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ARTICLES

"ON THE BASIS OF SEX": USING TITLE IX TO PROTECT TRANSGENDER STUDENTS FROM DISCRIMINATION IN EDUCATION

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INTRODUCTION

Transgender students are vulnerable to discrimination, exclusion, and harassment. For proof of this fact, one need only consider a cursory collection of recent events reported in the media. Parents of a six-year-old transgender girl in Colorado mounted a challenge to her school's decision to exclude her from the girls' bathroom.[1] Smith College, an all-women's college in Northampton, Massachusetts, refused to consider the application of a transgender female student due ostensibly to a male gender marker appearing on one component of her application.[2] A transgender woman student announced that she was suing California Baptist University for expelling her after she outed herself in an appearance on a program on MTV.[3] A transgender woman student-athlete on the women's basketball team at a community college in California was criticized on nationally-syndicated sports radio program because of her age and natal sex.[4] Students at a high school in Mississippi staged a protest of the school's decision to permit a transgender student to wear clothing appropriate for her affirmed gender, a violation of the dress code in these students' minds.[5] These examples, all taken from news reports from a three-month period in early 2013, are stories that reveal just the surface of the problem. For every story of discrimination that's reported, there are likely countless others that are not.[6]

While it's clear that transgender students are harassed, excluded, and otherwise the victims of discrimination, what is less clear is the extent to which this discrimination is prohibited by law. Title IX, the federal law prohibiting discrimination "on the basis of sex" in federally-funded schools,[7] does not expressly prohibit discrimination against transgender students.[8] Yet it is

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1. Dan Frosch, *Dispute on Transgender Rights Unfolds at a Colorado School*, N.Y. TIMES, Mar. 18, 2013.

2. Natalie DiBlasio, *Smith College Rejects Transgender Applicant*, USA TODAY (Mar. 22, 2013, 11:37 AM), http://www.usatoday.com/story/news/nation/2013/03/22/smith-college-transgender-rejected/2009047/.

3. *Expelled Transgender Student Sues California Baptist University*, SAN DIEGO GAY & LESBIAN NEWS (Mar. 1, 2013), http://sdgln.com/news/2013/03/01/expelled-transgender-student-suing-california-baptist-university.

4. Erin Buzuvis, *Transgender Athlete in Women's Locker Room Sparks Criticism. . .Inclusion and Respect*, LGBT ISSUES IN SPORT BLOG (Jan. 2, 2013), http://stream.goodwin.drexel.edu/lgbtsportresearchnet/?p=863.

5. Justin Hanson, *Students Protest Over Transgender Student's 'Special Treatment,'* WMC-TV (Feb. 27, 2013 5:56 PM), http://www.wdam.com/story/21415682/students-accuse-school-of-discrimination.

6. EMILY A. GREYTAK, ET AL., HARSH REALITIES: THE EXPERIENCES OF TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS x-xi (2009), http://glsen.customer.def6.com/sites/default/files/Harsh%20Realities.pdf (reporting that 90% of transgender students reported hearing disparaging remarks, including from teachers and staff, 55% reported being physically harassed, and 28% physically assaulted).

7. 20 U.S.C. § 1681(a) (2012).

8. *Id.*

possible to interpret the prohibition on sex discrimination in a number of different ways that would make the law available to transgender plaintiffs in some, many, or all cases of discrimination otherwise covered by the statute. Since Title IX has only been invoked in a handful of transgender rights cases, litigants must reference judicial decisions interpreting the sex-discrimination prohibition in Title IX's employment discrimination analog, Title VII of the Civil Rights Act of 1964.[9] For example, in a line of cases going back to the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, courts have interpreted statutes that prohibit sex discrimination to include discrimination on the basis gender nonconformity.[10] More recently, however, a lower federal court interpreted sex discrimination in the employment context to include discrimination based on the change of one's sex; and the federal agency that enforces federal employment discrimination law interpreted sex discrimination to include discrimination based on gender identity.[11] All of these interpretations have the potential to assist transgender plaintiffs in at least some circumstances. This article will identify and evaluate these various interpretations with a goal toward maximizing the statute's potential to protect transgender plaintiffs, particularly students who, unlike teachers and staff, do not otherwise enjoy protection under civil rights laws protecting discrimination in employment.[12]

In pursuit of this goal, it is important to acknowledge that Title IX is not the only potential source of legal remedies to transgender students who have endured discrimination. A growing number of states include gender identity in the list of categories protected by their nondiscrimination statutes that apply to education, offering more direct, express protection for transgender students than Title IX itself.[13] Yet these protections only exist in fifteen states plus the District of Columbia, and the protection in three of these states only cover elementary and secondary education, excluding college and graduate school.[14] Another potential source of protection for transgender students is the proposed federal Student Nondiscrimination Act, which has been introduced, unsuccessfully so far, in the previous two congressional terms.[15] This bill seeks to prohibit discrimination on the basis of gender identity (as well as sexual orientation) in schools across the country.[16] But versions of the bill proposed so

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9. Title VII prohibits employers from discriminating against "any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . . ." 42 U.S.C. § 2000e-2(a)(1) (2012).

10. *See infra* Part II.B.

11. *See infra* Part II.C.

12. Title IX protects school employees from sex discrimination as well. This article will focus on students' rights, however, because employees enjoy commensurate protection under Title VII, while students do not.

13. *E.g.*, CONN. GEN. STAT. ANN. § 10-15c (West 2011); MASS. GEN. LAWS ANN. ch. 76, § 5 (West 2012); NEV. REV. STAT ANN. § 233.010 (West 2011).

14. CONN. GEN. STAT. ANN. § 10-15c (West 2011); NEV. REV. STAT ANN. § 233.010 (West 2011).

15. H.R. 998, 112th Cong. (2011); S. 555, 112th Cong. (2011); H.R. 4530, 111th Cong. (2010).

16. S. 555, 112th Cong.

far all include conflicting language that could be read to limit at least some of the law's protections to students at public elementary and secondary schools.[17] Title IX, in contrast, applies to educational institutions of every level that receive some federal funding.[18] Therefore, in addition to political advocacy aimed at passing the Student Nondiscrimination Act and expanding protections available under state laws,[19] advocates must fully leverage Title IX's potential as well.

This article will first provide a brief overview of Title IX, including, primarily, a general discussion of the statute's scope. Part II will examine judicial and regulatory decisions interpreting sex discrimination for purposes of Title VII, while Part III will describe the handful of cases to date in which courts have considered Title IX's applicability to cases involving transgender plaintiffs. Finally, Part IV looks ahead, envisioning Title IX's application to transgender discrimination contexts that haven't yet been considered by the courts. Part IV will also demonstrate that a number of interpretations support Title IX as a source of legal rights for transgender plaintiffs in contexts like harassment, admissions, and expulsion, while plaintiffs challenging discrimination in those aspects of education that are lawfully segregated by sex can benefit from recent and emerging interpretations of sex discrimination borrowed from the Title VII context.

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17. The Student Nondiscrimination Act has been described, even by its sponsors, as seeking to "establish[] a comprehensive federal prohibition against discrimination and bullying *in public schools* based on sexual orientation or gender identity." *Student Non-Discrimination Act*, AL FRANKEN: U.S. SENATOR FOR MINNESOTA, http://www.franken.senate.gov/?p=issue&id=212. The bill's primary provision, on the other hand, is written broadly to apply, like Title IX, to all federally funded educational institutions. *See* Student Non-Discrimination Act, S. 555, 112th Cong. § 4(a) ("No student shall, on the basis of actual or perceived sexual orientation or gender identity of such individual or of a person with whom the student associates or has associated, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any program or activity receiving Federal financial assistance.*) (emphasis added). Yet other provisions, read together, raise the possibility that the drafters understand its scope to be limited to public elementary and secondary schools. *See id.* § 4(b) ("For purposes of this Act, discrimination includes *harassment* of a student on the basis of actual or perceived sexual orientation or gender identity of such student or of a person with whom the student associates or has associated.") (emphasis added); *id.* § 3 ("The term 'harassment' means conduct that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from a program or activity of a *public school* or educational agency . . . .") (emphasis added); *id.* § 3(a)(5) ("The term 'public school' means *an elementary school . . . . that is a public institution*, and a *secondary school . . . . that is a public institution.*") (emphasis added).

