1-1-2014

The Legal Enforcement of "Proper" Gender Performance Through Title VII

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I. Introduction

Recent court cases have extended legal protection to transgender[1] employees for the first time.[2] While this would seem to be a revolutionary shift in legal interpretation, the actual impact of the decisions on the lives and experiences of transgender employees will be much more limited. Legal protection will be limited by sex-specific grooming codes and medical gate-keeping, such that the recent changes will only provide protection to those transgender persons whose gender identity reaffirms, rather than challenges, society's traditional, binary conceptions of "masculine" and "feminine."

Our understanding of sex and gender in society and in the law has changed greatly since sex discrimination in employment was first outlawed by Congress in the form of Title VII of the Civil Rights Act of 1964.[3] To accurately consider and analyze the impact of sex discrimination in the law and in the workplace, we must begin with an understanding of what "sex" and "gender" are and how they are created. Feminist and queer theory provide a solid background on which to

[1] For a useful resource on terminology, *See Transgender Terminology*, National Center for Transgender Equality, found at http://transequality.org/Resources/NCTE_TransTerminology.pdf. For my purposes here, it is useful to define a few. Transgender is an umbrella term for people whose gender identity, expression, or behavior is different from those typically associated with their assigned sex at birth, including but not limited to transsexuals, cross-dressers, androgynous people, gender-queers, and gender non-conforming people. Transsexual, often used in cases referenced here, is more specific, referring to people whose gender identity is different from their assigned sex at birth, and who often wish to alter their bodies through hormones or surgery in order to make it match their gender identity.
Cisgender refers to someone whose gender identity does match their assigned gender at birth. Throughout, I prefer to use the more inclusive term "transgender" but use other terms when in reference to specific cases as used by the court.

[2] *See* Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Macy v. Holder, EEOC DOC 0120120821.

[3] 42 U.S.C. § 2000e-1 to -17 (1981).

situate and understand sex and gender as socially constructed and performative,[4] and as a method of assigning social value and power in a hierarchy, with hegemonic masculinity at the top.[5] Any deviance from this masculine ideal is punished.[6] While this includes more commonly recognized forms of discrimination, such as discrimination against women, it also shows many other acts of discrimination, such as that against gay, lesbian, and bisexual employees, that against transgender employees, and that against even male employees who are not perceived to be masculine enough, are all interrelated and perpetrated with the same motivation.[7] Without this understanding, we would be unable to accurately understand the causes of sex discrimination, and likewise unable to interpret Title VII in ways to actually achieve the remedial goal of the statute; elimination of all employment discrimination "because of […] sex."[8]

By considering the shift in court interpretation from the Gender Stereotyping approach to the new Categorical Inclusion approach, the similarities and differences between them become more apparent. Section II will trace the history and evolution of these approaches and detail the advantages of Categorical Inclusion over Gender Stereotyping. Section III highlights the three continuing problems, and the particular dangers of Categorical Inclusion. These are sex-specific grooming codes and medical gate-keeping. Then, Section IV will show how deep-seated beliefs about proper levels of employer/societal control over gender performance transform what seems to be the explicit, categorical inclusion of protection for transgender employees into an approach more accurately labeled "Category Neutrality," an interpretation characterized not by protection

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[4] *See* JUDITH BUTLER, GENDER TROUBLE (1990); JUDITH BUTLER, UNDOING GENDER (2004); Judith Butler, *Performativity, Precarity and Sexual Politics*, Revista de Antropologia Iberoamericana, 4, No. 3, 1-13 (2009).

[5] *See* Ann McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. Colo. L. Rev. 1151 (2008); Ann McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. Mich. J. L.. Reform 713 (2010).

[6] *Id.*

[7] *Id.*

[8] 42 U.S.C. §2000e-2 (1981).

of gender nonconformity, but by the ability to choose which category you will conform to. Category Neutrality will provide no protection outside of binary gender performances and will then serve to reinforce and mandate such performances of gender by employees, cisgender and transgender alike.

Finally, Section V will conclude, framing this process as one of "preservation through transformation." This type of seemingly large charge is often subject to societal impulses to limit the change as much as possible, and to even repurpose the change to reaffirm the status quo. Here, court cases that seem to create Categorical Inclusion have actually created a regime of Category Neutrality, which uses sex-specific grooming codes and medical gate-keeping to limit protection to only those employees who practice binary performances of gender and will reinforce binary gender performances on all employees, trans and cisgender alike. This will only continue and reaffirm society's patriarchal norms, devaluing women, the feminine, anyone stepping outside of binary gender norms, and those who challenge the naturalness of those norms. Those who fit into a binary system of gender will be privileged over those who do not, who become invisible under the law.

II. Shifting from a Gender Stereotyping Approach to Categorical Inclusion (Sort of)

To understand how courts interpret Title VII in cases involving transgender plaintiffs, it is useful to see how this interpretation has changed over time. There are three distinct interpretations that have been utilized by courts to understand these cases, each occupying what seems to be a distinct chronological period of time, Categorical Rejection, Gender Stereotyping, and Categorical Inclusion.[9] This Section will trace the history and evolution of the two most

[9] This categorization is my own, but other similar formulations are offered by Kim Yuracko and Jason Lee. *See* Kim Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. Pa. L. Rev. 757 (2012); Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 Harv. J. L. & Gender 423 (2012).

recent approaches in depth, Gender Stereotyping and Categorical Inclusion, and will conclude with a look at the advantages of Categorical Inclusion over Gender Stereotyping.

Transgender plaintiffs first began to find success after the Supreme Court's 1989 *Price Waterhouse* decision.[10] Prior to then, very few cases were brought by transgender plaintiffs and all were ultimately unsuccessful.[11] This stage was characterized by the categorical rejection of claims by transgender plaintiffs.[12] The courts considered the plaintiffs to be members of a "new" category, transsexuals, one that was not protected under Title VII.[13]

In the years following the *Price Waterhouse* decision, most circuit courts have reconciled their resistance to adding "transsexual" as a "new" category meriting protection with *Price Waterhouse's* Gender Stereotyping theory by concluding that, while transgender plaintiffs are not protected as transgender, they are still entitled to the same protection they would have as a cisgender, nonconforming plaintiff.[14] "There is nothing in existing case law setting a point at which a man becomes too effeminate, or a woman becomes too masculine, to warrant protection."[15] If they can prove that their discrimination was based on gender stereotypes, they can be successful under Title VII.[16] This had the potential to dramatically change Title VII, but has been limited by courts' normative belief that there is an acceptable level of enforced gender conformity and their belief that homosexuality and transgender identities are not *inherently*

[10] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
[11] See Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Holloway v. Arthur Andersen & Co., 566 F.2d 659; Summers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982).
[12] *Id*.
[13] *Id*.
[14] *See* Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F.Supp.2d 653 (S.D. Texas 2008); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 WL 22757935.
[15] Lopez, *supra* note 39, at 660.
[16] *Supra* note 14.

gender nonconforming, such that evidence of homophobia and transphobia do not constitute evidence of gender stereotyping.[17]

The third, emerging stage has recognized that, as currently understood by society, transgender identities *are* inherently nonconforming.[18] Recognition that homosexuality is considered inherently gender nonconforming seems to be imminent.[19] In addition to better understanding how sex discrimination operates in society, this approach provides several distinct, practical benefits in regards to pleading, sex-segregated facilities, and evidence.

a. The Predominant Interpretation: Gender Stereotyping

The second stage, which was triggered by the Supreme Court's unexpectedly revolutionary decision in *Price Waterhouse*,[20] came to be characterized by a reconciliation between the realization that Title VII needed to include "gender stereotyping"[21] to be successful in its remedial goal of eliminating sex discrimination and the resistance of courts to consider homosexuality or gender nonconformance to be against society's gender stereotypes of men and women.[22]

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[17] *See* Joel Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 Duke J. Gender L. & Pol'y 205, 218-219 (2007).

