BECAUSE OF INTERSEX: INTERSEXUALITY, TITLE VII, AND THE REALITY OF DISCRIMINATION "BECAUSE OF . . . [PERCEIVED] SEX"

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ABSTRACT

The federal doctrine of sex discrimination in employment depends on the underlying yet unstated assumption that sex is binary: one is either a man or a woman, and there is no other possibility. The existence of intersex individuals challenges this assumption. This article asks how Title VII doctrine can be applied to intersex employees. In answering, the Article considers (1) the ramifications of the ever-developing definition of "because of . . . sex" in Title VII jurisprudence as applied to sexual minorities and (2) the implications of Title VII doctrine regarding mixed-race individuals for our understanding of how the law treats (and should treat) individuals "in between" the categories. The article moves beyond previous work, which suggests that intersex individuals be protected as a third sex category under Title VII, because that work only reinforces the exact sex categorizations that should be undermined by any serious examination of intersexuality. Instead, the article proposes a new model for protection against sex discrimination in employment—that of discrimination "because of perceived sex."

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INTRODUCTION

Pat is chromosomally and gonadally male, but, because she has Partial Androgen Insensitivity Syndrome, her testicles have not descended and her genitals and secondary sex characteristics most closely (although not completely) follow the pattern associated with females. Pat identifies as female and presents herself as such to her employers. However, her former boss and coworkers perceived her to be an insufficiently feminine woman and made the office such an uncomfortable place for Pat to work that she eventually quit.

Chris has a mixed karyotype. Chris has some cells exhibiting XY (generally considered chromosomally male), some cells exhibiting XX (generally considered chromosomally female), and some cells exhibiting XO (generally considered either female or ambiguous). Chris's genitals and gonads do not conform to those associated with either males or females. Chris self-identifies as intersex and feels no need to fit into a gender or sex binary. However, Chris was rejected from numerous jobs for which Chris is qualified and is fairly sure that the people doing the hiring just cannot understand or tolerate the idea of an intersex individual.

Tal is genetically and gonadally female. However, because of

Congenital Adrenal Hyperplasia (CAH), a condition in which hormonal influences cause the genitals to virilize (develop male characteristics), she was born with what was never questioned to be anything but a penis. Tal has always identified as an intersex female. When she was eighteen, she decided to undergo surgery to construct a vagina so that her outer genitals could match her genes, gonads, and gender identity. Years later, an employer found out that she had surgery altering her genitals, called her a transsexual, and fired her.

Mark identifies as a male with Klinefelter's Syndrome. Born with a 47,XXY karyotype (conforming to neither the 46,XY nor the 46,XX karyotype found most commonly in humans), he exhibits classic signs of Klinefelter's: little facial or body hair, gynecomastia (enlarged breasts on a male), the inability to produce sperm, and small testes. A supervisor at work accessed Mark's medical records through an in-house doctor and discovered his condition. Mark was never again scheduled to work the shift overseen by that supervisor. Because of this, his average hours worked per week dropped from thirty-five to twenty.

These stories are hypothetical, but they raise crucial questions. How do the laws prohibiting sex discrimination in employment apply to Pat, Chris, Tal, and Mark? More importantly, how *should* the law be applied to these individuals? Can anti-discrimination doctrine be advanced so that statutes protect all individuals who should be protected from sex discrimination in all of the situations in which they might be subject to it? Can the prohibition of discrimination "because of . . . sex" be interpreted and employed in order to accommodate our developing scientific and social understandings of sex?

The federal doctrine of sex discrimination in employment depends on the underlying yet unstated assumption that sex is binary: one is either a man or a woman, and there is nothing in between or beyond. The existence of intersex individuals challenges this assumption. Morgan Holmes's imperfect[1] but working definition of intersexuality as "refer[ring] to a physical and/or chromosomal set of possibilities in which the features usually understood as belonging distinctly to either the male *or* female sex are combined in a single body"[2] demonstrates the dilemma: because intersex individuals possess traits generally associated only with males *and* traits generally associated only with females, they defy categorization as either. However, in the years since the 1964 Civil Rights Act the doctrine

1. Intersexuality is difficult, if not impossible, to define, because its existence as a condition, group of conditions, or tool for categorization of human beings depends on the existence of "maleness" and "femaleness" as conditions or sorting mechanisms. However, for the purpose of explaining the question posed by intersexuality to employment discrimination doctrine, I will adopt this definition. I will discuss the difficulties of definition further in Section II, *infra*.

2. MORGAN HOLMES, INTERSEX: A PERILOUS DIFFERENCE 32 (2008).

of sex discrimination in employment has developed based on precisely that binary categorization. The doctrine's foundational model of sex involves males and females—and no intersex individuals.

Section I of this article illustrates the conflict between the federal doctrine of employment discrimination and the current social and scientific understanding of intersexuality. It poses the primary question that the doctrine must address: how can anti-discrimination law[3] rise above this binary conception of sex and gender[4] to accommodate a reality that is quite different?

Section II examines the case law that most directly addresses the definition of "because of . . . sex" in Title VII discrimination: sex discrimination cases brought by lesbian, gay, bisexual, and transgender individuals. The definitions and doctrine advanced in these cases provide a critical backdrop to the question of how federal employment discrimination law might apply to intersex individuals. Section III examines the case law regarding mixed-race individuals, investigating how the law treats people who seem "stuck in the middle" of the categories that judges depend on to find illegal discrimination in employment. Employment law doctrines regarding sexual minority and mixed-race individuals can inform the application of anti-discrimination law to

3. I will address the federal law prohibiting discrimination by private employers based on sex. *See* Title VII of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241. I will not address state laws, some of which might be more able to accommodate sexual minorities (although no state case law has directly addressed the application of the prohibition on sex discrimination in employment to intersex individuals thus far). This is because (1) given the paucity of case law on the subject, a survey of individual statutes in order to guess the application of their law to intersex individuals would likely be ineffective, and (2) most state law on the subject of employment discrimination is heavily influenced by Title VII. I will also not address other types of anti-discrimination law that might be construed to protect intersex individuals. In particular, at least one group of intersex activists believes that they might be protected by the Americans with Disabilities Act (ADA). *See* Intersex Initiative, Intersex in Non-discrimination Law: Why We Oppose the "Inclusion" (Sept. 6, 2004), http://www.ipdx.org/law/nondiscrimination.html ("[D]iscrimination based on medical conditions, such as those categorized as intersex, is considered a *disability*. . . ."). Without going into detail, I will simply note that it seems highly unlikely that an ADA case based on intersexuality would be successful without the presence of other conditions (such as depression) because in order to count as a relevant disability, a condition must impair a major life activity. 42 U.S.C. § 12102(2)(a) (2006). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (2006). I do not know of any intersex conditions which impair major life activities such as these.

4. Like Suzanne Kessler and Judith Butler, I question the distinction between sex and gender. As I will discuss in Section I, *infra*, sex is socially constructed (or, more specifically, medically constructed) just as gender is socially constructed. I believe that to distinguish between the two implies that sex is a natural distinction, that male and female are inherent categories, and that sex should be respected and upheld as a category. For this reason, I will seldom distinguish between the two. The exception is in my discussion of gender identity. Realizing that common parlance distinguishes between anatomy and gender identity, I will use the term "gender identity" to indicate self-identification solely for clarity.

intersex individuals. Judges and legislators can and should learn important lessons from the successes and failures of these bodies of doctrine and their implications for future interpretations of anti-discrimination law.

Section IV of this article considers the multiple ways that judges might apply federal employment discrimination law to intersex individuals. It reflects on the ramifications of these doctrinal possibilities in light of the multiple perspectives within the intersex movement and the goals of anti-discrimination law generally. Section V proposes a new model for sex discrimination in employment—discrimination "because of perceived sex." It discusses the strengths and weaknesses of the perceived sex model for addressing not only the concerns of intersex individuals but also those of all individuals, whatever their location in the universe of sex and gender possibilities.

I.
TITLE VII AND INTERSEX INDIVIDUALS: THE CONFLICT BETWEEN DOCTRINE AND REALITY

A. Title VII's Binary Conception of Sex

In 1964, Congress enacted Title VII of the Civil Rights Act to protect Americans from employment discrimination by private employers on the basis of race, color, religion, sex, or national origin. Section 703 of Title VII declares:

> It shall be an unlawful employment practice for an employer
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
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> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[5]

The statute did not provide guidelines for proving these acts of discrimination; however, the courts, including the Supreme Court, have developed a large body of case law in the area and created requirements for proving illegal discrimination of various types in the workplace. It is the case law, rather than the statute, which sets out how a judge or jury

5. 42 U.S.C. § 2000e-2(a) (2006).

should determine if discrimination has occurred "because of . . . sex."