18. 20 U.S.C. § 1681(a) (2012).

19. After all, Title IX has limitations of its own that could leave some transgender plaintiffs looking for remedies under state law. For example, Title IX does not apply to private undergraduate admissions, and thus would be unhelpful in instances like the Smith College example described above.

I. AN OVERVIEW OF TITLE IX

Just over forty years ago, Congress passed and President Nixon signed an omnibus education bill called The Education Amendment Acts of 1972, which contained the following provision, known as Title IX:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .[20]

Though this provision was primarily aimed at eliminating discrimination against women in college admissions and faculty hiring,[21] the law defines the statute's application broadly to address all levels of education, including "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education . . . ."[22] But despite the statute's breadth in this regard, Title IX also contains a number of exclusions and exemptions, which this Part will discuss in detail. It will also describe how Congress and the courts resolved other questions regarding the law's scope not addressed directly by the statute's terms; namely, Title IX's application to programs that are not themselves in direct receipt of federal funds, employment practices, and sexual harassment. Last, this section will address the ways in which Title IX permits educational institutions to segregate certain aspects by sex, including dormitories and facilities, athletics programs, and certain classes in elementary and secondary education.

A. Title IX Contains Statutory Exemptions for Private Undergraduate Admissions Practices and Other Programs

Title IX applies to college admissions, but the statute contains two express limitations in this regard. First, it excludes the admissions practices of private undergraduate institutions.[23] This limitation reflects the political influence of private colleges, many of whom were either not yet admitting women, or only admitting women subject to a limiting quota, at the time Title IX was being considered.[24] During floor debates on the proposed versions of Title IX,

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20. § 1681(a).

21. H.R. REP. NO. 92-554 at 1; Education Amendments of 1972 P.L. 92-318, 86 Stat. 235 (describing congressional testimony about discriminatory practices in admissions and hiring); Bernice R. Sandler, *"Too Strong for a Woman" – The Five Words that Created Title IX*, *in* TITLE IX: A BRIEF HISTORY WITH DOCUMENTS 35, 35.

22. § 1681(c).

23. *Id.* § 1681(a)(1) ("[I]n regard to admission to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . .").

24. *E.g.*, 117 CONG. REC. 38639–42 (Nov. 1, 1971) (remarks of Rep. Erlenborn) (including letters from Harvard, Yale, Princeton, Dartmouth, Smith, and the Association of American Universities, objecting to Congress's inclusion of undergraduate admissions in the nondiscrimination mandate). These arguments included concerns about the greater costs

Members of Congress spoke in favor of excluding undergraduate[25] admission in order to ensure that colleges would not be liable for sex discrimination as they transitioned towards equality.[26] Others spoke of the need to preserve institutions' "free[dom] to experiment with varying ratios of men and women on the campus"[27] and objected to the possible federal intrusion into the "right to determine the composition of their own student bodies . . . ."[28] The House of Representatives amended the bill to exclude all undergraduate admissions from the nondiscrimination mandate, but this broad exception had to be reconciled with the Senate's narrower exception during the conference.[29] As a result, the version of Title IX that was ultimately signed into law excludes private undergraduate admissions.[30]

This same floor debate also gave rise to Title IX's second limitation with respect to admissions—an expressed exclusion of the admissions practices of any single-sex public undergraduate institution that "traditionally and continually from its establishment has had a policy of admitting only students of one sex."[31] The exemption for public undergraduate admissions applied to such institutions as the Mississippi University for Women and the Virginia Military Institute; however, the single-sex practices of both institutions were subsequently found to violate the Equal Protection Clause of the 14th Amendment.[32] As a result of these decisions, Title IX's exemption for single-sex public institutions is effectively moot. The last public single-sex undergraduate institution was Douglass College (formerly New Jersey College for Women) which merged with Rutgers in 2007.[33]

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institutions would incur by adding an equal number of women to student bodies that were predominantly male, that increasing the number of female undergraduates would require institutions to redistribute faculty from the sciences to the humanities, and that having more female students would ultimately diminish alumni contributions. *Id.*

25. The House version of the bill containing the provision that would become Title IX contained an exemption for undergraduate admissions, while the Senate version excluded only private undergraduate admission as well as public institutions with a single-sex tradition. The Senate's version prevailed in the conference report.

26. *E.g.*, 117 CONG. REC. 39253–54 (Nov. 4, 1971) (Statement of Rep. Conte) (supporting an exception for undergraduate admissions, on behalf of private colleges like Williams and Amherst, who were by that time co-ed, but still low enrollment of women that could have appeared to be discriminatory under a law prohibiting sex discrimination in admissions); *id.* at 39254 (statement of Rep. Wyman) (supporting the amendment on behalf of Dartmouth College).

27. *Id.* at 39252 (statement of Rep. Peyser).

28. *Id.* at 39249 (statement of Rep. Erlenborn) (calling such intrusion "the seed of destruction for our system of higher education as we know it.").

29. *See* Sen. Conf. Rep. No. 92-798, at 221 (1972).

30. *Id.*

31. 20 U.S.C.§ 1681(a)(5) (2012). It also contained a now-outdated grace period for the admissions practices of institutions that were in the process of transitioning from a single-sex institution to a coeducation one. *Id.* § 1681(a)(2).

32. *United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

33. *Douglas Residential College*, WIKIPEDIA (Sept. 4, 2013), http://en.wikipedia.org/wiki/Douglass_Residential_College; *Women's Colleges in the United*

In addition to the statute's limitations regarding admissions, Title IX also includes a number of other expressed exemptions, including those for institutions whose primary purpose is to train individuals for the military of the United States,[34] social fraternities and sororities and voluntary youth service organizations,[35] boys and girls conferences,[36] father/daughter and mother/son activities,[37] and beauty pageant awards.[38] The statute also provides an exemption for religious institutions that demonstrate that Title IX is not consistent with the religious tenets of their organization.[39] The exemption, however, does not apply to the entire institution, but only those practices of the institution that are in fact in conflict with Title IX.[40]

B. Title IX's Scope Includes Programs Not Directly Receiving Federal Funds, Employment, Harassment

Today, it is clear that Title IX applies to all aspects of an institution that receives federal funds, but the law has not always been interpreted so broadly. After Title IX took effect in 1972, some educational institutions argued that the law's reach was limited only to programs that directly received federal funds.[41] In 1984, the Supreme Court endorsed this position in a case involving Grove City College, a private Christian college whose only contact using federal funds was its students' participation in federal financial student aid programs.[42] The Court held that Grove City College's admissions program was subject to Title IX as a result of that federal money, but its reasoning made clear that other aspects of the College that did not have a direct nexus with federal funds were outside the scope of the law.[43] Though Grove City College's case was not about athletics, the Court's reasoning rendered Title IX inapplicable to college and university athletic departments which do not directly receive federal funds.[44] Congress nullified this decision, however, when it passed the Civil Rights Restoration Act of 1987, amending Title IX to provide its application to "all

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States, WIKIPEDIA (Oct. 7, 2013), http://en.wikipedia.org/wiki/Women%27s_colleges_in_the_United_States.

34. § 1681(a)(4). The U.S. service academies, state and private military academies, now all admit women, so this exemption is moot to some extent. However, this exemption is not limited to admissions. As a result, service academies could argue that claims of sex discrimination outside the context of admissions, such as sexual harassment, are outside the scope of Title IX.

35. *Id.* § 1681(a)(6).

36. *Id.* § 1681(a)(7)

37. *Id.* § 1681(a)(8).

38. *Id.* § 1681(a)(9).