[18] *Supra* note 2.

[19] For arguments in favor of expanding protection to cover sexual orientation, *see* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,* 69 N.Y.U. L. Rev. 197 (1994) and Olivia Szwalbnest, *Discriminating Because of "Pizzazz": Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 Tex. J. Women & L. 75 (2010). For a case that comes right up to the line without explicitly providing coverage for sexual orientation, *see* Centola v. Potter, 183 F.Supp.2d 403 (D. Mass 2002).

[20] Price Waterhouse, *supra* note 10.

[21] *Id*. at 251.

[22] *See* Rivera v. HFS Corp., 2012 WL 2152072 (D. PR 2012) (finding that calling plaintiff a "dirty dyke" was insufficient to show gender stereotyping and that gender stereotyping should not be used to "bootstrap" protection for sexual orientation); Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2004) ("This theory would not bootstrap protection for sexual orientation into Title VII"); Kiley v. American Soc. for Prevention of Cruelty to Animals, 296 Fed.Appx. 107 (2nd Cir. 2008) ("a plaintiff may not use a gender stereotyping claim to bootstrap protection for sexual orientation into Title VII"); Dobre v. National R.R. Passenger Corp., 850 F.Supp. 284 (E.D. PA 1993) ("Congress did not intend Title VII to protect transsexuals on the basis of their transsexualism").

Price Waterhouse first outlined a sex discrimination claim based on sex (or gender) stereotyping in 1989.[23] Though not considered an important issue at the time, this has been one of the most significant precedents set by the case.[24] Using a Gender Stereotyping theory of liability, plaintiffs can show that they had been discriminated against, based not just on their sex, but based specifically on the perception that they were violating gender stereotypes.[25] Prior to *Price Waterhouse*, a claim of sex discrimination was generally interpreted as requiring that an adverse employment action be made "because of sex," in the sense that it was based on animus towards one gender, and preference for the other, or because an individual was assumed to *fulfill* a negative stereotype rather than for violating one (ex. women do not have the strength to be police officers).[26] A Gender Stereotyping theory allows sex discrimination to be shown when the adverse employment action is made because the individual is perceived as violating gender stereotypes.[27] Under this theory, if an employer does not discriminate against all women, but does discriminate against women (or a woman) perceived as too masculine, this would now be sufficient to show sex discrimination.[28] Likewise, a man who is discriminated against for being perceived as too feminine can also show sex discrimination.[29]

Despite the broad, inclusive language, there is not agreement that the holding of *Price Waterhouse* is really that broad. While the court felt that it was unfair discrimination for a successful woman to be denied partnership for the very masculine qualities that made her so

[23] Courts generally use sex and gender interchangeably, but based on the analysis, it would be better described as "gender" stereotyping, since it addresses stereotypes of gendered behavior, not biological characteristics.
[24] The other main issue addressed in *Price Waterhouse*, the establishment of the mixed-motive claim, has been altered by amendment to Title VII in 1991. *Supra*, note 10.
[25] *Id*. at 251.

[26] Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561 (2007) at 573.

[27] Price Waterhouse, *supra*, note 10, at 250-251.
[28] *Id*.
[29] *Id*. at 251.

successful, it is not as clear that absent this sort of catch 22, there should be protection.[30] This disagreement over the boundaries of *Price Waterhouse* (or perhaps just resistance to the implications of it) has led courts in various directions, but most have ultimately headed towards at least some protection for LGBT employees.

Smith v. City of Salem is a good example of this reconciliation.[31] In this case, Smith brought a claim against her employer for sex discrimination based on Gender Stereotyping and because of her identification as a transsexual.[32] Smith was diagnosed with Gender Identity Disorder (GID) and began presenting at work as a woman.[33] Following this, Smith's co-workers began commenting that her appearance was "not masculine enough"[34] and her employer subjected her to psychological evaluations before ultimately suspending her.[35] The Sixth Circuit found in her favor, clarifying that someone's transgender status is not fatal to an otherwise successful claim of sex discrimination, as shown through Gender Stereotyping.[36] Gender identity is not covered, but people who are transgender are likewise not excluded from the same protections that cisgender employees have, from being discriminated against for failing to conform to gender stereotypes.[37]

Cases such as this, involving homosexual or transgender plaintiffs, show the implicit limitations of *Price Waterhouse*. Although they aim to apply a Gender Stereotyping theory to homosexual and transgender plaintiffs in the same way they would to a heterosexual, cisgender

[30] *Id.*
[31] Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004). See e.g. Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F.Supp.2d 653 (S.D. Texas 2008); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005); Tronetti v. TLC Healthnet Lakeshore Hosp., 2003 WL 22757935; Broadus v. State Farm Ins. Co., 2000 WL 1585257 (W.D. MO 2000); Creed v. Family Express Corp., 2009 WL 35237 (N.D. IN 2009).
[32] Smith, *supra*, note 31, at 571. In *Smith*, the court uses male pronouns, identifying her as a man who is violating male stereotypes by identifying and acting contrary to that masculine identity. However, I refer to Smith by female pronouns because she identifies as a woman.
[33] *Id.* at 568.
[34] *Id.*
[35] *Id.* at 569.
[36] *Id.* at 575.
[37] *Id.*

plaintiff, courts still see "homosexual" and "transgender/transexual" as additional, unprotected categories, rather than recognizing sexuality and gender as something that all people have, but which can be performed in conforming or nonconforming ways. Therefore, the courts do not categorize homosexuality or transgender identity as *inherently* nonconforming.[38] Hence, there must be additional evidence that the discrimination was based on gender stereotypes, exclusive of any evidence that it seems based on homosexuality or gender identity.[39] This understanding of gender and sexuality fails to see the connections between them, as well as the connection between discrimination based on sex or gender, that based on sexual orientation, and that based on gender identity. In reality, these are all connected, working together to devalue the feminine, whether found in men or women, and to punish any nonconformance.

b. A New Interpretation: Categorical Inclusion (Sort Of)

What could be identified as the third stage has emerged slowly and quietly over the last few years. The first example, *Schroer v. Billington*,[40] was decided in 2008, but did not reach the circuit level, limiting its precedential value. *Glenn v. Brumby*[41], decided by the Eleventh Circuit, was decided in 2011, and is the closest to Categorical Inclusion a circuit court has come. The final case, *Macy v. Holder*[42], decided in 2012, also has limited precedential value because it is an administrative decision by the Equal Employment Opportunity Commission (EEOC) and binding only on the federal government, but potentially setting a persuasive standard.[43]

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[38] *Supra* note 22.
[39] *Id*. For example, in Simonton, *supra* note 22, at 38, the court notes that "[t]his theory would not bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." While this is surely true, it refuses to address the reality that the individual's homosexuality itself may be considered nonconforming (even where he conforms otherwise to masculine stereotypes/she conforms to feminine stereotypes).
[40] Schroer v. Billington, 577 F.Supp.2d 293 (D.D.C. 2008).
[41] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).
[42] Macy v. Holder, EEOC DOC 0120120821.
[43] *See* U.S. Equal Employment Opportunity Commission, *Federal Sector*, found at http://www.eeoc.gov/federal/index.cfm.