Title VII forbids two fundamental types of employment discrimination: disparate treatment and disparate impact. Section 703 of Title VII prohibits the former, which is the disparate, or different, treatment of employees based on certain protected characteristics. The Court first formulated the test for disparate treatment discrimination in the 1973 racial discrimination case *McDonnell Douglas Corp. v. Green*[6] and has since broadened it to apply to a greater contingent of possible plaintiffs and situations. In order to make out a prima facie case of disparate treatment, a plaintiff must show: (i) that she belongs to a particular group based on race, color, religion, sex, or national origin; (ii) that she was subject to some adverse employment action; and (iii) that a member (or members) of a different group (based on race, color, religion, sex, or national origin) was treated better.[7] Put most plainly, courts identify disparate treatment discrimination using "the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex [or race, color, religion, or national origin] would be different."[8]

The doctrine of disparate impact discrimination, established for the first time by the Supreme Court in *Griggs v. Duke Power Co.*, similarly compares different groups in order to prove discrimination.[9] The *Griggs* Court found discrimination where an employment practice serving no legitimate business necessity resulted in adverse employment actions at significantly different rates for different racial groups.[10] In disparate impact cases, courts compare the effects of employment practices on members of one group (designated by race, sex, etc.) with their effects on nonmembers to look for discrimination.

Whether the discrimination is demonstrated in the treatment or in its impact, Title VII doctrine requires comparison of groups in order to show discrimination. The intent of the employer is irrelevant;[11] it is the

6. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

7. *See, e.g.*, Patterson v. McLean Credit Union, 491 U.S. 164, 186–87 (1989); McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 282–83 (1976); *McDonnell Douglas Corp.*, 411 U.S. at 802; Parker v. N.C. Dep't of Agric., Food & Drug Div., No. 93-1297, 1994 WL 633474, at *2 (4th Cir. Nov. 14, 1994); Gee-Thomas v. Cingular Wireless, 324 F. Supp. 2d 875, 882–83 (M.D. Tenn. 2004).

8. City of L.A., Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (internal quotation marks omitted).

9. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

10. *Id.* Disparate impact discrimination was later codified by Congress in 42 U.S.C. § 2000e-2(k).

11. This applies to both disparate treatment and disparate impact cases. Regarding disparate impact cases, see *Griggs*, 401 U.S. at 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."). Regarding disparate treatment cases, see United States v. Cent. Motor Lines,

comparison that matters.

In sex discrimination cases, this focus on comparison means one thing: the comparison of men and women. In order to determine whether employment discrimination "because of . . . sex" has occurred, courts ask "whether or not men and women were treated differently,"[12] and "whether similarly situated and similarly available men and women have been treated differently from each other."[13] The doctrine holds that if the plaintiff, a woman, is treated worse than a comparably situated man, or if the plaintiffs, men, are disparately impacted by a neutral employment practice as compared to women, then a prima facie case of employment discrimination has been proven. But what if the plaintiff is neither a woman nor a man? What if the plaintiff is intersex?

B. Intersexuality[14] Challenges the Binary

Intersex people do not fit within the two categories—male and female—that Title VII doctrine assumes encompass sex. Intersexuality itself, though, is difficult to delineate. It has been defined as a "congenital anomaly of the reproductive and sexual system,"[15] but this characterization only obfuscates the true meaning of intersexuality (as well as the difficulty of defining it). Not every congenital anomaly of the reproductive and sexual system is an intersex condition; if a child is born as a "normal girl" with a tumor on her uterus, she is not considered to be intersex. Neither is Morgan Holmes's definition, cited earlier, exactly accurate. Holmes suggests that intersexuality is "a physical and/or chromosomal set of possibilities in which the features usually understood as belonging distinctly to either the male *or* female sex are combined in a single body."[16]

Inc., 338 F. Supp. 532, 559 (W.D.N.C. 1971) ("In cases under Title VII, the 'intent' required by the statute may be inferred from the defendants' conduct. The statute requires only that a defendant has meant to do what was done; that is, the act or practice must not be accidental.").

12. EEOC v. Nat'l Educ. Ass'n, Ala., 422 F.3d 840, 846 (9th Cir. 2005).

13. Valentino v. U.S. Postal Serv., 511 F. Supp. 917, 940 (D.D.C. 1981), *aff'd*, 674 F.2d 56 (D.C. Cir. 1982).

14. In this article, I will avoid the use of the term "hermaphrodite." The term is considered offensive by many intersex people. Further, some intersex activists draw a clear distinction between intersex humans and hermaphrodites:

> In biology, "hermaphrodite" means an organism that has both "male" and "female" sets of reproductive organs (like snails and earthworms). In humans, there are no actual "hermaphrodites" in this sense, although doctors have called people with intersex conditions "hermaphrodites" because intersex bodies do not neatly conform to what doctors define as the "normal" male or female bodies. We find the word "hermaphrodite" misleading, mythologizing, and stigmatizing.

INTERSEX INITIATIVE PORTLAND, INTRODUCTION TO INTERSEX ACTIVISM 4 (2d ed. 2003), *available at* http://www.ipdx.org/publications/pdf/intersex-activism2.pdf.

15. *Id.* at 3.

16. HOLMES, *supra* note 2, at 32.

But sometimes a person will be described as intersex not because of a combination of "male" and "female" characteristics, but due to the absence of a characteristic believed to be crucial for one sex. For instance, an individual with Turner Syndrome has "a genetic condition in which a female does not have the usual pair of two X chromosomes."[17] Individuals with Turner Syndrome have non-functioning ovaries; the resulting estrogen deficiency impairs "normal" female puberty.[18] They do not have male chromosomes or hormones, but the absence of the second "X" chromosome leads some to characterize them as intersex. This characterization is quite controversial in the field.[19] Morgan Holmes's narrow definition takes a clear stance on the issue, excluding those with Turner Syndrome from the definition of intersexuality—but this makes Holmes's definition more political than academically rigorous.

Where both of these definitions fall short is the acknowledgement that the definition of intersex is shifting and changing alongside the corresponding shifts and changes in societal definitions of "male" and "female."[20] Intersex individuals have congenital anomalies of the reproductive and sexual system that bring into question their categorization as either male or female. Whether a given anomaly is sufficient to bring male or female categorization into question and whether the anomaly is required to introduce some combination of "male" and "female" characteristics into a single body are both disputed and socially determined questions. What is clear is that the intersex body fits the definition of neither a male nor a female body—and that it defies the gender binary so commonly assumed by individuals and the law.

One reason it is so difficult to define intersexuality is because the definition of "sex" itself is quite muddled. Bruce E. Wilson and William G. Reiner discuss some of the many aspects of sex in *Management of Intersex: A Shifting Paradigm*.[21] When an infant develops as a "normal" male or female, the following types of gender and sex determinants align:

Genetic sex. This is usually identified by the presence or absence of the SRY gene on the Y chromosome, the genetic sequence directing the

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17. Luc Jasmin, *Turner Syndrome*, *in* MEDLINEPLUS MEDICAL ENCYLOPEDIA (U.S. Nat'l Library of Med. & The Nat'l Insts. of Health eds., 2009), http://www.nlm.nih.gov/medlineplus/ency/article/000379.htm.

18. CATHERINE HARPER, INTERSEX 171 (2007).

19. *See, e.g.*, *id.* at 175 (describing various ways in which a person with Turner Syndrome may or may not be considered intersex).

20. For instance, the discovery of DNA and the X and Y chromosomes created one more factor by which to define sex—and one more factor that could thus contribute to the labeling of a body as "intersex." ALICE DOMURAT DREGER, HERMAPHRODITES AND THE MEDICAL INVENTION OF SEX 9–10 (1998).

21. Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, *in* INTERSEX IN THE AGE OF ETHICS 119, 119 (Alice Domurat Dreger ed., 1999).

development of the testes.

Chromosomal sex. This is identified by the presence or absence of the Y chromosome itself. Chromosomal sex is distinct from genetic sex because there are cases of individuals of the XX karyotype with male testicular and genital development due to the SRY gene's translocation onto another chromosome.