39. *Id.* § 1681(a)(3);

40. *See*, 20 U.S.C. § 1681(a)(3); 34 C.F.R. § 106.12(a) (2013).

41. *See Univ. of Richmond v. Bell*, 543 F. Supp. 321, 322 (E.D. Va. 1982); *Othen v. Ann Arbor Sch. Bd.*, 507 F. Supp. 1376, 1379 (E.D. Mich. 1981); *Grove City Coll. v. Harris*, 500 F. Supp. 253, 255 (W.D. Pa. 1980).

42. *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).

43. *Id.* at 573-74.

44. *Id.*

operations" of an educational institution, "any part of which is extended [f]ederal financial assistance . . . ."[45] As a result, Title IX applies, subject to the exclusions and exemptions discussed elsewhere in Part I, to all public elementary and secondary educations and even some private K-12 programs, who receive federal grants for classroom initiatives, educational technology, or subsidies for school lunch programs. As for colleges and universities, virtually all of them, public and private, participate in federal financial student aid programs,[46] ensuring that all of their programs and activities must comply with Title IX unless otherwise excluded or exempt.

Other questions of Title IX's scope have also been clarified by Supreme Court decisions. In *North Haven Board of Education v. Bell*, the Court clarified that when Congress said "no person" shall be subject to discrimination based on sex in federally –funded educational programs, it meant to include employees as well as students,[47] thus establishing Title IX's application to employment practices of educational institutions otherwise subject to the law. The Supreme Court has also confirmed that Title IX is enforceable not only by the Department of Education, but also through lawsuits by private individuals,[48] including lawsuits seeking money damages.[49] Additionally, the Court has confirmed that discrimination prohibited by the statute can include sexual harassment if school officials had notice of ongoing harassment or a threat thereof and responded to that information with deliberate indifference.[50]

C. *Title IX Allows Segregation by Sex in Athletics, Facilities, and K-12 Classes*

In most contexts to which it applies, Title IX's nondiscrimination mandate requires institutions to provide equal opportunity to students and employees of each sex. For example, the regulatory interpretation of Title IX's application to admissions prohibits preferences or numerical limitations based on sex, requiring applicants to be judged neutrally in that regard.[51] However, Title IX adopts a separate-but-equal approach to certain aspects of education. For one thing, the Department of Education's implementing regulations clarify that Title IX allows colleges and universities to provide separate dormitories, locker rooms, toilets, and shower facilities to each sex, so long as separate facilities

45. 20 U.S.C. § 1687 (2012).

46. One notable exception being Grove City College itself, who withdrew from participation in federal financial aid programs in order to preserve its institutional independence from Title IX and other civil rights laws similarly conditioned on federal funding. *About: Grove City College*, GROVE CITY COLLEGE, http://www.gcc.edu/about/Pages/About.aspx.

47. 456 U.S. 512 (1982); *see also* 34 C.F.R. §§ 106.51–106.61 (2013) (provisions of Title IX's implementing regulations governing employment practices).

48. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 677 (1979).

49. *Franklin v. Gwinnettt Cnty. Pub. Sch.*, 503 U.S. 60, 60 (1992).

50. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629 (1999).

51. 34 C.F.R. § 106.21(b) (2013).

are of comparable quality and proportionate in quantity.[52] The regulations also allow schools to provide separate athletics opportunities to students of each sex,[53] again, subject to requirements that separate programs be equivalent in terms of the number of opportunities available to each sex, as well as overall quality.[54]

Educational institutions may offer certain classes separately to members of each sex, including human sexuality classes, physical education classes that involve in contact sports, and chorus.[55] Additionally, the Department of Education adopted regulatory provisions in 2006 which expand opportunities for elementary and secondary schools to offer single-sex classes.[56] Such classes must either exist as part of an overall policy to provide diverse educational opportunities, or in order to address "particular, identified needs of its students.[57] Additionally, such programs must be voluntary, and must not supplant coeducation opportunities in the same subject or activity.[58] Since this regulation took effect, the number of public single-sex education classes has increased considerably.[59] Nevertheless, they remain controversial, as many have been challenged for violating these regulatory requirements and for employing generalizations and stereotypes about sex in an unconstitutional manner.[60]

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52. *Id.* §§ 106.32-106.33.

53. *Id.* § 106.41(b) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport."). The regulation does require, however, that when an institution offers a particular sport only for one sex, it allow members of the other sex the opportunity to try out in certain circumstances, i.e., (1) the student seeking the opportunity to try out must be a members of the sex whose athletic opportunities have previously been limited; and (2) the sport involved is a contact sport like boxing, wrestling, rugby, ice hockey, football, basketball, or other sports the purpose or major activity of which involves bodily contact. *Id.*

54. *Id.* § 106.41(c).

55. *Id.* § 106.34(a).

56. Dep't. of Educ., 71 Fed. Reg. 62530-32 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106).

57. § 106.34(b).

58. *Id.*

59. The National Association for Single-Sex Public Education reports that in the 2011-12 school year, 506 public elementary and secondary schools had some form of single sex education; 116 were entirely or mostly single sex while 390 were co-ed schools that segregated by sex for certain classes. *Single-Sex Schools/Schools with Single-Sex Classrooms/What's the Difference?*, NAT'L ASS'N FOR SINGLE SEX PUB. EDUC., http://www.singlesexschools.org/schools-schools.htm.

60. *Doe v. Vermilion Parish Sch. Bd.*, No. 10-30378, 2011 WL 1290793, at *368, *377 (5th Cir. Apr. 6, 2011) (remanding case to district court for full consideration of plaintiffs' claims that single sex education program violated Title IX and the Equal Protection Clause); *Doe v. Wood Cnty. Bd. of Educ.*, 888 F. Supp. 2d 771 (S.D.W. Va. 2012) (enjoining single-sex classes that were not completely voluntary). *See also* Teach Kids, Not Stereotypes, AMERICAN CIVIL LIBERTIES UNION (Mar. 28, 2013), http://www.aclu.org/womens-rights/teach-kids-not-stereotypes (describing the ACLU's efforts to challenge single-sex education that does not comply with Title IX).

D. Conclusion

Many specific questions regarding Title IX are answered in the statutory text, by judicial opinion, and by the statute's implementing regulations. Yet none of these sources of law definitively address the question at the heart of any attempt to apply Title IX to transgender students. What does it mean to discriminate based on *sex*, and how does that concept apply to someone who self-identifies in terms of gender in a manner that is incongruous with the sex that individual was assigned at birth?

It is clear that Congress did not consider questions of how Title IX would apply to transgender students and institutional employees when it passed Title IX in 1972, or when the Department of Health, Education and Welfare (the Department of Education's predecessor) promulgated Title IX's initial implementing regulations in 1975. It is not surprising that transgender issues were not on lawmakers' collective radar. Litigation seeking relief for transgender plaintiffs in the analogous context of employment was only beginning to occur at that point in time[61] and public attention had not yet focused on transgender athletes the way it would after Renee Richards' high-profile lawsuit challenging her exclusion from the 1976 U.S. Women's tennis open.[62] Over the last several decades, courts in the employment context have been called upon to consider how statutory prohibitions against sex discrimination apply to transgender plaintiffs, and it is to these interpretations this Article now turns.

II. TITLE VII CASES DEFINING DISCRIMINATION BASED ON SEX

Title VII of the Civil Rights Act of 1964, the federal employment discrimination statute, prohibits an employer from refusing to hire, firing, or otherwise discriminating against any individual "because of such individual's race, color, religion, sex, or national origin."[63] Congress did not define "sex" in this context either, nor did it leave a useful record suggesting how it may have interpreted the term.[64] Over the years, courts have struggled to provide a definition that would satisfactorily answer whether discrimination against transgender employees is sex discrimination under the law.[65] As this Part will show, a variety of such interpretations has emerged, from early interpretations that restricted transgender plaintiffs' rights under Title VII, to very recent decisions that have broadened those rights significantly.