These cases have all gone further than those from the second stage, by identifying discrimination based on gender identity as inherently about gender nonconformance[44] or by categorically including discrimination based on gender identity as sex discrimination.[45] This presents the possibility of broad protection for all gender nonconformity, but like in the first and second stage, will ultimately be constrained by deep societal beliefs about reasonable enforcement of gender performance.

Schroer v. Billington addressed the rescinding of an offer of employment to Diane Schroer,[46] who applied to be a terrorism specialist at the Library of Congress under what had been her legal name at the time, David Shroer.[47] She was highly favored over the other candidates, having retired as a Colonel after twenty-five years of service in the U.S. Armed Forces followed by work at a private consulting firm.[48] She earned the highest interview score and was recommended unanimously by the selection committee.[49] A job offer was made, but it was rescinded after she informed them that she would be transitioning from male to female before starting work.[50]

The court found both that she could make a Gender Stereotyping claim,[51] and that a claim based on discrimination because someone planned to "undergo[…] sex reassignment … is *literally* discrimination because of … sex," regardless of evidence about stereotypes.[52] As to the Gender Stereotyping claim, the court found that there was compelling, direct evidence that the

[44] Brumby, *supra* note 41, at 1316.
[45] Schroer, *supra* note 40, at 306-307, and Macy, *supra* note 42, at 10-11.
[46] *Supra* note 40 at 299.
[47] *Id*. at 295.
[48] *Id*.
[49] *Id*. at 296.
[50] *Id*. at 295-299.
[51] *Id*. at 305.
[52] *Id*. at 308. Italics in original.

defendant's decision was based on sex stereotypes.[53] The defendant admitted that she saw Schroer as "a man in women's clothing."[54] The court ultimately concluded that it did not matter "for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[55] There was no need to differentiate, because they are all based on gender stereotypes.[56] Unlike many cases, the court here recognizes both that these categories are connected, and that discrimination based on any one of them comes out of the same desire – to punish nonconformity, whether performed by a trans or cisgendered person.

As to the other argument, that discrimination based on gender transition is, regardless of direct evidence of stereotyping, sex discrimination, the court again found in the plaintiff's favor.[57] Making an analogy to discrimination based on religion that would later be quoted by the *Macy* decision, the judge argued that an employee changing their sex should be compared with an employee changing their religion. If an employer discriminated against an employee after she converted from Christianity to Judaism, but harbored no bias towards Christians or Jews generally, we would have no difficulty defining this as discrimination based on religion. Where one is discriminated against based on a change of religion, we would recognize that that is still "because of religion," and likewise, where one is discriminated against because they are changing their sex, this is still clearly "because of sex."[58] The creation of a new category, whether "converts" or "transsexual/gender" is an inappropriate way to avoid protection based on religion or gender. This understanding better recognizes that gender identity is something that

[53] *Id*. at 305.
[54] *Id*.
[55] *Id*.
[56] *Id*.
[57] *Id*. at 306.
[58] *Id*. at 306-307.

everyone has, whether cisgender or transgender. Everyone has a gender, but society only disapproves of some gender presentations.

In 2011, the Eleventh Circuit decided *Glenn v. Brumby*, brought by the plaintiff following her termination from employment with the state of Georgia.[59] Glenn had worked with the Georgia General Assembly's Office of Legislative Counsel since 2005.[60] In 2007, when Glenn informed her supervisor that she would start presenting as a woman at work, she was fired.[61] She was told that her "transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."[62]

In response, Glenn sued her former employer, alleging that Brumby had discriminated against her based on sex, including her gender identity and her failure to conform to sex stereotypes.[63] The court first considered whether firing an employee based on their failure to comply with gender stereotypes is a violation of the Equal Protection Clause.[64] To find an equal protection violation, one must belong to a suspect class (such as gender or race) that has been

[59] Brumby, *supra* note 41, at 1313.
[60] *Id*. at 1314.
[61] *Id*.
[62] *Id*.
[63] *Id*. Because her employer was an arm of the state, she had more legal options than are usually available in cases of employment discrimination. Most are brought under Title VII, but where there is state action, a discriminatory action can also constitute a constitutional violation, under the Equal Protection Clause. "In a § 1983 action, a court must determine 'whether the plaintiff has been deprived of a right secured by the Constitution and laws."' *Id.* (quoting Baker v. McCollan, 443 U.S. 137, 140 (1979)). Section 1983 is a statutory vehicle for addressing the "deprivation of any rights ... secured by the Constitution and laws." 42 U.S.C. § 1983 (2006). When an Equal Protection Clause claim is brought to challenge the same type of employer conduct that can be remedied by Title VII, the same framework is used to analyze both types of cases. Demoret v. Zegarelli, 451 F.3d 140, 149 (2nd Cir. 2006) (holding that once color of law is established, the analysis for a § 1983 claim is similar to an employment discrimination claim under Title VII, except that a § 1983 claim can be brought against an individual); Stuart v. Jefferson Cnty. Dep't of Human Res., 152 F.Appx 798, 802 (11th Cir. 2005) (recognizing that when § 1983 is a parallel remedy to Title VII, the elements are the same); Wright v. Rolette Cnty., 417 F.3d 879, 884 (8th Cir. 2005) (stating the elements of a prima facie case are the same regardless of whether a plaintiff seeks relief under a Title VII or § 1983 claim); Beardsley v. Webb, 30 F.3d 524, 527 (4th Cir. 1994) (pointing out that Title VII and § 1983 "coexist to afford relief for employment discrimination" and the standards are the same for litigation under both); Lipsett v. Univ. of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (using the same precedent developed under Title VII to analyze a § 1983 claim); Klen v. Colo. State Bd. of Agric., No. CIVA05CV02452EWNCBS, 2007 WL 2022061, at 19 (D. Colo. July 9, 2007).
[64] Brumby, *supra* note 41, at 1315.

discriminated against.[65] Unlike Title VII, there is no list of protected classes, and different classes trigger different levels of protection.[66] However, sex is considered a suspect class that triggers heightened scrutiny.[67] Instead of determining if being transgender is a suspect class on its own, the court considered whether gender identity fits within "sex" as protected, and decided that it did.[68] Walking a fine line between the Gender Stereotyping approach and a Categorical Inclusion approach, the court said that when a transgender employee is fired because of his or her gender non-conformity, the government violates the Equal Protection Clause.[69] However, while this sounds like traditional Gender Stereotyping theory following *Price Waterhouse*, the court then acknowledged that a person is defined as transgender precisely because they are perceived as violating gender stereotypes.[70] There is thus "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[71] This successfully identifies the reason why trans people are discriminated against – it is because their identities challenge society's gender norms.