Gonadal sex. This is identified by the status of the gonads as testicular or ovarian tissue.

Phenotypic sex (internal). This is identified by the internal sex structures: a uterus and fallopian tubes (the Mullerian structures) or epididymis, vas deferens, and prostate (the Wolffian structures). The internal sex structures are developed and maintained by hormones secreted from the gonads.

Phenotypic sex (external). This is identified by the genitalia. The fetal labioscrotal folds generally form a scrotum or labia; the fetal phallus becomes a clitoris or a penis. In a penis, the phallus enlarges and the urethra generally migrates so that its opening is at the tip.

Sex of rearing. This is identified by the parents' designation (and treatment) of the child as a boy or a girl.

Gender. This is identified by the individual's self-designation and expression of gender.[22]

To Wilson and Reiner's sex determination factors, I will add two:

Secondary sex characteristics. These consist primarily of body shape, breast development, and facial and body hair.

Sexual orientation. This is identified by the gender and sex to which an individual is attracted.

The second of these two factors is extremely controversial: an alert reader might protest that sex and sexual orientation are hardly the same. An even more alert reader might note that sex and gender (the latter represented on this list by both "sex of rearing" and "gender") are different as well. Nonetheless, each trait represents a characteristic strongly associated for some with the definition of sex. In order to understand the many ways in which one's sex/gender identity can evade simple definition as "male" or "female," it is important to include all of the factors that are considered to naturally encompass and derive from "maleness" and "femaleness." This list is an attempt to enumerate the many characteristics that various people and communities have considered necessary or sufficient to determine sex. There are individuals who call homosexuality "unnatural." For them, to be male naturally means to be

22. *Id.* at 120–21.

attracted to females (and vice versa). There are others who believe that those who are unquestionably physically female are only "normal" if they also identify as women. For that reason sexual orientation and gender self-identification may be considered factors affecting how one's sex is assigned or whether one evades sex categories.

Intersexuality occurs when there is ambiguity within any one determinant of sex, or when one or more determinants are divergent from the others.[23] In her article *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, Julie A. Greenberg lists possible conflicts within and between sex determinants that lead to intersex conditions, including the following:

Chromosomal ambiguity. When chromosomes deviate from the typical XY or XX pattern, instead exhibiting such combinations as XO, XXY, XXXY, XYYY, or XXX.

Gonadal ambiguity. When individuals have streak gonads (which have not fully developed as either ovaries or testes), ovotestes (gonads with a combination of ovarian and testicular tissue), or one ovary and one testis.

Ambiguity of external genitalia. When genitalia do not conform to the expected penis and scrotum or clitoris and vagina. Often, the fetal phallus will develop to an intermediate length that is considered normal for neither a clitoris nor a penis.

Ambiguity of internal morphologic sex. When internal sex organs are incomplete, absent, or a combination of the male and the female.

Hormonal variation. When the hormones generally associated with sexual development (androgens, estrogen, and progesterone) are produced at an anomalous rate.

Ambiguity of secondary sex characteristics. When individuals have combinations of secondary sex characteristics generally associated with the male and with the female.

Sex/gender identity anomaly. When an individual identifies or is perceived of as neither male nor female.

Incongruity among factors. When sex determinants are neither all clearly male nor all clearly female. Incongruity among determinants can be caused by chromosomal sex disorders, gonadal sex disorders, internal organ anomalies, external organ anomalies, hormonal disorders, gender identity disorders, and the surgical creation of the intersex condition.[24]

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23. Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 281 (1999) [hereinafter Greenberg, *Defining Male and Female*].

24. *Id.* at 281–83. Greenberg notes that individuals who do not consider themselves either male or female "identify themselves as a third sex." While that may be true in some

Variance within and between sex determinants leads some bodies to be labeled as "intersex." It is crucial to remember that "[t]here is no single 'intersex body'; it encompasses a wide variety of conditions that do not have anything in common except that they are deemed 'abnormal' by . . . society."[25] Because of the haziness of the term "abnormal," there is a diversity of views regarding which conditions should be categorized as "intersex."

Most if not all scholars would consider bodies exhibiting a number of conditions to be fairly uncontroversially intersex, as intersexuality is described in western medicine today. For instance, an individual with CAH might have entirely masculinized external genitalia due to anomalously high testosterone levels, and yet possess DNA, gonads, and internal structures (fallopian tubes and uterus) generally considered to be entirely female.[26] Individuals with Androgen Insensitivity Syndrome (AIS) have "male" DNA and gonads, but, based on the level of insensitivity to the virilizing hormone androgen, may have external genitalia and secondary sex characteristics ranging from what is generally considered completely normal for a female to only very scarcely anomalous for a male.[27] Those with 5-Alpha-Reductase Deficiency often exhibit female external genitalia as children that virilize when they reach puberty.[28] These hormonal conditions are among the most common bases

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cases, it is a strong assumption to make that everyone acquiesces to a sex/gender system (even a tertiary as opposed to a binary system). For that reason, I omit this observation. Section IV, *infra*, will discuss the idea of a "third sex" in more detail.

25. INTERSEX INITIATIVE PORTLAND, *supra* note 14, at 3.

26. CAH is the most common intersex condition amongst individuals with ovaries. SHARON E. PREVES, INTERSEX AND IDENTITY 27 (2003). It appears in roughly one out of every 5000–15,000 births. Greenberg, *Defining Male and Female*, *supra* note 23, at 288. Due to enzyme error, the otherwise female body produces an excess of testosterone that causes the external genitalia to virilize (masculinize), while the gonads and internal structures (the fallopian tubes and uterus) remain female. Wilson & Reiner, *supra* note 21, at 122. CAH is unique among intersex conditions in that it is the only condition likely to pose any danger to the physical health of the child; it can cause a metabolic emergency within weeks of birth. *Id.* at 127.

27. AIS is the most common intersex condition among individuals with testes. Although individuals with AIS are genetically and internally male, they lack an androgen receptor required for the body to respond to the androgen hormone, which is necessary for the virilization of external genitalia and development of secondary sex characteristics. There are two versions of AIS: Complete Androgen Insensitivity Syndrome (CAIS) and Partial Androgen Insensitivity Syndrome (PAIS). Individuals with CAIS develop to resemble "normal females" externally. Often it is not until puberty, when they fail to menstruate (due to the lack of female internal sex organs) or develop underarm and pubic hair (due to the lack of androgen receptors), that individuals with CAIS are labeled "intersex." This is the opposite for individuals with PAIS. Individuals with PAIS are only partially insensitive to androgens, which allows for some masculinization of the external genitalia and secondary sex characteristics subject to the level of androgen insensitivity. Depending on the resulting ambiguity of the genitalia, this often leads to contested sex at birth as well as later in life. PREVES, *supra* note 26, at 27–29.

28. 5-Alpha-Reductase (5-AR) Deficiency is, like AIS, a hormonal abnormality found

for the "intersex" label.

Other intersex conditions are not primarily hormonal. Some individuals are born with a mosaic karyotype, in which different cells exhibit different chromosomal combinations.[29] Such a person might have some 46,XX cells, some 46,XY cells, and some 46,XO cells.[30] Individuals can also exhibit a mixture of male and female gonads—sometimes possessing one testis and one ovary and sometimes possessing a mixture of testicular and ovarian tissue in a single gonad (called an ovotestis). These gonadal and genetic conditions sometimes coincide, and each can result in a wide variety of internal and external sex characteristics.[31] Sometimes, an individual will have testes and yet exhibit incongruity with other internal sex organs. For instance, an individual with Persistent Mullerian Duct Syndrome is chromosomally and gonadally male, but develops a uterus and fallopian tubes alongside the epididymis, vas deferens, and prostate.[32] All of these bodies are widely labeled as "intersex."