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61. *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 n.7 (9th Cir. 1977) (citing earlier cases from 1975 and 1976, and adopting a "traditional definition" of sex that denied transgender plaintiff relief under Title VII).

62. *Richards v. U.S. Tennis Ass'n*, 400 N.Y.S.2d 267 (Sup. Ct. 1977).

63. 42 U.S.C. § 2000e-2(a) (2012).

64. See Shawn D. Twing & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class Under the Term "Sex" and Practical Implications of Inclusion*, 15 Tex. J. on C.L. & C.R. 173, 174 (2010) (describing how "sex" was inserted into Title VII legislation in the first place as a joke in an effort to get the bill defeated).

65. See infra Part II(A)-(C)

A. Early Decisions: "Because of [biological] sex"

In most early decisions involving transgender plaintiffs, courts reasoned that Congress meant for "sex" to mean biological sex, separate and apart from the sex (or more accurately, gender) one experiences oneself to be, an interpretation that resulted in courts denying Title VII protection to transgender plaintiffs.[66] *Ulane v. Eastern Airlines*, a case in which an airline fired a pilot after discovering the pilot had sex reassignment surgery, is perhaps the most notorious of these cases.[67] There, the Seventh Circuit Court of Appeals reasoned that Ulane's transition did not change her biological sex, in that it did not create a uterus and ovaries, or alter her male chromosomes.[68] Therefore, since Ulane did not change her sex, the airline did not discriminate against her "because of sex."[69]

While this judicial interpretation of "sex" was the one most commonly applied to early transgender plaintiffs, it was not an inevitable interpretation. Before being overruled by the Seventh Circuit, the federal district court in *Ulane* had ruled in the pilot's favor.[70] After receiving testimony from medical experts, the judge was persuaded that one's "sex" consists of more than just one's chromosomes or reproductive anatomy, but includes "at least in part a question of self-perception and a societal perception . . . ."[71] Once the court accepted sex as a multi-faceted concept, whose constituents are not always necessarily in accord, the court easily concluded that discrimination "because of sex" includes discrimination "because of transsexuality."[72] The judge bolstered this reasoning by analogizing to race discrimination, recognizing that race, too, has both biological and non-biological components that don't necessarily align.[73] A Hispanic plaintiff who is white but who presents and perceives himself to be non-white is covered by race discrimination, just as a plaintiff who is biologically male but who presents and perceives herself to be female is covered by sex discrimination.[74] Had the judge's conclusions been upheld on appeal instead of reversed, Title VII's application to transgender

66. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977); *Grossman v. Bd. of Educ.*, 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. 1975) *aff'd mem.*, 538 F.2d 319 (3d Cir. 1976); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) *aff'd mem.*, 570 F.2d 354 (9th Cir. 1978).

67. 742 F.2d 1081 (7th Cir. 1984).

68. *Id.* at 1083.

69. *Id at 1087.*

70. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 821 (N.D. Ill. 1984), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

71. *Id.* at 823-24.

72. *Id.* at 839-40. In the alternative, the judge would have let Ulane's case proceed on the theory that she was discriminated against because of her female sex. *Id.*

73. *Id.* at 823-24 (citing *Budinsky v. Corning Glass Works,* 425 F. Supp. 786, 788 (W.D. Pa. 1977

74. *Id.*

plaintiffs—and by extension, Title IX's—might have been a much more straightforward proposition.

B. "Because of sex"...stereotypes

The Supreme Court eventually rejected the view that Congress meant sex discrimination to only mean discrimination against one's biological sex.[75] In *Price Waterhouse v. Hopkins*, the Supreme Court considered the case of Ann Hopkins, a female accountant who was passed over for promotion based at least in part on the partners' view that she was too aggressive for a woman.[76] The Court recognized that because aggressiveness is a trait the partners require for promotion, their objections to Hopkins's aggressiveness placed her in an "intolerable and impermissible catch 22 . . . ."[77] By agreeing that "Title VII lifts women out of this bind," the Court interpreted sex discrimination to include not just discrimination on one's sex in the sense of being "biologically" male or female, but also discrimination on the basis of how one presents one's gender relative to one's "biological" sex.

Since *Price Waterhouse*, many lower courts have applied its holding to the benefit of plaintiffs claiming discrimination on the basis of their failure to conform to stereotypes about sex or gender.[78] Though *Price Waterhouse* did not involve a transgender plaintiff, transgender plaintiffs are among those who have prevailed under this interpretation. For example, in *Smith v. City of Salem*,[79] a city fire department tried to force an employee to resign after "he" (the court used plaintiff's birth-sex pronouns, perhaps to make the application of the sex stereotype theory more easily understood) began expressing his female gender identity in the workplace and expressed his intention to physically transition from male to female. Applying *Price Waterhouse*, a federal court of appeals determined that Smith's case was actionable under Title VII.[80] Specifically, the court drew a parallel between an employer "who discriminates against women because, for instance, they *do not* wear dresses or makeup" and employers "who discriminate against men because they *do* wear dresses or makeup, or otherwise act femininely. . . ."[81] If the former is an example of sex discrimination, as *Price Waterhouse* says, so too is the latter,

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75. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

76. *Id.* at 234-35.

77. *Id.* at 251.

78. *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (gay male employee harassed by fellow employees due to failure to conform to gender stereotypes). *But see Dawson v. Bumble & Bumble*, 398 F.3d 211, 220-23 (2d Cir. 2005) (plaintiff's evidence was insufficient to show that she was discriminated against for her gender nonconforming appearance, rather than her sexual orientation); *Jesperson v. Harrah's Operating Co. Inc.*, 392 F.3d 1076, 1082-83 (9th Cir. 2004) (rejecting that an employer's dress code, which required female employees to wear makeup, constituted a sex stereotype in violation of Title VII).

79. 378 F.3d 566, 574-75 (6th Cir. 2004).

80. *Id.* at 572-73.

81. *Id.* at 574 (first emphasis added).

and the fact that Smith's gender nonconformity could also be labeled transsexuality did not make the analogy to *Price Waterhouse* any less persuasive.[82] Besides *Smith v. City of Salem*, other judicial opinions have similarly applied the reasoning of *Price Waterhouse* to extend Title VII's protections to transgender plaintiffs who have endured adverse employment action due to the employer's perception that they failed to conform to stereotypes in behavior and appearance that are consistent with the plaintiff's birth sex.[83] As these cases demonstrate, gender nonconformity theory provides for the possibility of a work-around to the restrictive interpretation of sex presented by the *Ulane* line of cases. While not accepting a definition of sex that is broad enough to include transsexuality per se, these courts at least accept that a plaintiff's non-stereotypical presentation of one's biological sex can be the basis of protection, and have been able to fit transgender plaintiffs into this mold.

C. *Because of [Change of] Sex and Because of Transgender Gender Identity*

In 2008, *Schroer v. Billington*, a lower federal court decision, marked a turning point for transgender plaintiffs by interpreting sex discrimination to include discrimination on the basis of one's transsexuality.[84] The plaintiff in the case was Diane Schroer, a transgender woman who had applied for and was offered a job in the Library of Congress Congressional Research Service while she was still presenting as a male.[85] Before starting the job, Schroer disclosed her transgender status and her intention to present fulltime as a woman and undergo a physical transition as well.[86] Subsequently, the employer rescinded Schroer's job offer, claiming as the reason that it would be difficult for Schroer

82. *Id.* at 574-75.

83. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 656, 660 (S.D. Tex. 2008) (transsexual male-to-female (MTF) plaintiff whose job offer was revoked after she came to the interview presenting as a woman); *Schroer v. Billington*, 424 F. Supp. 2d 203, 210-11 (D.C. Cir. 2006); *Doe v. United Consumer Fin. Servs.*, No. 1:01 CV 1112, 2001 WL 34350174, at *3-4 (N.D. Ohio Nov. 9, 2001). *See also Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination against a transgender plaintiff's sex discrimination for purposes of applying heightened scrutiny under the Equal Protection Clause, noting that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."). *But see Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-1225 (10th Cir. 2007) (though transgender plaintiff alleged discrimination for failing to conform with stereotypes consistent with her birth sex, the defendant satisfied its burden of proving a legitimate, nondiscriminatory explanation for its decision; i.e., that plaintiff's desire to use public, women's bathrooms posed a risk of liability); *Oiler v. Winn-Dixie La., Inc.*, No. Civ. A.00-3114, 2002 WL 31098541, at *4-6 (E.D. La. Sept. 16, 2002) (relying on pre-Price Waterhouse decision holding transgender plaintiffs were not protected by Title VII ban on discrimination because of sex).

84. 577 F. Supp. 2d 293, 308 (D.C. Cir. 2008).

85. *Id.* at 295.

86. *Id.* at 296.

to obtain the necessary security clearance for the job.[87] Schroer sued, and after conducting a bench trial, the court ruled in her favor, on two alternative grounds.[88] First, applying *Price Waterhouse*, the court concluded that the employer discriminated against Schroer on the basis of gender nonconformity.[89] Schroer had produced sufficient evidence to suggest that the hiring decision maker rescinded the job offer because she was uncomfortable about the prospect of Schroer, whom she had come to know as a man, would be wearing a dress and presenting as a woman.[90]

Next, the court reasoned that, separate and apart from sex stereotyping, refusing to hire someone who changes their sex targets that person because of sex.[91] It is therefore sex discrimination in the same sense that refusing to hire someone because they have converted from one religion to another is discrimination on the basis of religion. [92] This reasoning offers broader protection for transgender plaintiffs than the sex stereotyping rationale; after all, it would have been available to Schroer even if the job offer had been revoked under circumstances that didn't evoke discrimination on the basis of gender nonconformity—for example, if Schroer had not been able to prove that her prospective employer thought of her as a "man in a dress" and was uncomfortable about that. Moreover, it avoids the awkward fit that comes from having to conceive of a plaintiff like Schroer as a gender nonconforming man in order to find in her favor. Finally, by sidestepping the inquiry into what Congress meant by sex, this reasoning avoids a collision course with the *Ulane* line of cases, and is therefore potentially available in jurisdictions where those cases are still good law.[93]

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87. *Id.* at 299.

88. *Id.* at 300.

89. *Id.* at 303-06.

90. *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D. Cir. 2008). The judge in this case had, in an earlier decision, acknowledged the apparent awkwardness of framing of Schroer's as a gender nonconformity case:

> Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that "Diane" is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave-she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex. *Id.* at 210-11 (the court went on to deny the Library's motion to dismiss anyway).

91. *Id.* at 306-08.

92. *Id.* at 306-07.

93. *Id.* at 308 ("Even if the decisions that define the word 'sex" in Title VII as referring only to anatomical or chromosomal sex are still good law—after that approach 'has been eviscerated by *Price Waterhouse*'—the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'") (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

Last year, an even broader interpretation of "because of sex" appeared in a decision of the Equal Opportunity Employment Commission, the federal agency that enforces Title VII and through which potential plaintiffs must first seek administrative relief before they may sue in federal court.[94] Mia Macy, a transgender woman, was still presenting as a man when she applied for a position with the Bureau of Alcohol, Tobacco, and Firearms crime laboratory in Walnut Creek, California.[95] After interviewing Macy, the lab director indicated that Macy would be hired if she cleared the background check.[96] Soon after that, Macy disclosed to the Director that she was in the process of transitioning from male to female.[97] Suddenly, the job was no longer available.[98] Macy filed a complaint with the Equal Employment Opportunity Commission (EEOC), which initially declined to process Macy's case as a case about discrimination on the basis of "gender identity, change of sex, and/or transgender status," but changed its position after Macy's intra-agency appeal.[99] Relying on *Price Waterhouse* and other precedent involving sex stereotyping claims, the EEOC reasoned that sex, as used in Title VII, encompasses both sex and gender.[100] Therefore, sex discrimination incorporates discrimination on the basis of someone's transgender status, as such discrimination is directed at the gender that individual performs relative to that individual's "biological," or assigned, sex. In total, the EEOC endorsed the broadest possible definition of sex discrimination: one that incorporates discrimination on the basis of biological sex, discrimination on the grounds of gender nonconformity (*Price Waterhouse*), discrimination on the basis of change of sex (*Schroer*), and discrimination on the basis of gender identity and transgender status (directly contra *Ulane*).

III. TITLE VII'S INFLUENCE ON TITLE IX CASES TO DATE

Of all of the Title VII precedent interpreting "because of sex," the *Price Waterhouse* gender nonconformity interpretation is the one to have already proven influential in Title IX cases. The vast majority of these cases have involved non-transgender plaintiffs. For example, in *Montgomery v. Independent School District No. 709*, the plaintiff was a male high school student who had been verbally and physically tormented by his classmates throughout eleven years of public education.[101] The harassing students

94. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Macy v. Holder*, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012), *available at* http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt.

101. 109 F. Supp. 2d 1081, 1083-84 (D. Minn. 2000).

routinely calling the victim a girl and by a girl's name suggested to the court that the plaintiff was targeted for being insufficiently masculine in his appearance and behavior, making his case one of gender nonconformity.[102] Even though the plaintiff was also targeted for his perceived sexual orientation, the extent to which this harassment took the form of targeting his gender presentation is what gave him a right to relief under Title IX. Since *Montgomery*, many plaintiffs, both male and female have prevailed in harassment cases by invoking *Price Waterhouse*.[103] Even in cases where plaintiffs' cases were dismissed, such outcomes were due to insufficient evidence that gender nonconformity motivated the harassment, not a disagreement about whether "because of sex" incorporates gender nonconformity as a matter of law.[104]

Outside the courts, federal agencies with enforcement authority over Title IX have also interpreted discrimination "because of sex" to include discrimination on the basis of gender nonconformity. In 2010, the Justice Department sought to intervene in Title IX litigation on behalf of the plaintiff, a male student who was bullied and harassed by his peers because he "engages in physical expressions that are stereotypically female, e.g., swinging his hips and singing in a high pitched voice."[105] The case settled before the Justice Department could brief the issue, but the agency's effort to take the plaintiff's side demonstrates the government's approval of interpreting Title IX to apply in cases involving discrimination on the basis of gender nonconformity. Later that year, the Department of Education issued a "Dear Colleague Letter" to clarify school districts' obligations under Title IX to address peer harassment.[106] Among other points, the letter explained that while Title IX does not expressly cover discrimination on the basis of sexual orientation or gender identity, it does protect all students, including gay, lesbian, bisexual, and transgender students, who experience sex- or gender-based harassment.[107] As an example, the letter describes a hypothetical non-transgender gay male student who was ridiculed because his effeminate behavior and mannerisms

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102. *Id.* at 1090-93.

103. *Patterson v. Hudson Area Sch.*, 551 F.3d 438 (6th Cir. 2009); *Doe v. Brimfield Grade Sch.*, 552 F. Supp. 2d 816 (C.D. Ill. 2008); *Riccio v. New Haven Bd. of Educ*, 467 F. Supp. 2d 219 (D. Conn. 2006); *Theno v. Tonganoxie Unified Sch. Dist No. 464*, 377 F. Supp. 2d 952 (D. Kan. 2005).

104. *E.g.*, *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 861, 867 (8th Cir. 2011); *A.E. ex rel. Evans v. Harrisburg Sch. Dist. No. 7*, No. 6:11-CV-6255-TC, 2012 WL 4794314 (D. Or. Oct. 9, 2012); *Estate of Carmichael v. Galbraith*, No. 3:11-CV-0622-D, 2012 WL 4442413 (N.D. Tex. Sept. 26, 2012); *Hoffman v. Saginaw Pub. Sch.*, No. 12-10354, 2012 WL 2450805 (E.D. Mich. June 27, 2012).