The court then applied this legal interpretation to Glenn's case.[72] The defendant testified that he considered it "inappropriate"[73] for her to be dressed as a woman, that he found it "unnatural,"[74] and that his decision to fire her was based on "the sheer fact of the transition."[75] Based on this direct evidence, the court determined that "[i[f this were a Title VII case, the

[65] Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, AT 685-690.
[66] *Id*.
[67] Brumby, *supra* note 41, at 1315-1316.
[68] *Id*. at 1316.
[69] *Id*.
[70] *Id*.
[71] *Id*.
[72] *Id*. at 1320.
[73] *Id*.
[74] *Id*.
[75] *Id*. at 1321.

analysis would end here."[76] Glenn would thus have successfully won a Title VII claim, but since this was brought as an Equal Protection Clause claim, there was one more step in the analysis.[77] If Brumby had an "exceedingly persuasive justification" based on a "sufficiently important government interest" for the discriminating conduct, her firing would not be an equal protection violation.[78] Brumby alleged that their reason was concern that other women would object to Glenn's use of the women's restroom.[79] However, because this claim was contradicted by the evidence and was wholly based on speculation, the court did not find this reason sufficient to withstand heightened scrutiny.[80] Glenn was thus still successful even with the extra hurdle of an Equal Protection Clause claim.

The most recent case is *Macy v. Holder*, an EEOC administrative decision, binding only on the federal government with respect to its own employees.[81] The plaintiff applied for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives at a crime laboratory.[82] At the time, she still presented publically as a man.[83] After phone conversations with the director of the lab, she was told that the job was hers pending completion of a background check.[84] While waiting to hear the results of the background check, Macy informed them that she was in the process of transitioning from male to female.[85] Five days later, Macy was informed that the position was no longer available.[86]

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[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.* However, it is worth noting that this leaves the door open for the possibility that where there was evidence of complaints, the employer *would* have an "exceedingly persuasive justification" for the firing of a transgender employee.
[81] Macy, *supra* note 42.
[82] *Id.* at 1.
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*

Macy filed a formal complaint, describing her claim as based on sex, gender identity, and sex stereotyping.[87] In analyzing her claim, the EEOC noted that the interpretation of sex under Title VII was becoming increasingly more inclusive of gender identity, and concluded that they must likewise open up sex discrimination to include transgender plaintiffs.[88] While it could be easily argued that they somewhat overstate their case here, ignoring other precedent to the contrary and interpreting *Smith v. City of Salem* very broadly,[89] they did correctly identify an ongoing sea change in courts' responses to transgender plaintiffs, though it may not be as unanimous as they imply.[90] They then considered the plain language of Title VII and the analogy suggested by the court in *Schroer v. Billington*.[91] By comparing someone changing their sex to someone converting from one religion to another, they argue that even the plain language must include discrimination based on gender identity, regardless of the precedent in favor of it.[92] On this basis, the EEOC determined that discrimination based on someone's transgender status is *per se* sex discrimination, and expressly overruled prior decisions to the contrary.[93] This expansion acknowledges the connection between discrimination based on sex and discrimination based on gender identity. By expanding coverage to include gender identity, the EEOC creates the possibility of better effectuating the remedial goal of Title VII. If our goal is to eliminate discrimination based on sex and gender, we must include protection for all gender performances, even those that challenge societal beliefs.

[87] *Id*. at 2. The EEOC initially separated her claim into a sex discrimination claim, which they accepted, and a gender identity claim, which they rejected. Macy tried to appeal, but the Agency responded by informing Macy that the appeal was premature, since her claim of sex discrimination had not been decided yet. In order to remove this obstacle to her appeal, Macy withdrew her claim of sex discrimination, choosing to solely pursue her gender identity discrimination claim. *Id*. at 2-3.
[88] *Id*. at 5-10.
[89] *Id*. at 8.
[90] *Id.* at 5-10.
[91] *Id*. at 10-11.
[92] *Id*. at 11.
[93] *Id.* at 11. For a more detailed analysis of *Macy v. Holder*, *see* Caroline Hyatt, *Transforming the Plain Meaning of "Sex,"* _ Freedom Center J. _ (forthcoming).

c. Advantages Over the Gender Stereotyping Approach

There are several advantages to the categorical approach for transgender employees that are relevant to consider. Firstly, there will be less possibility that an improper pleading will get the case tossed out. Under the Gender Stereotyping approach, where it is important to distinguish between covered gender nonconformity and unprotected gender identity, the way that the case is pled is very important.[94] While this is less of a problem for transgender plaintiffs than it is for homosexual plaintiffs,[95] it can present problems. For example, Macy originally pled that she was discriminated against based on both sex and gender identity, and her claim based on gender identity was dismissed.[96] To force the EEOC to address the issue of gender identity, she withdrew the sex discrimination claim and appealed on gender identity.[97] In her case the strategy worked, but most courts would reject a claim based only on gender identity without a second thought.[98] If lucky, the court will allow a plaintiff to amend their complaint.[99] The best strategy is to plead both sex and gender identity, but this is not always done, possibly because of unfamiliarity with the law, or because of strong feelings on the part of the plaintiff about how they understand the discrimination they experienced. Regardless, valid claims should not be dismissed because of a lack of clarity, and including gender identity as a category protected

[94] *See e.g*. Bilunas v. Henderson, 2000 WL 639329 (D.N.H. 2000) (Man who alleged gender discrimination, rather than "gender stereotyping," had claim dismissed to amend complaint to "describe the precise legal theory under which he is proceeding and shall plead adequate facts to support that theory.").
[95] *See* Simonton, *supra* note 22 (Dismissed for failure to plead facts supporting evidence of gender nonconforming behavior, only sexual orientation); Kiley, *supra* note 22 (Dismissed for failure to plead facts supporting allegation of gender stereotyping); Birkholz v. City of New York, 2012 WL 580522 (E.D. NY 2012) (Dismissed for failure to allege gender stereotypes, where stereotypes alleged were about gay men); Pagan v. Gonzalez, 430 Fed.Appx.170 (Dismissed claim alleging discrimination based on sex and sexual orientation, concluding that it was really about sexual orientation, not sex, where no evidence of masculine behavior was pled); Williamson v. A.G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989) (Claim of discrimination based on homosexuality dismissed). On the other hand, Centola v. Potter, 183 F.Supp.2d 403 (D. Mass 2002) (Court found that although employee described his own discrimination on based on sexual orientation was relevant, it did not foreclose the possibility that his discrimination was based on gender stereotyping).
[96] Macy, *supra* note 42, at 2-3.
[97] *Id*. at 4.
[98] *Supra* notes 94 and 95.
[99] Bilunas, *supra* note 94, at 3.

under Title VII creates clarity as to what is covered under Title VII and ensures that all claims brought by transgender plaintiffs will be considered equally before the court.