In addition to these conditions, there are others whose inclusion as "intersex" is far more controversial. Some would include gender identity disorder as an intersex condition.[33] Some would include cliteromegaly (larger than average clitoris) and micropenis, in which the phallus is of an intermediate size between those sizes considered "normal" for clitorises and penises.[34] Some would consider individuals with Turner Syndrome (who have a 45,X karyotype or only a partial second sex chromosome) and Klinefelter's Syndrome (who have a single Y and multiple X chromosomes) to be intersex.[35] Because the definition of "intersexuality" is dependent on judgments as to what is sufficiently "abnormal" to preclude categorization as "male" or "female," and because these judgments are in turn dependent on scientific advances and social opinion,

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in those who are chromosomally and gonadally male. An individual with 5-AR Deficiency cannot convert testosterone to the more powerful hormone dihydrotestosterone and does not develop male external genitalia before birth or during childhood, thereby resembling a female for many years. However, by the beginning of puberty the body virilizes, the testes descend, and the phallic tissue enlarges to become a "functional" penis capable of ejaculation (although the prostate typically remains small and facial hair is always sparse, even in adulthood). Greenberg, *Defining Male and Female*, *supra* note 23, at 287.

29. Wilson & Reiner, *supra* note 21, at 122.

30. *Id.*

31. *See id.* (discussing how individuals who are "true hermaphrodites" can exhibit highly variable internal and external sexual characteristics).

32. Greenberg, *Defining Male and Female*, *supra* note 23, at 285.

33. *See, e.g., id.* at 289 (discussing studies that suggest that gender identity disorder may result in brain structure that is more reflective of the opposite sex).

34. *See, e.g.*, SUZANNE J. KESSLER, LESSONS FROM THE INTERSEXED 42–44 (1998) (discussing attempts to standardize sex assignment based on the size of an infant's clitoris or penis).

35. *See, e.g.*, Wilson & Reiner, *supra* note 21, at 123 (describing Turner and Klinefelter's Syndromes, among other intersex conditions).

lists of conditions differ and definitions shift.

Alice Domurat Dreger, one of the most prominent scholars of intersexuality, emphasizes the contextual nature of intersexuality repeatedly in her work. She writes:

> Today my own students, college students in history classes, sometimes in exasperation ask these questions of me at the end of a discussion of the history of sex, as if I am hiding the "real" answer from them. "What *really* is the key to being male, female, or other?" But, as I tell them . . . the answer necessarily changes with time, with place, with technology, and with the many serious implications—theoretical and practical, scientific and political—of any given answer. The answer is, in a critical sense, historical—specific to time and place. There is no "back of the book" final answer to what *must* count for humans as "truly" male, female, or hermaphroditic . . . .[36]

As Dreger taught her students, definitions of intersexuality and the implications of intersexuality for social roles have varied over time.

Before the discovery of hormones, before the discovery of genes, and certainly before the development of genital surgery, intersexuality was conceived of quite differently. In ancient Rome, babies born with ambiguous genitalia were considered monsters and were killed in a purifying ceremony. In the sixth century, Emperor Justinian proposed that children with ambiguous genitalia be allowed to live and that their sex (either male or female) be determined according to the most dominant aspect of their genitals. The father of the child would declare the child's sex at the baptism, and before marriage the child would choose his or her future sex, publicly swearing a "promissionary oath" to live as a member of that sex for life. In the eighteenth century, the oath, with its ceremony and official nature, was eliminated; individuals were required to indicate their choice of sex through unambiguous behavior alone. After this, the idea of "choice" slowly faded, and sex designation became the domain of medical judgment.[37]

The French *Code Civil* of 1804 left sex designation to doctors, markedly influencing legislation in other parts of continental Europe.[38] During the nineteenth and twentieth centuries in Europe and the Americas, definitions of male, female, and intersex came to be fully medicalized. Doctors became the seldom-questioned authorities on sex and sexual identity.[39]

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36. DREGER, *supra* note 20, at 9.

37. *See* PEGGY T. COHEN-KETTENIS & FRIEDEMANN PFÄFFLIN, TRANSGENDERISM AND INTERSEXUALITY IN CHILDHOOD AND ADOLESCENCE: MAKING CHOICES 155–56 (2003).

38. *Id.* at 156.

39. *See* DREGER, *supra* note 20, at 60–61.

In the eighteenth century, doctors defined sexual status by the gonads. One could be male, female, male pseudohermaphrodite (an intersex individual with testicular tissue only), female pseudohermaphrodite (an intersex individual with ovarian tissue only) or a true hermaphrodite (an individual with some mix of ovarian and testicular tissue).[40] Doctors focused on the gonads in an attempt to define sex in one way so that their labeling could be considered the detection of the individual's true sex.[41]

Since the discovery of DNA, the development of genital surgery, and advancements in the social sciences, this paradigm has changed. Many doctors still present their decisions as a process of discovering a baby's sex.[42] However, there is now "a more explicit awareness that the medical intervention sets out not to discover, but to *create* a child of a certain gender."[43] Doctors consider what gender identity they believe the child will find most comfortable, and, based on this, decide what surgeries and other treatments to pursue. Their hypotheses about future gender are based on what kind of genitals can be constructed, because doctors assume that the child will be better socially accepted and adjusted if its genitals match an idealized penis or vagina as closely as possible.[44] Decisions regarding gender assignment and surgery are generally made based on the size of the infant phallus, and whether it might be considered a "satisfactory" penis or needs to be shaved down to a "normal" clitoris (often with a corresponding vaginoplasty to create a vaginal canal). There are even published guidelines for acceptable clitoral size, although many pediatric surgeons make their decisions regarding genital surgery based on their personal opinion of "overall appearance."[45]

The intersex movement has highlighted many problems with these protocols, and activists are still fighting for changes in the medical norms regarding treatment of intersex infants and children. Advocates for change claim that there is no clear line between male and female, and, as a result, any decision made in infancy is arbitrary. Moreover, parents are unable to ensure the development of the child into the designated gender, and doctors cannot predict future gender with much confidence.[46] Given that gender identity is extremely complex and that we remain largely ignorant about its formation, advocates like Kenneth Kipnis and Milton Diamond argue that there is no reason to assume that gender assignment

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40. *Id.* at 36–39.

41. *See* Robert A. Crouch, *Betwixt and Between: The Past and Future of Intersexuality*, *in* INTERSEX IN THE AGE OF ETHICS, *supra* note 21, at 29, 30.

42. *See* KESSLER, *supra* note 34, at 22–23.

43. Crouch, *supra* note 41, at 31.

44. *See* KESSLER, *supra* note 34, at 34–36.

45. *Id.* at 42–51.

46. *See* Kenneth Kipnis & Milton Diamond, *Pediatric Ethics and the Surgical Assignment of Sex*, *in* INTERSEX IN THE AGE OF ETHICS, *supra* note 21, at 173, 187.

and surgery will make a child into a "normal" male or female.[47] In addition to the concern that genital surgery will be performed on a child who later identifies differently, adult intersex individuals who have been subject to these protocols raise their own complaints post-surgery. Surgery hardly produces "ideal" penises, clitorises, and vaginas. Instead, adults who underwent genital surgery as infants complain of nerve damage and resulting sexual dysfunction.[48] They complain that their constructed genitalia neither function nor look as they should.[49] For these reasons, intersex activists propose a new paradigm for medical treatment of intersex individuals.

The first step in any new protocol put forward by those within the intersex movement, be they intersex individuals, social scientists, or medical doctors, is the requirement that the birth of an intersex baby no longer be considered a medical crisis necessitating immediate treatment. The only real concern for physical health arising from an intersex condition is the possibility of a metabolic emergency in babies with CAH.[50] This implies that the vast majority of treatments imposed on intersex babies, including infant genital surgery, are performed for social and not medical reasons.

Instead of surgical sex assignment or prolonged hormone treatment, intersex activists argue that babies should be assigned a provisional gender, and parents should remember that, while they may raise the child in that gender, they do not know how the child will eventually identify.[51] Activists such as Milton Diamond suggest that the provisional gender be determined based on genetic sex, in utero and post-natal hormonal exposure, genitals, and the child's possible future social and sexual development during and after puberty.[52] Decisions regarding more permanent medical creation of sex attributes, including genital surgery, should be delayed until the child is old enough to participate in the decision along with family and medical professionals.[53]

For a movement that arguably began in the United States only in the early 1990s,[54] the intersex activist movement has been relatively—although

47. *See id.* at 185.

48. *See* PREVES, *supra* note 26, at 153.

49. *See* KESSLER, *supra* note 34, at 56–57, 60–64, 72–73.

50. Wilson & Reiner, *supra* note 21, at 127.

51. *See* Alice Domurat Dreger, *A History of Intersex: From the Age of Gonads to the Age of Consent*, *in* INTERSEX IN THE AGE OF ETHICS, *supra* note 21, at 5, 18; Kipnis & Diamond, *supra* note 46, at 187.

