly.com/news/?ak=7288> (citing Masen Davis of the Transgender Law Center and Shannon Minter of the National Center for Lesbian Rights).

142. See *NLRB v. Bell Aerospace*, 416 U.S. 267, 295 (1974).

143. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

144. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976), *superseded on other grounds by* Pregnancy Discrimination Act of 1978 §1, Pub. L. No. 95-555, 92

decision, although favorable to the transgender claimant, inadvertently supports the continued adoption of the Court's second malfeasance within "gender discrimination" jurisprudence by assuming that manifestations of the transgender claimant's identity are merely a rejection of the judiciary's conflated understanding of sex and gender.<sup>145</sup>

As a result, lower courts unpersuaded by arguments requesting the adoption of the Supreme Court's *Price Waterhouse* analysis to issues involving the transgender community will likely remain unyielding because of the judiciary's continued failure to understand the complex interrelationship of sex and gender. Thus, transgender claimants will continue struggling to garner the judiciary's exercise of heightened scrutiny to invalidate the inequitable transgressions of government and private action until the Court rectifies its imprecise development of "gender discrimination" jurisprudence.<sup>146</sup>

"Gender discrimination" is neither premised on the presence of rudimentary biological indicators nor is it the mere infringement upon the physicality of one's person.<sup>147</sup> "Gender discrimination" attacks the very core of an individual's innate identity as well as the individual's ability to manifest his or her own destiny. Certainly, "gender discriminatory" conduct falls within the ambit of the Equal Protection Clause. But "gender discrimination" is, first and foremost, a violation of an individual's substantive due process right to liberty.<sup>148</sup> As Justice Kennedy observed in *Lawrence*:

Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests.<sup>149</sup>

Justice Kennedy's reasoning reflects the Court's promising move

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Stat. 2076 (codified at 42 U.S.C. § 2000e(k)); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing *Gilbert*, 429 U.S. at 142).

145. *See supra* Part II.

146. *See supra* Part III. Professor Yoshino additionally suggests that litigants' attempts to acquire a heightened scrutiny analysis "have an increasingly antiquated air in federal constitutional litigation, as the last classification accorded heightened scrutiny by the Supreme Court was that based on non-marital parentage in 1977." Yoshino, *supra* note 12, at 756-57.

147. *See supra* Part II.

148. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992); *Schlesinger v. Ballard*, 419 U.S. 498, 512 n.1 (1975) (Brennan, J., dissenting); *Kahn v. Shevin*, 416 U.S. 351, 357 (1974) (Brennan, J., dissenting); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality opinion); *Roe v. Wade*, 410 U.S. 113, 153 (1973).

149. *Lawrence*, 539 U.S. at 575.

towards an acknowledgement that the equality and the liberty interests are “intertwined.”<sup>150</sup> Therefore, while the Court’s opinion in *Lawrence* does, in part, function as a missed opportunity in protecting an individual’s inborn identity against “gender discrimination,” *Lawrence* also signals an explicit appreciation for claims asserted on the dual premises of equality and liberty by “str[iking] the chains of history from due process jurisprudence.”<sup>151</sup>

Further, the Court’s recognition of substantive due process “liberty-based dignity claim[s]”<sup>152</sup> implicitly suggests a death knell to the antiquated equal protection methodology based upon highlighting the differences between claimants.<sup>153</sup> To be sure, “[t]he Court left no doubt that it was protecting the equal liberty and dignity not of atomistic individuals torn from their social context, but of people as they relate to, and interact with, one another,”<sup>154</sup> by emphasizing what we as humans all have in common.<sup>155</sup> One commonality that remains at the very “heart of liberty” is “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”<sup>156</sup> Surely, government or private action resulting in “gender discrimination” constitutes infringement on the individual’s right to self-identify and to manifest his or her own destiny, premised on a rejection of sex-normative stereotypes about the roles of the male and female sexes.<sup>157</sup>

Notwithstanding this glaringly obvious link between equality and liberty, lower courts will continue to operate under the judiciary’s misconceived understandings of sex, gender, and “gender discrimination.”<sup>158</sup>

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150. Yoshino, *supra* note 12, at 748-49; *see also* Brown, *supra* note 12, at 1505, 1507, 1541; Ginsburg, *supra* note 12, at 375; Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 211 (2011); Tribe, *supra* note 1, at 1934.

151. Yoshino, *supra* note 12, at 777; *see also* Tribe, *supra* note 1, at 1899.

152. *See* Yoshino, *supra* note 12, at 779; *see also* Henry, *supra* note 150, at 189; Tribe, *supra* note 1, at 1898.

153. Yoshino, *supra* note 12, at 794. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 658 (1972); Craig v. Boren, 429 U.S. 190, 199 (1960).

154. Tribe, *supra* note 1, at 1898.

155. Yoshino, *supra* note 12, at 796.

156. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

157. *Cf.* Feldblum, *The Right to Define*, *supra* note 7, at 126.

158. *Cf.* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1225 (10th Cir. 2007); *Brown v. Zavaras*, 63 F.3d 967, 972 (10th Cir. 1995); *Creed v. Family Express Corp.*, No. 3:06-CV-465, 2009 WL 35237, at \*11 (N.D. Ind. Jan. 5, 2009); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1001 (N.D. Ohio 2003); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*6 (E.D. La. Sept. 16, 2002); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 288 (E.D. Pa. 1993); *Goins v. W. Grp.*, 635 N.W.2d 717, 725 (Minn. 2001); *Hispanic AIDS Forum v. Estate of Bruno*, 792

Accordingly, the Supreme Court must redress its “gender discrimination” jurisprudence through an explicit recognition of liberty within its “gender discrimination” analyses.

#### VII. CONCLUSION

This article seeks to challenge archaic assumptions about sex and gender as well as the Supreme Court’s conflation and disaggregation of the two terms. Judicial reliance on these outmoded assumptions has resulted in the complete impediment of achieving total gender equality by recognizing what the Court has deemed the “relevant differences” between the sexes. To members of the transgender community, this conflict is inescapable, and the law has generated grave uncertainty with little to no protective recourse for these conflicts as they arise within the workplace. But until the Court rejects “conformance to a background social norm—i.e., that there must always be complete unity between sexual anatomy and gender identity—those individuals”<sup>159</sup> who maintain the transgender identity will continue to suffer disastrous consequences in the workplace.

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N.Y.S.2d 43, 48 (N.Y. App. Div. 2005).

159. See Feldblum, *The Right to Define*, *supra* note 7, at 138.