Secondly, it may provide more protection for transgender plaintiffs who are terminated due to issues surrounding use of sex-segregated facilities. Restroom usage has been a persistent problem for transgender employees.[100] Employers often require transgender employees to use the facilities for a gender that they do not identify with, often based on supposed fears about the reactions of other employees.[101] When employees are terminated for failure to follow these policies, courts have been unsympathetic, often determining that this concern constitutes a legitimate, nondiscriminatory reason for the termination.[102] With Categorical Inclusion, it would be a more difficult argument for an employer to make because it would be clear that only transgender employees would be fired in such a situation. With transgender status explicitly protected, usage of facilities consistent with gender identity would also be protected. This is an important change, due to the persistent problems faced by the trans community in regards to bathroom usage.

Thirdly, it will expand the evidence that can be used to demonstrate discrimination against a transgender plaintiff. Under the Gender Stereotyping approach, only very specific factual scenarios can find success in the courtroom. These factual scenarios are limited to

[100] This is seen in court cases and in feminist writing on the subject. JUDITH HALBERSTAM, FEMALE MASCULINITY (1998), at 20-29; Johnson v. Fresh Mark, Inc., 98 Fed.Appx. 461 (Firing of transsexual woman after refusing to use men's restroom did not violate Title VII); Kastl v. Maricopa County Community College District, 325 Fed.Appx. 492 (9th Cir. 2009) (Banning transgender woman from using women's restroom did not violate Title VII); Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007) (Employer's requirement that employees use restroom matching their genitalia is a legitimate, nondiscriminatory reason to fire employee). On the other hand, Michaels v. Akal Sec., Inc., 2010 WL 2573988 D. Co (2010) (Where restroom restriction is not the only basis for the claim, a gender stereotyping claim may be successful).
[101] *E.g*. Kastl, *supra*, note 100, at 493.
[102] *Id*. at 494.

explicit comments about what is appropriate for men or for women.[103] It is not enough to argue that certain harassment or conduct is based on stereotypes. The discriminating supervisor or harasser must specifically and explicitly invoke the stereotype.[104] This creates a situation in which very similar treatment may be completely protected or completely unprotected. For example, if an employer regularly promoted other, less qualified employees over a transgender woman, and the supervisor included comments on her yearly reviews about how it is unnatural for a man to dress in feminine attire and is thus not projecting the right image for the company, she would likely find protection under Title VII. On the other hand, if the comments said that the employee found transgender status to be unnatural, and contrary to the image the company wanted to project, she would *not* find protection under Title VII through a Gender Stereotyping theory. The scenarios are almost identical, and both are certainly motivated by the same animus; punishing gender nonconformance that fails to reinforce proper boundaries between the masculine and the feminine and the naturalness of those boundaries. The only difference is the specific language used. Under a categorical approach, however, both would clearly be protected under Title VII.

The other implicit problem with requiring specific language that directly invokes a gender stereotype is that it essentially requires direct evidence. Most employment discrimination cases, however, are based on indirect evidence that creates an inference of discrimination,[105] such as firing a woman and replacing her with a man. Determining whether discrimination was based on gender stereotyping and not gender identity cannot be done without direct evidence, because the determination is so fact-specific. This means that cases brought by transgender

[103] Smith, *supra* note 31, where co-workers commented that her appearance and mannerisms were not masculine enough plaintiff was successful with gender stereotyping claim, as opposed to Fresh Mark, *supra* note 100, where plaintiff's claim of sex stereotyping was unsuccessful, there were no comments invoking stereotypes.
[104] Smith, *supra* note 31, at 568 and 572.
[105] As established in McDonell-Douglas v. Green, 411 U.S. 792. This has become the norm.

plaintiffs will always be more difficult to win under a Gender Stereotyping theory and will get harder as time goes on. Because there is less societal consensus that discrimination based on gender identity is wrong, people are more likely to verbalize their animus. As society changes, this will become less and less common, and discrimination will get harder and harder to prove, because it is almost impossible to indirectly prove discrimination against a transgender employee using a Gender Stereotyping theory. Having gender identity categorically included will allow transgender employees to have the same ability to prove discrimination indirectly as cisgender employees.

There are thus clear, practical benefits to a Categorical Inclusion approach over a Gender Stereotyping approach. There are people who would not have been able to successfully find relief from discrimination under a Gender Stereotyping approach, but who are able to under the Categorical Inclusion of gender identity. It also seems to better understand the causes of discrimination based on gender identity and its overlap with discrimination based on sex, by recognizing that they cannot be separated. Potentially the most important step made by the categorical approach is the implicit statement that discrimination based on gender identity is just as much of a problem as other forms of discrimination, and thus deserving of protection. This acknowledgement is an important step to true gender equality.

III. Continuing Problems

However, there are still considerable problems that continue or even worsen under a Categorical Inclusion approach. These problems create substantial gaps in protection, and will make the Categorical Inclusion approach only minimally effective at eliminating gender discrimination. Each of these problems, sex-specific grooming codes and medical gate-keeping, will be considered individually. What they all have in common that that they all provide

protection to some trans people, and to certain types of gender nonconformance, while excluding others from protection.

a. Sex-Specific Grooming Codes

A key problem that is unaddressed by any of the cases that have held gender identity to be categorically included among the protected classes in Title VII, is the problem of sex-specific grooming codes.[106] This is an area that has always suggested the courts' discomfort with the implications of the Gender Stereotyping theory.[107] The silence of the courts in this area[108] leads to only one conclusion: that the categorical approach does nothing to overturn the longstanding precedent on sex-specific grooming codes.

A recent, well-known example is *Jespersen v. Harrah's*, where the Ninth Circuit made clear that *Price Waterhouse* did not prohibit employers from instituting sex-specific grooming codes.[109] In the case, a female bartender was fired after failing to conform to the company's new dress code.[110] This dress code had separate rules for men and for women. While the uniform itself was the same for men and women, women were required to wear makeup, while men were prohibited from wearing makeup.[111] Women were also required to have their hair teased, curled, or styled, and men were required to keep their hair short.[112] While the plaintiff here was cisgender and identified as a woman, she did not conform to her employer's definition of what a woman should be. She felt very strongly that the makeup requirements conflicted with her self-