52. HARPER, *supra* note 18, at 6.

53. *E.g.*, Wilson & Reiner, *supra* note 21, at 128.

54. *E.g.*, Sharon E. Preves, *Out of the O.R. and into the Streets: Exploring the Impact of Intersex Media Activism*, *in* POLITICS OF CHANGE: SEXUALITY, GENDER AND AGING 179, 189 (Lisa K. Waldner, Betty A. Dobratz & Timothy Buzzell eds., 2004).

hardly completely—successful. Dr. Diamond, one of the most prominent intersex researchers and a proponent of the new paradigm, states that his recommendations are being followed by a significant and increasing number of pediatric surgeons.[55] The Intersex Society of North America (ISNA), which was at one point the largest and most powerful intersex activist group in the United States, has published a *Consensus Statement on Management of Intersex Disorders* in collaboration with many prominent pediatricians.[56] The *Consensus Statement* is a compromise and does not include all that the intersex activist community proposed, but it does recommend banning vaginoplasty (the surgical creation of a vagina) in children before adolescence and performing cliteroplasty (the surgical reduction of a clitoris) only in especially severe cases.[57] With the publication of the *Consensus Statement*, ISNA disbanded in order to focus on implementing of the agreement as a new organization, the Accord Alliance.[58]

With the growing success of the intersex movement, the reality of intersexuality in the United States may be changing. Under the new protocols, intersex people may make different decisions for themselves than the choices doctors have been making for them for decades. After years of living in their bodies, with their genitals unchanged by surgery, a growing number of individuals may decide that they do not want clitoroplasties or vaginoplasties or the other surgeries that have until recently generally been conducted on infants in order to "normalize" their genitalia. They may further decide that they do not want to conform to the strict sex/gender binary that accompanies the bodies so carefully categorized by those surgeries. Some intersex individuals are already making these decisions.[59]

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55. *See* HARPER, *supra* note 18, at 6.

56. Peter A. Lee, Christopher P. Houk, S. Faisal Ahmed & Ieuan A. Hughes, *Consensus Statement on Management of Intersex Disorders*, 118 PEDIATRICS e488 (2006).

57. *Id.* at e491, e492.

58. Intersex Society of North America, Dear ISNA Friends and Supporters, http://www.isna.org/farewell_message (last visited Apr. 15, 2010).

59. Already, some intersex individuals have been encouraged by the intersex movement to challenge the binary of male and female. Catherine Harper reports on one intersex individual named Anja:

> Finding others who are intersexed—in spite of the assertion of her doctor that she never would—and embracing the language of being a "zwitter" [hermaphrodite] has been enormously liberating for Anja. She identifies herself as intersexed, and reflects "we are born with intersex . . . we are intersexed, we stay intersexed." She describes how some of her intersexed friends and acquaintances feel more comfortable if they adopt a male or female gender role, appearance, behavior, and maintain either male or female in their official documents. Anja, however, wants intersex to be a recognized category in society, and she believes that many of those intersexed whom she knows would want this to be formalized and fully accepted also. She asserts that she is "not a woman and not a man," but notes that this is a recent shift for her—"it is really a short

Furthermore, a new conception of sex and gender among the intersex community has the potential to change how the law views sex and gender. Though frequency estimates vary, the most commonly cited number is that one out of every 1000 to 2000 births has sufficiently ambiguous genitalia that doctors call in a specialist in sex differentiation.[60] These numbers *only* include infants with ambiguous genitalia. When more subtle sexual variance and variance discovered later in life are included, estimates of intersexuality climb to include nearly two percent of the population.[61] Considering these statistics, as intersex people begin to question the gender/sex binary, judges will be forced to acknowledge that the law's assumption does not reflect reality—and that the law's reliance on the binary must be changed.

C. A Conflict Between Doctrine and Reality

Intersex individuals, by definition, defy categorization as males or females. However, the categories of "intersex," "male," and "female" are in flux, and the categorization of a particular individual or group of individuals is sometimes controversial. How, then, is Title VII to be applied to intersex individuals? Under the current doctrine, males are compared to females and females are compared to males. To whom is an intersex plaintiff to be compared? And who is to decide that the plaintiff is, indeed, intersex?

The statute itself provides no guidance regarding how Title VII might protect intersex individuals. The simple words "because of . . . sex" do not dictate how discrimination is determined. The legislative history does not provide any further insight. "Sex" was added as a last-minute amendment to anti-discrimination legislation intended mainly to combat racial discrimination.[62] No hearing, bill, debate, or committee report discusses the definition of "sex" and what or who was to be protected by the amendment.[63] Unless Congress passes new legislation, court-developed doctrine will need to explain the meaning of "sex." However, only four Title VII sex discrimination cases thus far have even mentioned intersex

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time that I know where I am and what I am."

HARPER, *supra* note 18, at 138. It is clear that the new protocols and the choices they provide have the potential to change how many intersex individuals view sex and gender.

60. *See, e.g., id.* at 3; PREVES, *supra* note 26, at 2.

61. *See* HARPER, *supra* note 18, at 3.

62. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, 1283–84 (1991).

63. *See* 1964 U.S.C.C.A.N. 2355–91. A search of the Congressional Information Service for Public Law 88-352 turned up no discussion of the definition of the term "sex." The same was true for all relevant indices and citations from the following bibliographies: NANCY P. JOHNSON, SOURCES OF COMPILED LEGISLATIVE HISTORIES (2007) and BERNARD D. REAMS, JR., FEDERAL LEGISLATIVE HISTORIES: AN ANNOTATED BIBLIOGRAPHY AND INDEX TO OFFICIALLY PUBLISHED SOURCES (1994).

individuals, and none has addressed the issue directly.

In three of those cases, the question of Title VII and its application to intersex individuals is hinted at, but no serious attention is paid to it. In the 2003 case of *Johnson v. Fresh Mark, Inc.*, Selena Johnson, a "pre-operative transsexual woman" diagnosed with gender identity disorder, sued her former employer for illegal termination in violation of Title VII and the Americans with Disabilities Act.[64] In her Memorandum in Opposition to the Motion to Dismiss, Ms. Johnson stated that "Defendants fail[ed] to allow for the possibility that Plaintiff might be intersexed."[65] However, the court refused to address this issue, or any possible distinction between transgenderism and intersexuality with respect to Title VII, on the grounds that the plaintiff had not stated her intersexuality as a fact to either her employer or the court.[66]

In a 2008 district court decision, *Schroer v. Billington*, a transgender woman sued for illegal discrimination in hiring in violation of Title VII, and experts from both sides testified on the relationship between intersexuality and transgenderism.[67] However, the court noted that "deciding whether [either of the experts] is right turns out to be unnecessary,"[68] and decided the case based on precedent and reasoning regarding transgenderism alone. Finally, in *Ulane v. Eastern Airlines, Inc.*, a much-quoted 1984 decision regarding Title VII's application to transgender individuals, the court distinguished between transgender and intersex individuals in a footnote.[69] However, the opinion did not elaborate on what that difference might mean or how it might influence Title VII's application to intersex individuals.

Only one decision regarding sex discrimination in employment has come before a judge with a fact pattern that included an intersex plaintiff. In *Wood v. C.G. Studios, Inc.*, plaintiff Wilma Wood claimed that her employer discriminated against her in violation of the Pennsylvania Human Relations Act when it fired her after discovering that "she had undergone surgery to correct her hermaphroditic condition prior to working for defendant."[70] While the case was decided under state law, the court found Title VII cases to be persuasive authority because of the considerable similarity between the statutes.[71] Ultimately, the court

64. Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 996 (N.D. Ohio, 2003), *aff'd*, 98 F. App'x 461 (6th Cir. 2004) (emphases omitted).

65. *Id.* at 1000.

66. *Id.*

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

68. *Id.*

69. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1083 n.3 (7th Cir. 1984).

70. Wood v. C.G. Studios, Inc., 660 F. Supp. 176, 176 (E.D. Pa. 1987).

71. *Id.* at 177–78. For a discussion of authority relying on similar analogous reasoning, see *infra* note 74.

decided the case as one about genital surgery (analogizing to cases of discrimination against transgender individuals who have had sex-reassignment surgery) and ignored whether the plaintiff's status as an intersex individual might play a role in the employer's discrimination.[72] By treating the plaintiff solely as someone who had undergone genital surgery, the only court to face a case of employment discrimination involving an intersex plaintiff managed to skirt the issue entirely.