105. J.L. v. Mohawk Cent. Sch. Dist. 6:09 Cv. 943 (N.D.N.Y.) (U.S. Department of Justice motion for leave to intervene), available at http://www.justice.gov/crt/about/edu/documents/mohawkmotion.pdf.

106. Dear Colleague Letter from Russlynn Ali, Department of Education Assistant Secretary for Civil Rights, Oct. 26, 2010, available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf

107. *Id.*

and his preference for certain activities like drama club over sports.[108] The Department confirmed that a school district in such a case is obligated to respond to such harassment, taking such steps as reasonably necessary to prevent its recurrence and address its affects.

The gender nonconformity theory of *Price Waterhouse* has thus become of fixture in harassment cases, suggesting this interpretation is available to transgender plaintiffs in Title IX cases as well. After all, harassment is a form of discrimination that is familiar to both employment and education contexts, so it is natural that precedent defining "because of sex" in one context would apply in the other. There is also a strong similarity between the type of harassment experienced by the gay and lesbian Title IX plaintiffs who have prevailed on this theory and the type of harassment transgender plaintiffs would likely challenge under the law.

Given this seemingly good fit, it is interesting to note that in the one reported Title IX harassment case that actually involved a transgender plaintiff, the gender nonconformity theory was nowhere to be seen. In *Miles v. New York University*,[109] the court accepted Title IX's applicability because the plaintiff, a student victim of sexual harassment, had been "perceived as female" by the offending professor.[110] Save for one very recent state superior court decision, in which the court considered the applicability of Title IX to the plaintiff's harassment claims without even analyzing whether harassment was "because of sex,"[111] no other reported Title IX harassment decisions have addressed plaintiffs who were identified as transgender.

At the same time, the gender nonconformity theory *did* make an appearance in the only other reported Title IX/transgender case, where it was of questionable relevance. In *Kastl v. Maricopa County Community College District*, a community college prohibited a transgender instructor from using the women's restroom during her transition.[112] In a point that contradicted the lower court's reasoning, the Ninth Circuit Court of Appeals determined that Kastl had established a prima face of sex discrimination, based on a reading of Title IX that incorporated discrimination on the basis of gender conformity.[113] In the end, though, the court affirmed the lower court's dismissal of the case because it was persuaded by the college's evidence that the bathroom assignment was in fact motivated by concerns about safety instead.[114] The court's one-page opinion gives rise to several unanswered questions about its reasoning. For one thing, if the court really was concerned about stereotypes about sex and gender, why didn't it recognize that the college's ostensible and

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108. *Id.*

109. 979 F. Supp. 248 (S.D.N.Y. 1997).

110. *Id.* at 249-50.

111. *Doe v. Clenchy*, Penobscot Super. Ct, Nov. 20, 2012 (order granting summary judgment).

112. *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009).

113. *Id.*

114. *Id.* at 494.

vaguely-described concerns about "safety" traded in gender and transgender stereotypes as well? Relatedly, why did the court allow the college to offer a non-discriminatory justification in the first place? To accommodate the fact that most discrimination in the employment context is not discriminatory on its face, courts will allow plaintiffs to establish a prima facie case for discrimination based on circumstantial evidence. In such cases, the defendant can nevertheless prevail by offering a plausible nondiscriminatory justification for its action that is not pretext for unlawful discrimination.[115] But a case like Kastl's did not involve circumstantial evidence of discrimination. She was banned from the women's restroom explicitly because of her "sex"—whether that means her biological sex or transgender status. Therefore, the court should not have considered the college's ostensibly nondiscriminatory, alternative explanation.[116]

Finally, the court's terse analysis does not answer the question of exactly why Kastl's case was one involving gender nonconformity. After all, the college was not excluding Kastl from the men's room because Kastl did not dress and act like a stereotypical male. Instead, it was treating her differently from other women based on the priority it assigned to her "biological" male sex. It is possible the court viewed Kastl as a gender nonconforming woman, in the sense that her anatomy, chromosomes, and birth sex assignment defy stereotypes about the anatomy, chromosomes, and birth sex assignment women typically have. But if the court was viewing Kastl that way, it would have been applying *Price Waterhouse* in a new and unique way—one that bears more explanation than what the court provided. In its brevity, the court's decision in Kastl offers very little substance to help us understand how courts should or will apply Title IX in cases involving transgender plaintiffs.

IV. TITLE IX'S APPLICATION TO TRANSGENDER PLAINTIFFS GOING FORWARD

Title IX cases involving transgender plaintiffs are, so far, rare, raising the question of how the law would apply to transgender cases in contexts not yet litigated. On top of that, recent developments in Title VII cases involving transgender plaintiffs provide additional new arguments that litigants can seek to apply in Title IX cases. This Part seeks to apply both existing and new interpretations of sex under Title VII to answer open questions about Title IX's application to transgender discrimination in the context of harassment, admissions and expulsion, and exclusion from lawfully sex-segregated contexts of education such as dormitories, bathrooms, and athletic teams.

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115. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

116. "[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination." *Trans World Airlines, Inc. v. Thurston*, 469 U .S. 111, 121 (1985).

A. Harassment Cases

If a transgender plaintiff brought a Title IX case against an educational institution stemming from peer or teacher harassment, the gender nonconformity theory of *Price Waterhouse* would be the case's strongest legal ground for argument that harassment is "because of sex." After all, this theory was employed favorably towards transgender plaintiffs in the employment context, as well as by nontransgender plaintiffs in the education context, as discussed above. Based on this precedent, a judge would likely be persuaded to view harassment of a transgender student as targeting the student's perceived failure to conform to the stereotypes associated with that student's natal sex.[117] Especially in cases where the harassing students have already come to know the student's natal sex, this perception of nonconformity is likely to be present, or at least easy for the judge to imagine.[118] In fact, except for cases like Miles, where the plaintiff was not perceived as transgender, most harassment that targets a transgender student is likely to involve negative comments about the student's gender expression and appearance, which would likely demonstrate animus based on gender nonconformity.

While the advantage of relying on the gender nonconformity theory is that it is tried and true, particularly in cases involving harassment, there are potential disadvantages and limitations to pursuing relief under this approach. For instance, there may be some cases of harassment in which there is evidence of transgender animus, but not evidence of animus towards the plaintiff's gender nonconformity.[119] In such cases the gender nonconformity approach would be of little use. There also may be cases in which the gender nonconformity theory may be useful, but undesirable to the plaintiff. Some view the gender nonconformity theory as undermining or erasing a transgender plaintiff's gender identity, as it would require a transgender woman, for example, to seek relief for discrimination against her as a gender nonconforming man.[120] To be sure, the law does not technically require the

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117. Leena D. Phadke, Comment, *When Women Aren't Women and Men Aren't Men: The Problem of Transgender Sex Discrimination Under Title IX*, 54 U. KAN. L. REV. 837, 845-46 (2006); Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 589-90 (2007).

118. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

119. *See* Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: "Because of Sex" and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL'Y 219, 230 (2010) (describing a case in which a transgender plaintiff's harassment claim was dismissed because the only evidence she was able to show was that her supervisor referred to her as a "he/she," which, while offensive, did not constitute evidence of the harasser's animus towards her gender nonconformity (*citing Myers v. Cuyahoga Cnty.*, 182 F. App'x 510, 520 (6th Cir. 2006)).

120. Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 666 (2009) ("Our difficulty with the Smith case is that the court reduces Smith's transgender identity to little more than a fashion choice to wear women's clothing."); Kelly, *supra* note 119, at 230;Devi Rao, *Gender Identity Discrimination Is Sex Discrimination: Protecting Transgender Students from Bullying and Harassment Using Title IX*, 28 WISC. J.L, GENDER, AND SOC'Y 245, 256 (2013).

plaintiff to claim that status, only that she was perceived that way by those who harassed her or responded indifferently to her harassment.[121] Nevertheless, such a plaintiff might understandably be uncomfortable standing behind a complaint that fails to name the target of harassment for what is – her transgender status. Another negative consequence of the gender nonconformity theory is that in basing relief on the gender nonconformity, it validates gender stereotypes as such.[122] To describe a person's behavior or appearance as gender nonconforming implies there is a "correct" gender for whatever behavior or appearance is at issue. This might not feel right to some transgender plaintiffs, particularly if their gender identity is outside the gender binary altogether.

Given these limitations, the emerging theories on transgender discrimination as sex discrimination articulated in *Macy* and *Schroer* may offer alternative grounds for some transgender plaintiffs in cases involving harassment. A transgender student who is not harassed prior to transition, but is harassed during and after, could argue that such harassment was based on sex under the transitional theory of *Schroer*[123] although a transgender student who is not transitioning and whose genderqueer presentation is the basis for harassment might not have the evidentiary basis to pursue such a claim.[124] Of course, the theory that sex discrimination includes transgender discrimination per se, as articulated in *Macy*, is the broadest theoretical approach, capable of including harassment targeted at a transgender student's gender nonconformity, transition, or the fact of their transgender identity. The only downside to that framing is that, so far, no court has yet endorsed the EEOC's very recent interpretation, raising uncertainty about the plaintiff's likelihood of success using such approach. While we would expect courts to defer to the EEOC's construction of sex in a Title VII case, the EEOC's decision in *Macy* will be influential on Title IX courts only to the extent it is persuasive.

B. Admissions and Expulsion Cases

Title VII case law favorable to transgender plaintiffs is also likely to be influential in other Title IX contexts, which, like harassment, have analogs in employment. Admissions, for example, is analogous to hiring, while expulsion is analogous to firing. To work through this analogy, imagine a transgender student who is admitted to law school as a male but later begins to present as

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121. *Glenn v. Brumby*, 663 F.3d 1312, 1314 (11th Cir. 2011) (plaintiff claimed that employer "discriminat[ed] against her because of her sex, including her female gender identity and her failure to conform to the sex stereotypes associated with the sex Defendant[ ] perceived her to be.").

122. Rao, *supra* note 120. *Cf.* Judith Butler, *Appearances Aside*, 88 CALIF. L. REV. 55, 62 (2000) ("Antidiscrimination law participates in the very practices it seeks to regulate; antidiscrimination law can become an instrument of discrimination in the sense that it must reiterate–and entrench–the stereotypical or discriminatory version of the social category it seeks to eliminate.").

123. *See* Glazer & Kramer, *supra* note 120.

124. Katrina McCann, *Transsexuals and Title VII: Proposing an Interpretation of Schroer v. Billington*, 25 WIS. J.L. GENDER & SOC'Y 163, 182 (2010).

female, in accordance with that student's female gender identity. If the law school expelled the student on these grounds, or otherwise took steps to make her want to drop out, the student's case would be highly analogous to Title VII cases like *Smith,* which involved constructive termination. The student could persuasively argue that she experienced discrimination on the basis of sex, on the grounds she was expelled because of her gender nonconformity. She could also argue, relying on *Schroer,* that she is being discriminated against on the basis of her transition[125] or that discrimination on the basis of her transgender gender identity is actionable sex discrimination, on the theory that the EEOC affirmed in *Macy.*

Now imagine a case in which a transgender student who presents as female is rejected from graduate school when admissions discovers that she had been assigned a male sex at birth. Such a case is less likely to involve evidence that admissions discriminated against the student for failing to conform to stereotypical notions of masculinity, and more likely to involve discrimination on the basis of her change of sex, or transgender status per se. Title VII cases like *Schroer* and *Macy,* from the analogous context of hiring, will be useful to the plaintiff here.

If a transgender student is rejected for admission to a private undergraduate program, however, Title IX is entirely unavailable as a source of legal protection, since the statute contains a categorical exclusion for the admissions practices of such institutions.[126] This would be the case whether the institution involved is coeducational or whether it is single sex. For example, the introduction to this Article referred to a well-publicized decision by Smith College, a women's college, to refuse to consider the application of a transgender student who identifies as female.[127] If this case were litigated, the statute's exclusion for private undergraduate admissions would prevent a court from providing the plaintiff with relief under Title IX, even if it was inclined to view *Smith's* decision as an act of sex discrimination.

Interestingly, the coverage of the Smith College case has revealed that administrators at some historically-women's colleges believe Title IX *requires* them to exclude transgender-female students in order to remain single sex (or else, lose federal funding).[128] Of course, Title IX's exclusion for private

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125. Schroer's job offer was rescinded when she came out about her impending transition. It therefore has the closest factual analogy to cases involving discrimination due to a present-tense transition on the job. Without the ongoing transition, discrimination appears to be more likely directed at the plaintiff's transgender status per se.

126. *See supra* Part I.A.

127. *See supra* Introduction.

128. Mia Council, *The Fight Over Trans* Women at Smith Sparks Debate,* THE SOPHIAN, Apr. 3, 2013, *available at* http://www.smithsophian.com/news/the-fight-over-trans-women-at-smith-sparks-debate-1.3019987#.UWMZtlfheSr (reporting that, "A common anxiety on campus is that if Smith admits a transgender woman, its status as a women's college will be in legal jeopardy under Title IX); Dylan Peters McCoy, *Transgender Applicant's Rejection Causes Stir,* DAILY HAMPSHIRE GAZETTE, Mar. 26, 2013, *available at* http://www.gazettenet.com/search/5274688-95/smith-college-students-transgender (quoting Mount Holyoke College President Lynn Pasquerella's fears that admitted transwomen would

undergraduate admissions also operates to belie any such claim. These administrators seem to consider themselves governed by Title IX's exception for admissions practices of undergraduate institutions that "traditionally and continually from its establishment has had a policy of admitting students of only one sex," even though this is the exception for public single-sex undergraduate institutions. Private undergraduate programs are not under a similar obligation to demonstrate continuity of admitting only women in order to remain legally free under Title IX to exclude men.[129] And even if they were under an obligation of continuity, Title IX does not preclude a single sex institution from considering a transgender woman who has applied for admission to be a woman, not a man.[130] Moreover, because the exclusion for private undergraduate programs is limited to admissions, Title IX does not permit private institutions to discriminate on the basis of sex against a student who is already admitted.[131] A transgender student who transitions from female to male while in college would therefore be protected from exclusion by Title IX, even if the college he attends is a women's college. For example, in 2011, Hollins University, a private women's college in Virginia, was reported to have a policy of expelling any student who transitions from female to male, or who has "taken a step towards transition."[132] If Hollins ever acted on this policy, it would clearly violate Title IX, which permits private institutions to refuse to admit male students, but does not permit lawfully expelling them.[133]

C. Sex-Segregated Contexts

So far, this Part has considered Title IX's application to the type of discrimination that transgender students could experience in contexts analogous to the workplace, and where it is, due to this analogy, relatively easy to imagine how Title VII case law might be deployed. Yet while the workplace is generally not formally segregated by sex, education has many aspects that are. As described in Part I, an increasing number of schools are experimenting with single-sex classrooms. Colleges and universities make dormitory, hall, or room assignments based on sex, and schools of all levels offer separate athletic teams for men and women. Title IX has not yet been called upon to address

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violate Title IX: "We're constrained by the law," Pasquerella said. "If someone is not legally female, we can't admit them and keep our federal funding.").

129. *Compare* 20 U.S.C. § 1681(a)(1) (2012) (excluding all private undergraduate admissions from Title IX's scope) *with* 20 U.S.C. § 1681(a)(5) (providing an exception to Title IX for admissions of public undergraduate institutions which are "traditionally and continually" single sex).

130. *See generally* 20 U.S.C. § 1681 (containing no definition of sex).

131. *Id.* § 1681(a)(1).