[106] Sex-specific grooming codes and dress codes mandate appropriate dress, appearance, and hygiene for employees.
[107] The creation by courts of a different legal scheme for sex-specific grooming codes, contrary to all other sex discrimination interpretations, sex stereotyping and otherwise, suggests an intention to limit the scope of Price Waterhouse's sex stereotyping theory. *See* Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1078 (9th Cir. 2006); Pecenka v. Fareway Stores, Inc., 672 N.W.2d 800 (Iowa 2003); Austin v. Wal-Mart Stores Texas L.P., 20 F.Supp.2d 1254 (N.D. Ind. 1998).
[108] Brumby, *supra* note 41, Schroer, *supra* note 40, and Macy, *supra* note 42. None of them reference grooming codes at all, much less the potential conflict created between these cases and the precedent on grooming codes.
[109] Jespersen, *supra* note 107.
[110] *Id*. at 1078.
[111] *Id*. at 1077.
[112] *Id*.

identity, that the requirement was offensive, and that it made her so uncomfortable that it interfered with her ability to do her job.[113]

Firing someone for not following a rule that only applies to women (that they must wear makeup) would seem to clearly violate any formulation of sex discrimination, because it is explicit that a woman is being fired for something that would not result in her firing had she been a man. It could be argued that the relevant comparison is whether a man would be fired for a violation of the grooming code (rather than for not wearing makeup), but following *Price Waterhouse* it seems clear that a rule created to enforce a gender stereotype – that women look a certain way – is a violation of Title VII. However, instead of following what seems to be clear precedent, the court set out a separate rule for sex-specific dress and grooming codes.[114] They decided that it is only a violation where the rule presents a "greater burden on one sex than the other."[115] As this is clearly contrary to the rest of the case law, it strongly suggests that the court felt, based on their own non-legal convictions, that it was *reasonable* to have sex-specific grooming codes. Here, where there were rules for *both* sexes and insufficient evidence had been presented that the women's rules were any more onerous than the men's rules, the court found that Harrah's grooming code did not create an undue burden, and was thus not a violation of Title VII. [116]

This resistance to see discrimination when there is a requirement on both men and women fails to understand gender properly. If discrimination is only exhibiting a preference for one gender over the other, then this is logical. However, a more complex understanding of

[113] *Id*.
[114] Jespersen, *supra* note 107, at 1080.
[115] *Id*.
[116] *Id*. at 1083.

gender directs us to recognize the way in which restrictions and gender policing on both/all genders hurt the individual "based on sex."

Considering this case in light of the new Categorical Inclusion approach to include discrimination based on gender identity suggests little change. For Jespersen herself, it provides no additional protection. She was not transgender and was not perceived as such. She violated gender stereotypes in a more limited way. She identified as a woman, but her gender performance did not match what was expected by her employer. In this way, the new interpretation does not change the outcome of this case. If we imagine a similar situation, where a sex-specific grooming code is violated, but by a transgender employee, the outcome still does not change. If we held transgender women to the same grooming code, some of them would be comfortable with the makeup requirement, and would comply. Others would run into the same problem that Jespersen did. A transgender woman with a more butch gender presentation might have similar feelings to the makeup requirement as Jespersen. If protection is available from discrimination based on gender identity, it would be illegal for the employer to force such a transgender woman to comply with the men's grooming code, based on their assumption that that was her "actual" or "real" gender. However, it *would not* give any greater protection from the women's grooming code (or the men's grooming code for a transman). She can choose to identify as a woman and have that decision protected, but can still be legally expected to conform to the employer's definition of what it means to be a woman.

This result is also suggested by the guidance provided by the Office of Personnel Management (OPM) on treatment of transgender employees in the federal government.[117] This

[117] *Employment of Transgender Individuals: Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace*, U.S. Office of Personnel Management (2012), http://www.opm.gov/diversity/Transgender/Guidance.asp.

guidance does not address legal rights, but seeks to provide guidelines for equitable treatment of transgender employees.[118] However, following the EEOC decision in *Macy*, this guidance has been promoted by the EEOC as consistent with *Macy* and as instructive in complying with *Macy* going forward.[119] This guidance specifically addresses grooming codes. They "should be applied to employees transitioning to a different gender in the same way that they are applied to other employees of that gender… [d]ress codes should not be used to prevent a transgender employee from living full-time in the role consistent with his or her gender identity."[120] This is completely consistent with the above analysis; a transgender employee cannot be forced to follow the code for a gender they do not identify with, but they will be forced to conform to the one that they do. In this way, burdensome requirements that reinforce and mandate specified gender performances are acceptable so long as they are equally discriminatory.

Transgender and cisgender employees alike can thus both still be required to adopt the gender performances mandated by an employer's sex-specific grooming code, so long as it is not considered to be putting an undue burden on one sex. This is considered to be consistent with *Price Waterhouse*, and is not changed by a prohibition on discrimination based on gender identity.[121]

b. Medical Gate-Keeping

A second problem that is not addressed or changed by the Categorical Inclusion of gender identity is that of medical gate-keeping. This problem is well established in the Gender Stereotyping approach[122] and will in fact worsen under a categorical approach.

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[118] *Id*.
[119] Chai Feldblum, Dan Vail, & Mellissa Brand, EEOC Brown Bag Session: What Does the Macy Decision Mean for Title VII? (June 15, 2012), *available at*: http://www.eeoc.gov/federal/training/brown_bag_macy.cfm
[120] *Supra* note 117.
[121] *Supra* note 107.
[122] *See e.g.* Tronetti, *supra* note 31; Lopez, *supra* note 31; Smith, *supra* note 31; Creed, *supra* note 31; Etsitty, *supra* note 100; Michaels, *supra* note 100.

Dean Spade has comprehensively documented many areas of law where medical evidence is necessary to establish the gender identity of someone who is transgender.[123] Anywhere that trans-identity comes in contact with the law, medical evidence determines whether one has legally cognizable rights.[124] This is the case in determining the legitimacy of a marriage, the custody of children, the right to wear gender appropriate clothing in school or foster care, rights in prison, or the right not to be discriminated against in employment.[125] He identifies two main problems with medical gate-keeping. Firstly, because medical intervention is only available to those that can afford it, this means that legal recognition is realistically unavailable to most transgender people.[126] Secondly, the medical care itself is doled out through gender-regulating processes that reinforce oppressive and sexist gender binaries.[127] To get the sexual reassignment surgery that is necessary to be legally recognized as the gender that someone identifies with, they must convince doctors that they are "really" transsexual.[128] To get through this process, transgender individuals must conform to hyper-masculine or hyper-feminine characteristics.[129] If they do not, they risk being considered just "confused," and thus unable to get access to the medical intervention that determines their legal rights.[130] This requirement of hyper-masculinity or -femininity requires not only current conformance, but also a history of gender nonconformance, preferably since childhood.[131] This process is so difficult that those whose identity does not fit into this neat medical understanding are often driven to

[123] Dean Spade, Resisting Medicine, Re/modeling Gender, 18 Berkeley Women's L.J. 15, at 17-18.
[124] *Id*.
[125] *Id*.
[126] *Id*. at 18.
[127] *Id*.
[128] *Id*. at 19-20.
[129] *Id*. at 28.
[130] *Id*. at 19-22.
[131] *Id*. at 19-20.

lying to obtain the surgery they desire.[132] This of course, does not even address people who do not desire surgery; this group would seem to be almost completely foreclosed from legal recognition.