The courts have yet to address what happens when a doctrine dependent on a binary conceptualization of sex runs into an individual who does not fit into the binary. With the progress of intersex activism, the steady changes to the medical paradigm of intersex treatment, and the increase in the numbers of people who challenge the gender binary, the courts eventually (perhaps sooner rather than later) will be required to apply Title VII to intersex individuals. In order to do so, they will need to rethink the meaning of "because of . . . sex," and, in doing so, they will need to rethink the foundations of Title VII sex discrimination doctrine.

II.
IN SEARCH OF A DEFINITION: "BECAUSE OF . . . SEX" AND SEXUAL MINORITIES

Courts have not been entirely successful in avoiding consideration of the meaning of "sex" in Title VII. A number have been forced to address discrimination "because of . . . sex" in cases brought by sexual minorities.[73] These cases have not provided a definition of "sex" that challenges the binary or could apply to intersex individuals. Nonetheless, the evolving case law regarding transgender individuals in particular is informative. This case law manifests a developing concept of sex discrimination, its application broadening beyond the traditional claims brought by women discriminated against in the workplace. Opinions in cases brought by transgender plaintiffs represent the vanguard of Title VII sex discrimination doctrine. They point the way to the next logical advancement of the doctrine, towards the application of Title VII to protect intersex individuals as well as other sexual minorities.

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72. *See id.* at 178 ("The Title VII cases unanimously hold that Title VII does not extend to transsexuals nor to those undergoing sexual conversion surgery, and that the term 'sex' should be given its traditional meaning. . . . These cases appear equally applicable to those who undergo gender-corrective surgery." (citations omitted)).

73. I generally use the term sexual minorities here to include lesbian, gay, bisexual, transgender, and intersex individuals. Anyone bringing a Title VII sex discrimination case on non-traditional grounds shares the concern of defining "because of . . . sex" in a more inclusive way.

A. *The First Generation: The "Plain Meaning" of Sex*

The first generation of decisions regarding transgender Title VII[74] plaintiffs rejected these plaintiffs' claims, purporting to do so on the basis of the plain meaning of the law and congressional intent. *Holloway v. Arthur Andersen & Co.*,[75] the first[76] published circuit court opinion on the issue of transgenderism and Title VII, is representative of these decisions.

The facts of the case are simple. The plaintiff, known at the time as Robert Holloway, began working for Arthur Andersen in 1969 and began female hormone treatments the following year. In February 1974 she informed her supervisor that she would be starting treatments in preparation for sex reassignment surgery. In November, her work records were altered at her request to reflect her name change to Ramona. Later that month, she was terminated.[77]

The Ninth Circuit refused to extend Title VII protection to Holloway or to transgender individuals in general. The court agreed with the defendant's position that "sex should be given the traditional definition based on anatomical characteristics,"[78] which the court described in a footnote citing *Webster's Seventh New Collegiate Dictionary* as "either of

74. This article focuses on Title VII case law and not decisions grappling with employment discrimination against transgender individuals that are based on state or local law. However, there have been only a handful of cases that apply Title VII to transgender individuals thus far. Some decisions applying state law analogize to Title VII to reject the claims of transgender individuals. *See, e.g.*, Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 97 (D.D.C. 1994) (applying D.C. law); Conway v. City of Hartford, 19 Conn. L. Rptr. 109, 113 (Super. Ct. 1997). Some cases, not directly following Title VII or only considering its doctrine as one factor in their deliberations, still reach this same result. *See, e.g.*, Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 472 (Iowa 1983) ("On this appeal we are not examining civil liberties protected by the Constitution, but civil rights which are enforceable claims rooted in the Iowa Civil Rights Act. . . . The commission construed the statutory language to exclude an action for discrimination on the basis of transsexuality."); Arledge v. Peoples Servs., Inc., No. 02 CVS 1569, 2002 WL 1591690, at *2 (N.C. Gen. Ct. Apr. 18, 2002) ("Transsexuals are not protected from discrimination 'on the basis of sex' by Title VII, and so this Court finds that they likewise are not within the ambit of any public policy expressed by [North Carolina's state employment discrimination statute]."). Some courts did not depend on Title VII analysis and protected transgender individuals, occasionally doing so much earlier than in any Title VII case. *See, e.g.*, Lie v. Sky Pub. Corp., 15 Mass. L. Rptr. 412 (Super. Ct. 2002); Enriquez v. W. Jersey Health Sys., 342 N.J. Super. 501 (Super. Ct. App. Div. 2001); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391 (Sup. Ct. 1995).

75. Holloway v. Arthur Andersen & Co., 566 F.2d 659 (6th. Cir. 1977).

76. While the Third Circuit issued an affirming decision in *Grossman v. Bernards Township Board of Education* the previous year, that opinion was unpublished and is unavailable. 538 F.2d 319 (3d Cir. 1976). The district court's decision was based on much the same grounds as the *Holloway* decision. Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

77. *Holloway*, 566 F.2d at 661.

78. *Id.* at 662.

two divisions of organisms distinguished respectively as male or female."[79] Noting the dearth of legislative history, the court adopted this interpretation as a matter of the "plain meaning" of the law.[80] The court considered the legislature's rejection of several amendments that would have added sexual preference to the list of protected characteristics as confirming that Congress's intent was for sex to mean nothing more than its traditional meaning, and that the goal of the statute was to protect women, not transgender individuals.[81] The court concluded, "The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."[82] As a transgender woman, Ramona Holloway was denied protection.

The reasons given by the *Holloway* court are a common trope amongst the first generation of court decisions regarding transgenderism and Title VII. Uniformly, they reject transgender plaintiffs' claims for protection, arguing on the basis of plain meaning,[83] congressional intent,[84] and the legislature's failure to amend Title VII to include sexual preference[85] (thereby ignoring the difference between sexual preference and gender identity). One decision cites the EEOC's interpretation of "sex," which was in accord.[86] Without exception, courts agreed with *Holloway* and denied transgender individuals protection under Title VII, a statute that they believed was intended to keep men and women on equal footing in the workplace and meant nothing more by "sex."

These decisions did not go uncriticized at the time. In an extremely prescient article, D. Douglas Cotton rejected the principal rationale behind courts' refusal to protect transgender individuals. Noting that Title VII has traditionally been construed liberally due to its remedial nature, Cotton argued that the same liberality should apply to the courts'

79. *Id.* at 662 n.4.

80. *Id.* at 662.

81. *Id.*

82. *Id.* at 663.

83. *See, e.g.*, Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Doe v. U.S. Postal Serv., Civ. A. No. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977); Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975).

84. *See, e.g.*, *Ulane*, 742 F.2d at 1085; *U.S. Postal Serv.*, 1985 WL 9446, at *2; Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978).

85. *See, e.g.*, *Ulane*, 742 F.2d at 1085–86; *Sommers*, 667 F.2d at 750; *Voyles*, 403 F. Supp. at 457.

86. *Powell*, 436 F. Supp. at 371.

definition of "sex" under the statute.[87] Cotton wrote:

> [T]he "plain meaning" of the word remains unclear. "Sex" may refer simply to a division between male and female based upon reproductive functions, but it also may mean a division based upon chromosomes, genital attributes, sex assigned at birth, gender identity, or upon some combination of the above.[88]

Douglas believed that this more liberal definition would, and should, protect transgender individuals under Title VII.[89] It could also, possibly, protect intersex individuals.

The first generation of decisions regarding Title VII and transgender individuals were problematic precisely because of what Douglas criticized: the failure to interpret "sex" liberally. The courts employed a very narrow definition, refusing to think past the male/female sex binary to realize how many factors are considered determinative of sex. They declared, "It is unlawful to discriminate against women because they are women and against men because they are men."[90] They refused to admit a more complicated conception of sex and refused to protect those outside of the gender binary.

B. The Second Generation: Sex Stereotyping

In 1989, the Supreme Court issued a decision with the potential to change the face of Title VII sex discrimination doctrine, particularly regarding transgender individuals. The plaintiff in *Price Waterhouse v. Hopkins*, Ann Hopkins, claimed that her employer had discriminated against her in its partner selection process.[91] As part of the selection, the current partners had written evaluations of her, and some of those evaluations betrayed highly stereotypical ideas about how women should behave—stereotypes to which Hopkins, an assertive woman, did not conform. The partner designated to explain to Hopkins why the firm had rejected her promotion suggested that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" if she wanted to improve her chances for promotion.[92] The Supreme Court found illegal discrimination and ruled for Hopkins, declaring:

> [W]e are beyond the day when an employer could evaluate

87. D. Douglas Cotton, Ulane v. Eastern Airlines*: Title VII and Transsexualism*, 80 NW. U. L. REV. 1037, 1051–52 (1986).