132. Don Troop, *Women's Univ. to Reconsider Hard Line on Transgender*, CHRON. OF HIGHER EDUC., Oct. 23, 2011, *available at* http://chronicle.com/article/Womens-University-to/129490/?key=Sz0mKFIwYSlEZnllNzoWZT1QYCNhMk17YyYdPi0nbltUFg%3D%3D.

133. Moreover, the mere existence of that policy could be considered as part of a case of institutional harassment of students based on either their male sex or gender nonconformity.

transgender discrimination in such cases. When it is, to what extent will Title VII precedent assist advocates and courts seeking to apply Title IX?

Imagine that a transgender college student who identifies as male requests housing in a men's dormitory, but is denied. Title IX expressly permits colleges and universities to segregate housing by sex.[134] Therefore, the college can legally exclude from the dormitory someone whose sex is female, and the student will not succeed by claiming discrimination on the basis of his (female) natal sex. A typical, *Price Waterhouse* style gender nonconformity analysis is also of limited value here, since it does not accurately describe the discrimination in this case. This plaintiff is not being excluded from the men's dorm because he is a gender-nonconforming woman, since *no* women are assigned to the men's dorm, gender conforming or otherwise.

The student could argue, relying in *Schroer*, that he is being discriminated against because of his transition. However, this is not likely to be an accurate description of the discrimination, either. This isn't a case like an employer who eagerly hires Jews, eagerly hires Christians, but has it in for anyone who converts from one to the other. The male dormitory in this case accepts men, but lawfully excludes women. It excludes our student-plaintiff not because it sees him as a "convert" but because it does not see him as a man.

However, a compelling argument for this plaintiff is that he is being excluded from the male dormitory because, unlike other men who are accepted to the dorm, he is a transgender man.[135] He could thus frame his case as one of sex discrimination on the grounds best articulated by the EEOC in *Macy*: that gender identity is one of the components of sex, so discriminating against someone on the basis of gender identity is necessarily discrimination on the basis of sex. Importantly, this theory requires the plaintiff to frame his gender identity as it relates to his sex assigned at birth, that is, to argue that he is excluded because of his *trans*gender identity. It won't work for him to argue that he is excluded because of his *male* identity, because that would identify him as similar, not different, from the men who are accepted to the dormitory, and thus obscure gender identity as the basis for exclusion.

Yet, the necessary focus on transgender gender identity (rather than male gender identity) is not likely to be problematic. In states where gender identity has been enumerated as a protected category in antidiscrimination statutes,

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134. *See* 34 C.F.R. § 106.32(b)(1) (2013) ("A recipient may provide separate housing on the basis of sex."). *See also id.* § 106.33 ("A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex."); *id.* § 106.41(b) ("Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport.").

135. The Department of Education's recent decision to accept jurisdiction over a Title IX complaint involving a transgender student sex-segregated bathroom matching her gender identity suggests that the agency has implicitly adopted this interpretation of Title IX. *Federal Government Resolves Complaint Filed by CA Transgender Student*, TARGET NEWS SERVICE (July 24, 2013) http://www.nclrights.org/press-room/press-release/federal-government-resolves-complaint-filed-by-ca-transgender-student/.

those interpreting such laws have concluded that they prohibit classifying individuals in a manner that conflicts with their gender identity. For example, state agencies in both Massachusetts and Connecticut have each considered how the state's statutory ban on gender identity discrimination applies to the sex-segregated context of athletics.[136] In summer of 2012, the Massachusetts Department of Elementary and Secondary Education promulgated regulations implementing the state education law, which had recently been amended to prohibit discrimination on the basis of gender identity.[137] The agency's regulations clarify that the new law gives students the right to play on a male or female team, consistent with the student's gender identity.[138] As the agency reasoned, "[e]xcluding a transgender student from a team that does not match the gender listed on the student's birth records would constitute unlawful discrimination on the basis of gender identity."[139] In similar fashion, the Connecticut Commission on Human Rights and Opportunities, which enforces that state's antidiscrimination statute, also recently amended to include gender identity as a protected category, interprets the law to allow students to use locker rooms, bathrooms, and athletic opportunities in a manner consistent with their gender identity.[140]

Besides a gender identity-based framing, there is yet one more possibility for framing the case of a transgender man excluded from a men's dormitory as one of sex discrimination under Title IX. The student could allege that he has been excluded from the men's dormitory based on gender nonconformity, but not as a gender nonconforming woman; rather as a gender nonconforming man. Specifically, he might argue that he is gender nonconforming in the sense that society expects men to have male anatomy, chromosomes, and a male gender marker on their birth certificates, indicia of masculinity that this male student lacks. This argument would break new ground, since gender nonconformity heretofore has considered the transgender plaintiff's expressed and visible departures from societal expectations associated with hir birth sex. Courts have not, with the possible—but even then, implicit—exception of *Kastl*, applied the gender nonconformity theory to address discrimination on the basis of an individual's invisible departures from societal expectations associated with hir expressed gender.

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136. 603 Mass. Code Regs. 26.05 (2012); *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws,* CONNECTICUT SAFE SCHOOL COALITION, http://www.ct.gov/chro/lib/chro/Guidelines_for_Schools_on_Gender_Identity_and_Expression_final_4-24-12.pdf.

137. 603 Mass. Code Regs. 26.01.

138. *Id.* at 26.06.

139. Memorandum from Mitchell Chester, Commissioner, Massachusetts Department of Elementary and Secondary Education, to Members of the Board of Elementary and Secondary Education (June 19, 2012), *available at* http://www.doe.mass.edu/boe/docs/2012-06/item5.html

140. *Guidelines for Connecticut Schools to Comply with Gender Identity and Expression Non-Discrimination Laws, supra* note 136.

Such an argument would not be persuasive in jurisdictions that still cling to *Ulane*'s rejection of sex being defined as anything other than biological sex. It not only requires a court to accept what *Ulane* would not—that sex consists of multiple constituent parts – anatomy, chromosomes, gender identity and expression—but to give primacy to gender identity and expression as the measure of one's "sex" for purposes of Title IX. To the contrary, it requires a court to accept, as the EEOC did in *Macy*, a definition of sex that is not restricted to biology. If "sex" means "gender," then failure to externally conform to expectations consistent with one's internal (biological) sex can be inverted to mean failure to internally conform to expectations consistent with one's external (expressed) gender. Of all theories discussed so far, this is the one that most accurately strikes at the heart of the nature of discrimination at issue: the institution's failure to treat this student as a man like any other.

In the harassment, admissions, and expulsion contexts discussed above, transgender plaintiffs had multiple options ranging from tried-and-true *Price Waterhouse*-style gender nonconformity, to new and emerging theories for extending sex discrimination to include discrimination based on one's transition (*Schroer*) or one's gender identity (*Macy*). In contrast, such options are limited for transgender plaintiffs challenging exclusion from sex-segregated contexts like dorm rooms, bathrooms, athletic teams, or single-sex classes, since traditional gender nonconformity, and transition-based discrimination do not apply. This distinction serves to underscore the significance of *Macy*, which provides courts a persuasively reasoned, deference-worthy authority for a contemporary interpretation of "sex," that gives rise to both the gender-identity based discrimination, or the "reverse gender nonconformity" theory discussed above.

CONCLUSION

The Members of Congress who debated and voted on Title IX surely did not have in mind the law's specific application to transgender students. Yet since the time of the law's passage, as transgender Americans and the discrimination they face has become increasingly visible, our collective understanding of what it means to discriminate on the basis of sex has also expanded. Borrowing largely from sex discrimination cases in the related context of employment, we can now impose a variety of interpretations, some or all of which could apply to transgender discrimination, depending on the nature and the context of that discrimination as discussed above. Whether or not they thought about transgender students, Title IX's champions were committed to ensuring that everyone receive a fair opportunity to pursue education or employment in the educational institutions of our country. All efforts to use Title IX for the purpose protecting transgender students from discrimination fit squarely within that goal.