Spade's analysis is consistent with both Gender Stereotyping cases and Categorical Inclusion cases, where medical evidence is used to legitimize the gender identity of the plaintiff. All of the Categorical Inclusion cases conform well to this unstated requirement of medical evidence. In *Schroer v. Billington*, Schroer had been diagnosed with Gender Identity Disorder (GID) and was following a medically appropriate plan for transition, guided by the Harry Benjamin Standards of Care.[133] The court took the time to include Schroer's description of how she saw being transgender, not as a choice, but as something that she had lived with all her life.[134]

In *Glenn v. Brumby*, we are told that Glenn has known she was a woman since puberty.[135] She was diagnosed with GID in 2005, and at that time began the process of transition under the supervision of health care providers.[136] She began living as a woman outside of work, as a prerequisite to sexual reassignment surgery, and in 2007, was considered ready to proceed with surgery and live as a woman full time.[137] Consistent with this, she had her name legally changed to match her gender identity.[138]

In *Macy v. Holder*, because the appeal only decides whether intentional discrimination against a transgender employee states a claim under Title VII and does not rule on the facts of

[132] *Id*. at 23.
[133] Schroer, *supra* note 40, at 295. The Harry Benjamin International Gender Dysphoria Association is now the World Professional Association for Transgender Health, at www.wpath.org.
[134] *Id*. at 296.
[135] Brumby, *supra* note 41, at 1314.
[136] *Id*.
[137] *Id*.
[138] *Id*.

Macy's claim, we do not have details about Macy's compliance with medical protocols.[139] However, in analyzing the legal precedent, the EEOC looks to many cases, including *Smith v. City of Salem, Glenn v. Brumby,* and *Schroer v. Billington*.[140] I have already addressed *Brumby* and *Schroer* in regards to their conformance with medical protocols. *Smith v. City of Salem* is similar, and the EEOC in *Macy* specifically references Smith's medical history, noting that Smith had been diagnosed with GID and that she was acting according to the medical protocols for treatment of her GID.[141]

Throughout all of these cases, we see medical evidence used to legitimize the gender identity of the plaintiffs. The fact that they were diagnosed with GID, per the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), that they were following a doctor's plan consistent with WPATH, they wanted to live completely as women, including surgery and proper legal documentation (such as a driver's license or other ID), and that they described their gender identity as something they had known for a long time, all go to create an understanding of their gender identity as real, scientifically verifiable, and immutable. For many transgender people, this is an accurate reflection of their experiences, but for many others, it is not.[142] This medical gate-keeping only allows some gender nonconforming people access to legal recognition, and without legal recognition, they have no protection from discrimination in the workplace. In addition to the outright exclusion of protection to many gender nonconforming people, it is important what type of gender nonconformity is being privileged. By privileging those who conform to a binary understanding of gender, either male or female, even though it is not the gender society expected them to identity with, they do not

[139] Macy, *supra* note 42.
[140] *Id*. at 8-11.
[141] *Id*. at 8.
[142] Spade, *supra* note 123, at 22.

challenge the gender binary in the same way that a more fluid or otherwise non-binary performance of gender does. This is because making their identity cognizable through medical diagnosis frames them as "fixable." By allowing them to transition, they are "fixed" and can begin life consistent with the preexisting gender performances available, rather than challenging them. In this way, transgender people's bodies are repurposed to support the patriarchal insistence that gender and natural, innate, and predetermined.

Particularly troublesome is that by offering categorical inclusion of gender identity, this problem will worsen. In a regime of protection specifically for people who are transsexual or transgender, courts will be forced to determine who qualifies as transsexual or transgender, and this medical evidence will become even more important to distinguish who is 'entitled' to legal protection and who is not.

IV. Creation of "Category Neutrality"

In addition to the gaps in protection left by these problems, court acceptance of sex-specific grooming codes and medical gate-keeping, they work together to result in "Category Neutrality."[143] Category Neutrality is characterized not by acceptance of nonconformity, but by the ability to choose which category an individual will conform to.[144] As such, while it offers some people the freedom to choose to live as the gender they identity with, it actually does nothing to expand the ability to live in ways that are considered gender nonconforming. Our perceptions as a society about proper gender performance will not only go unchallenged and unchanged, but will receive the force of law, mandating "proper" gender performance on the job. This law will even likely have extra legitimacy because of the appearance of coverage for

[143] Yuracko, *Supra* note 9. The term was coined by Yuracko as a potential explanation for courts seemingly inconsistent decisions in this area, but was dismissed. Her examination was not of a categorical inclusion approach, however, but of the earlier gender stereotyping approach.
[144] *Id*. at 780.

transgender employees. Transgender persons, despite having the potential to radically challenge our binary understanding of gender, will either continue to be unrecognizable under the law, in a state of increased precarity, or will be brought into the normative fold, reproducing binary performances of gender.

a. No Protection Outside of Binary

Category Neutrality does nothing to challenge binary performances of gender. While it has the potential to allow those who do not identity with the gender they were given at birth to transition to the other, it accepts these categories, completely unchanged. There are no options for nonconformity by transgender or cisgender employees. The result of this regime will be that only transgender persons that adhere to binary performances of gender will have legal protection. By basing protection on the individual's conformance with the medical model of transexuality, one defined by hypermasculine and hyperfeminine models of gender,[145] and allowing employers to enforce sex-specific grooming codes on their employees, those who do not conform to conventional notions of masculinity and femininity continue to lack protection from employment discrimination. Not only will this approach leave them unprotected, but it will also act to legitimize their exclusion from protection.

Medical gate-keeping acts to define who is entitled to this protection. Those whose gender identity fits the medical model are able to present courts with something scientific, something 'real,' and something therefore seen as immutable to justify and explain their identity. Framing an identity as immutable makes courts much more sympathetic to their claims; Title VII has traditionally been viewed as a vehicle for protecting individuals from discrimination based on immutable characteristics, those that we cannot help, those that we were born with. This is key to courts' desires to separate the immutable from mere 'preference.' In this way, medical

[145] Spade, *supra* note 123, at 28.

gate-keeping gives courts a way to determine what gender non-conformance is 'real' or 'immutable' and what is merely preference, and thus unprotected. Any gender nonconformance that does not fit this model then, whether by a transgender or cisgender individual, is then merely preference, a voluntary act, not considered deserving of protection under Title VII.[146]

While the medical community defines transsexuality very narrowly, the transgender community sees a much broader umbrella encompassing an infinite number of different ways one might understand their identity.[147] While many cisgender and transgender people identify comfortably with an identifiably masculine or feminine gender identity, many do not.[148] Additionally, transgender persons who are not binary-identified are often the most vulnerable, because they are less likely to be perceived as "passing" by cisgender individuals.[149] Any time that nonconformity is made visible, whether because someone's gender performance is not identifiably male or female, because they are unable to obtain the surgery or hormones that would allow them to live fully in the gender they identify with, or just because their official identification does not match their gender presentation, they are exposed to greater possibilities for harassment and violence.[150]

Finally, by offering protection for binary-identified trans people, the perpetuation of discrimination against those who are not binary-identified is not only continued, but legitimized. It might now be protected to be transgender, but only so long as you conform in every other way. By offering a route to protection however, conformance to binary gender norms, the law *seems*

[146] When finding that a behavior is not protected gender nonconformity, it is often described by the courts as a "preference." A preference is not considered the sort of immutable characteristic that Title VII was meant to protect, so by framing it this way, coverage is not extended. *E.g.* Austin, *supra* note 107, at 1256.
[147] Spade, *supra* note 123, at 22-23.
[148] *Id*. at 22.