88. *Id.* at 1049–50.

89. *Id.* at 1050–51.

90. *Ulane*, 742 F.2d at 1085.

91. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

92. *Id.* at 235 (internal quotation marks omitted).

> employees by assuming or insisting that they matched the stereotype associated with their group, for "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[93]

With its condemnation of sex stereotyping, the Supreme Court created a new avenue of Title VII litigation for transgender individuals. A biological "man" who is fired after wearing a dress and heels to work while transitioning to a female identity surely has a claim that she was fired for failing to fit the employer's preconceived notions of manhood. Transgender victims of sex discrimination seem to be perfectly appropriate plaintiffs under Title VII's theory of sex stereotyping.

However, in the years immediately following the *Price Waterhouse* decision, courts' response to the Title VII claims of transgender plaintiffs did not change. Courts continued to cite pre-*Price Waterhouse* opinions regarding transgenderism, ignoring any implications that *Price Waterhouse* might have had regarding the issue at hand. "It is well established," they declared, "that the term 'sex' is to be construed narrowly, according to its plain meaning."[94] They failed to apply *Price Waterhouse*'s sex-stereotyping analysis and continued to claim that a "[p]laintiff cannot state a claim for discrimination based upon transsexualism because employment discrimination based upon transsexualism is not prohibited by Title VII."[95]

Nine years after *Price Waterhouse*, the Supreme Court addressed a pair of cases that brought Title VII sex stereotyping to the fore once again, raising the question of how *Price Waterhouse* interpreted "sex." The lower court in one of those cases, *Doe ex rel. Doe v. City of Belleville*, explicitly endorsed a more expansive reading of *Price Waterhouse*.[96] The Seventh Circuit had held for the plaintiffs in *Doe*, finding sex discrimination on two bases: (1) because of sex stereotyping (in which a male was maltreated by coworkers for being insufficiently masculine)[97] and (2) because harassing someone in a sexual way is per se harassment "because of . . . sex."[98] The Supreme Court, however, vacated *Doe*[99] for reconsideration in light of its companion case, *Oncale v. Sundowner*

93. *Id.* at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

94. Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 286 (E.D. Pa. 1993).

95. James v. Ranch Mart Hardware, Inc., No. 94-2235, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994). *See also* Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994); Conway v. City of Hartford, 19 Conn. L. Rptr. 109, 113 (Super. Ct. 1997).

96. Doe *ex rel.* Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

97. *Id.* at 580–83.

98. *Id.* at 575–79.

99. City of Belleville v. Doe *ex rel.* Doe, 523 U.S. 1001 (1998).

Offshore Services, Inc.[100]

There was some concern that any door of opportunity *Price Waterhouse* had opened for transgender plaintiffs was shut by the vacation of *Doe.*[101] After all, the Court reacted to an opinion explicitly endorsing the broader interpretation of *Price Waterhouse* by vacating the decision. For Richard Storrow, *Doe*'s vacation "raise[d] questions regarding the extent to which the Supreme Court considers instances of sex stereotyping to be a proper basis for claims of sex discrimination in employment."[102]

These questions, however, were hardly a conclusive sign that the Court preferred a narrower interpretation of sex stereotyping. The Seventh Circuit in *Doe* found sex discrimination on two grounds: sex stereotyping and sexual harassment. The Court vacated for reconsideration in light of *Oncale.* The *Oncale* decision, without addressing sex stereotyping or gender nonconformity, explicitly stated that "we have never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations."[103] One reading of the Supreme Court's vacation of *Doe* is that the Court disagreed with its interpretation of sexual harassment and was not responding to its interpretation of sex stereotyping at all.

Moreover, the *Oncale* opinion lends itself—indirectly—to a broad reading of *Price Waterhouse* because of its stance that Title VII sex discrimination should be interpreted liberally instead of tightly cabined. The decision allows a claim of sex discrimination by a male employee against other males. The opinion notes:

> As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[104]

At the time, at least one scholar read this language to encourage a liberal interpretation of "because of . . . sex." Julie Greenberg, perhaps the foremost scholar on intersexuality and discrimination today, suggested that discrimination against sexual minorities is the type of "comparable evil" that the *Oncale* opinion states should be included within Title VII's

100. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

101. *See, e.g.*, Richard F. Storrow, *Gender Typing in Stereo: The Transgender Dilemma in Employment Discrimination*, 55 ME. L. REV. 117, 133–38 (2002).

102. *Id.* at 138.

103. *Oncale*, 523 U.S. at 80.

104. *Id.* at 79.

protections.[105] Instead of posing a threat to the application of sex-stereotyping theory to transgender individuals, the companion cases *Doe* and *Oncale* could be seen as clearing a path for transgender individuals to attempt once more to sue for sex discrimination under Title VII.

Ultimately, Greenberg's hopes and not Storrow's concerns were vindicated. Since *Oncale*, almost every[106] published decision on the issue has accepted the application of sex-stereotyping theory to transgender Title VII plaintiffs.[107] Courts in the First,[108] Second,[109] Third,[110] Fifth,[111] Sixth,[112] Seventh,[113] and Ninth Circuits[114] have interpreted Title VII to protect transgender victims of discrimination based on sex stereotyping.

The Sixth Circuit's opinion in *Smith v. City of Salem* is representative of this second generation of Title VII cases regarding transgenderism.[115] The plaintiff, a fire department employee, was suspended from work after being diagnosed with gender identity disorder, presenting herself as female at work in accordance with treatment protocols, and telling her supervisor

105. Greenberg, *Defining Male and Female*, *supra* note 23, at 324–25.

106. In 2002, a Louisiana district court refused to apply sex-stereotyping theory to transgender individuals (while acknowledging its application to more gender-normative individuals) in *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *5–6 (E.D. La. Sept. 16, 2002). In 2003, an Indiana district court refused to apply sex-stereotyping theory to the transgender plaintiff in *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058, at *3 (S.D. Ind. June 17, 2003), without implying that sex-stereotyping theory is generally inapplicable to transgender plaintiffs as a rule. These two decisions have been followed by subsequent decisions from other district courts within their circuits (Fifth and Seventh, respectively) accepting the application of sex-stereotyping theory to transgender Title VII plaintiffs. *See* Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007).

107. A notable exception to this rule is in cases regarding bathroom use. It seems that courts have been able to reconcile employers' decisions to refuse transgender individuals the right to use the bathroom of their choice with sex stereotyping theory. I will discuss this issue in greater depth in Section V, *infra*.

108. *See* Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (interpreting the Equal Credit Opportunity Act through reference to Title VII jurisprudence).

109. *See* Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935 (W.D.N.Y Sept. 26, 2003).

110. *See* Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006).

111. *See* Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008).

112. *See* Myers v. Cuyahoga County, 182 F. App'x 510, 519 (6th Cir. 2006); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 571–75 (6th Cir. 2004); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *2–5 (N.D. Ohio Nov. 9, 2001).

113. *See* Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007).

114. *See* Schwenk v. Hartford, 204 F.3d 1187, 1200–02 (9th Cir. 2000) (interpreting the Gender Motivated Violence Act through reference to Title VII jurisprudence).

115. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

that she would likely be physically transitioning from male to female in the future. After some discussion amongst the fire department management, Smith was suspended.[116] The Sixth Circuit concluded that the defendant had violated Title VII's prohibition against sex discrimination. The court reasoned:

> [D]iscrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.[117]

Using much the same reasoning, almost every court to face a transgender Title VII plaintiff since *Oncale* has concluded that Title VII protects transgender employees when they are victims of sex stereotyping.[118]

Case law regarding the protection of lesbian, gay, and bisexual (LGB) individuals under Title VII has followed a similar trajectory. Early claims were rejected on the grounds that the plain meaning of "sex" prohibited discrimination based on status as male or female but did not encompass discrimination based on sexual orientation.[119] A number of claims brought after *Oncale* and based on sex stereotyping have been allowed, although it is sometimes impossible to tell from the opinions whether a given plaintiff identified as LGB (and, therefore, whether the harassment was motivated by sexual orientation as opposed to gender nonconformity).[120]

However, numerous sex-stereotyping claims brought by LGB plaintiffs have been denied by courts that accept the *Price Waterhouse* sex-stereotyping theory. These courts believed (or the plaintiffs claimed) that their disparate treatment was based on sexual orientation as opposed to and distinct from disparate treatment based on failure to conform to gender stereotypes.[121] Richard Storrow writes about the pattern of

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116. *City of Salem*, 378 F.3d at 568–69.