[149] *See* Jack Harrison, A Gender Not Listed Here: Gender Queers, Gender Rebels, and Otherwise in the National Transgender Discrimination Survey, 2 LGBTQ Pol'y J. Hard. Kennedy School 13 (2012).

[150] DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS AND THE LIMITS OF LAW, (2011).

neutral. They cannot be expected to protect those who 'choose' not to seek the protection of the law. The fact that this protection is realistically unavailable to many people is of no concern to the Category Neutral/Categorical Inclusion approach.

b. Reinforcement of Masculine/Feminine Binary of Gender Performance

By offering protection only to those who desire to fit into either a masculine or feminine binary gender performance and by defining what those performances look like, such as through grooming codes, the processes of the workplace and the law act together to reinforce these binary performances. For most adults, the workplace is the key site for socialization. The interactions that take place in the workplace, both between coworkers and between employees and employer, are highly important as spaces for the creation and performance of all aspects of identity, including gender. In this way, it becomes the key social institution impacting the gender performances of both transgender and cisgender adults.

Sex-specific grooming codes are a good example of this problem, and one that is heightened under a Category Neutral regime. Where the discrimination (or burden) is felt by both men and women, courts have difficulty understanding it as "because of sex" because it is being applied to everyone.[151] Indeed, the test of whether a grooming code constitutes sex discrimination is whether it creates an undue burden on one sex over the other.[152] Such codes, however, have unparalleled power to define gendered expectations from the top down. The effect is that by defining limited performances for both genders, they can be discriminated against simultaneously. This occurs by putting the power of the organization behind the socially constructed gender performances. Hiring, firing, promotions and demotions, pay, and more, are strong motivations to conform to the expectations of the workplace, both implicit and explicit,

[151] *See* Jespersen, *supra* note 107.
[152] *Id*. at 1079.

such as a sex-specific grooming code. While there are certainly reasonable and acceptable expectations made of employees in the workplace, an employer's vision of proper gender performance is generally not going to be relevant to the proper functioning of a business or other employer. There are also other examples. Same-sex sexual harassment and "bisexual" harassment can both be effective but unofficial methods of reinforcing "proper" gendered behavior and performance, though they are beyond the scope of this paper.[153]

A Category Neutrality regime will legitimize the use of sex-specific grooming codes and other methods of regulation of gender performances by employees in the workplace. This will result in the reinforcement of binary gender performances on men and women, cisgender and transgender employees alike.

V. Conclusion: Preservation-Through-Transformation

As courts move towards explicit coverage for gender identity/transgender persons, they will do so in such a way as to reaffirm, rather than challenge binary understandings of gender. This is due to the patriarchal system we are still a part of, serving to devalue not only women, but anyone stepping outside of binary gender norms or challenging the naturalness of such norms. This will be affected through the use of sex-specific grooming codes and medical gate-keeping. Its effect will be to establish a hierarchy within the LGBT community, and even with the transgender community itself. Those who fit best into a binary system of gender will be the most privileged, while those who do not fit are rendered invisible under the law.

While the decisions in *Schroer*, *Brumby*, and *Macy* promise to provide more people coverage than had it before, they will actually offer coverage for *less* behavior, making the

[153] McGinley, *Creating Masculine Identities, supra* note 5 and Deborah Zalesne, *Lessons form Equal Opportunity Harassment Doctrine Challenging Sex-Specific Appearance and Dress Codes*, 14 Duke J. Gender L. & Pol'y 535 (2007) at 543-544.

ability of the law to define binary gender performance onto those people stronger. It will create a narrow prescribed space for non-conformity, unlike the (potential) open-endedness of *Price Waterhouse*. Transgender and cisgender employees alike will have to conform to the same stereotypes.

This process, of preservation-through-transformation, takes what looks like a huge step towards increased protection for the transgender population, and transforms it into something that will reinforce societal beliefs about gender.[154] We can include transgender individuals, but they will only be protected so long as they adhere to contemporary gender norms in every other way. This is not necessarily done out of any malicious intent. It is likely that the judges deciding these cases see themselves as allied with the movement, or at least as tolerant of it. However, they are deciding these cases and these questions within legal traditions and from a certain social position that predisposes them to certain legal conclusions.[155] In this way, the changes become as small as possible, to fit within prevailing narratives. Just as giving women the right to vote did not lead to political equality for women, and criminalizing intimate partner violence did not end the violence,[156] this is a big change, one that has the potential to lead somewhere positive, but which is also one that without very conscious interventions, will succeed only to reinforce the continued oppression of gender nonconforming persons in a more subtle, but no less effective, manner.

There are a number of potential solutions to this problem. Different legal interpretations, the passage of ENDA, instituting state protections rather than depending on federal ones, or encouraging companies to institute their own anti-discrimination policies can all help to address

[154] See Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L.J. 2117.
[155] *Id*. at 2180.
[156] Siegel, *supra* note 154.

the problem. But they are all potentially limited by the same problem of preservation-through-transformation.

The real issue is where our focus is, as employers, as judges, and as a country. Because we have started from a history of discrimination against individuals based on sexual orientation and gender identity, there is an assumption that there is no protection. Judges who believe it should stay that way then define why certain people are not entitled to protection. Those who believe differently then seek to define a larger group of people who are entitled to protection. However, by focusing on who is entitled to protection, we not only create a system that will by definition always exclude someone, but we lose sight of the remedial goal of Title VII; the elimination of all employment discrimination based on sex (among others).

The elimination of employment discrimination requires that we actively work to challenge and eliminate stereotypes and create workplaces that are inclusive. We must target the stereotypes and animus of employers, not get bogged down in what category the employee falls into. By refocusing on the intent and animus of the employer, we can more successfully target gender stereotypes, regardless of whether they are working against women, men, lesbians, gays, bisexuals, or transgendered individuals. If it is based on gender, it must be protected by Title VII to be successful, regardless of the identity of the person being discriminated against.

The importance of this sort of shift is ultimately not a hypothetical issue of gender and how workplaces participate in its creation, but of the real, lived effects on transgender individuals under U.S. law. This population continues to suffer some of the worst outcomes in the country, and inhabit the most precarious lives. They are routinely exposed to horrifyingly high rates of discrimination and violence. This system will only perpetuate the oppression of one of the most oppressed minorities in the country, and will legitimize the oppression of the most

vulnerable, those transgender individuals who are not binary-identified. The most vulnerable will continue to lack protection and everyone will continue to lack the self-determination to define their gender for themselves.