117. *Id.* at 575.

118. *See, e.g.*, *Barnes*, 401 F.3d at 737; Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653, 659–60 (S.D. Tex. 2008).

119. *See, e.g.*, Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1099–1101 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

120. *See, e.g.*, Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Rhea v. Dollar Tree Stores, Inc., 395 F. Supp. 2d 696 (W.D. Tenn. 2005).

121. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257 (3d Cir. 2001); Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000); Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000); Webb v. Int'l Bhd. of Elec. Workers, No. Civ.A. 04-3613, 2005 WL 2373869, at *8–11 (E.D. Pa. Sept.

extremely fine distinctions made by courts faced with LGB Title VII plaintiffs:

> In their struggle to distinguish between sex discrimination and sexual orientation discrimination, courts have reached the conclusion that as long as the alleged facts include some instances suggesting gender stereotyping alone, without any suggestion of sexual orientation discrimination, the claim may proceed.... Thus, alleging solely that the plaintiff was called "fag" or "dyke" would *not* support a gender stereotyping claim without other allegations that, for example, a male plaintiff was called "femme boy," "princess," or "girl" or that a female plaintiff was said to "wear the pants" or to be excessively "macho," each of the allegations in this latter group suggesting gender stereotyping alone, untainted by any sense of having been motivated by sexual orientation discrimination. This approach narrows the scope of actionable gender stereotyping.[122]

Another way in which courts have attempted to distinguish between claims based on sexual orientation and those based on sex stereotyping is by holding that, in order to make a successful case, the discrimination against the plaintiff must be based on her failure to conform to gender stereotypes in an observable way at work: the cause of the discrimination must be "behavior observed at work or affecting [one's] job performance."[123] The courts carefully cabin sex-stereotyping theory such that Title VII is not interpreted to protect LGB individuals qua LGB individuals, but only to protect LGB individuals as they challenge sex stereotypes unrelated to sexual preference.

The distinction between sex-stereotyping theory and the protection of sexual minorities manifests in Title VII cases with transgender plaintiffs as well. In a 2007 case, *Etsitty v. Utah Transit Authority*, the court explicitly did not reach the issue of sex-stereotyping theory, but did state that transgender individuals qua transgender individuals are not protected by Title VII.[124] "In light of the traditional binary conception of sex," the opinion maintains, "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual."[125] Another case decided that year declared that "a transgender plaintiff can state a sex stereotyping claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer, but such a claim must actually arise

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23, 2005).

122. Storrow, *supra* note 101, at 147.

123. *Vickers*, 453 F.3d at 763.

124. Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007).

125. *Id.* at 1222.

from the employee's appearance or conduct and the employer's stereotypical perceptions," not the plaintiff's transgender identity.[126]

The practical difference between drawing this distinction in cases with transgender plaintiffs and doing so in cases with LGB plaintiffs is great: the claims of LGB plaintiffs are much more likely to be perceived as about sexual orientation instead of about gender nonconformity and therefore rejected. Nonetheless, both groups of cases raise an important question: will the courts ever explicitly allow employment discrimination against sexual minorities qua sexual minorities as grounds for a Title VII suit?

C. The Third Generation: Discrimination Against Transgender Individuals

In late 2008, a federal judge—James Robertson of the District Court for the District of Columbia—answered that question for the first time with a resounding "Yes."[127] His decision in *Schroer v. Billington* represents a third generation of cases interpreting "because of . . . sex."

The plaintiff in the case, Diane Schroer, was offered a job with the Congressional Research Service at the Library of Congress in 2004.[128] Before the hiring supervisor had completed the paperwork finalizing the appointment, the two went to lunch, and Schroer informed the supervisor that she was transitioning from male to female.[129] The job offer was rescinded, and Schroer sued for sex discrimination under Title VII.[130] Her suit alleged discrimination on two theories: (1) because of her failure to conform to sex stereotypes and (2) because of her gender identity, which "is literally discrimination 'because of . . . sex.'"[131] Tracing sex-stereotyping theory to *Price Waterhouse*, Judge Robertson found the defendant liable based on "direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes."[132] But his opinion did not stop there.

"While I would therefore conclude that Schroer is entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping," Judge Robertson wrote, "I also conclude that she is entitled to judgment based on the language of the statute itself."[133] Judge Robertson analogizes transitioning from one sex to another to converting from one religion to

126. Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *3 (N.D. Ind. Aug. 3, 2007).

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

128. *Id.* at 296.

129. *Id.* at 296–97.

130. *Id.* at 295.

131. *Id.* at 302.

132. *Id.* at 305.

133. *Id.* at 305–06.

another and asserts that, just as discrimination against religious converts is discrimination because of religion, discrimination against transgender individuals is discrimination because of sex.[134] The plain meaning of discrimination "because of . . . sex," according to Judge Robertson, includes discrimination against transgender individuals.[135]

Schroer's acknowledgment that discrimination against a sexual minority is per se discrimination was revolutionary in the development of Title VII doctrine. It seems logical that discrimination based on sex *change* is discrimination based on sex, especially in light of the liberal interpretation to which remedial statutes are subject.

However, by depicting his holding as based on the plain meaning of the law without delving into what that meaning is, Judge Robertson created a holding in search of a rationale. What *Schroer* lacks is an overarching theory of sex discrimination. Judge Robertson concludes his opinion:

> In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes about how men and women should act and appear, *and* in response to Schroer's decision to transition, legally, culturally, and physically, from male to female, the Library of Congress violated Title VII's prohibition on sex discrimination.[136]

In doing so, he establishes two separate grounds for Schroer's sex discrimination claim. What he misses—and what would make this third generation of cases regarding sex discrimination and transgender individuals so much more compelling—is the acknowledgement that, in fact, both of his grounds are one. Discrimination against transgender individuals *is* sex stereotyping.

If a transgender individual is fired not because of looking or acting gender nonconformist in the office, but only because the supervisor is uncomfortable with transgender individuals, this is still sex stereotyping. The supervisor is firing the employee because of gender nonconformity. The supervisor believes strongly that females are not born with penises, or males with vaginas. To be a female with a penis, or a female born with a penis, is to fail to conform to gender expectations. This logic also applies to cases beyond the *Schroer* scenario. If a supervisor fires a gay man for being a gay man, it is because of the employee's failure to conform to that supervisor's expectation that men should be sexually interested in women alone. Discrimination against sexual minorities is per se sex discrimination for this reason. The third generation of sex discrimination doctrine has the

134. *Id.* at 306–07.
135. *Id.* at 306–08.
136. *Id.* at 308 (emphasis added).

potential to arrive at a crucial truth: discrimination because of sex is really all about sex stereotyping.

D. Moving Forward: Implications for Intersexual Individuals

Weaving together Judge Robertson's two theories of sex discrimination creates an overarching theory of sex stereotyping. For Diane Schroer, Ann Hopkins, and other gender nonconformists, Title VII is about prohibiting discrimination on the basis of an individual's failure to correspond with the reigning sex stereotypes. For a woman bringing a "garden variety" sex discrimination case, alleging that she is treated differently than the men in her office, Title VII is still about prohibiting discrimination based on sex stereotyping of females—that women are less competent, or deserve less compensation, or should be treated in a different way than their male counterparts—and punishment of those females who fail to conform. If sex-stereotyping theory continues to expand, it seems that many of the inconsistencies within Title VII sex discrimination doctrine will disappear, and sexual minorities, as well as plaintiffs bringing their cases as males or as females, will be protected within one unified doctrine.

The exception to this rule is the intersex plaintiff. Certainly, sex-stereotyping theory reaches discrimination against intersex individuals: these individuals fit preconceived notions of neither males nor females. However, sex-stereotyping doctrine (how courts *find* sex stereotyping) cannot protect intersex individuals because the doctrine requires a plaintiff to be classified within the sex binary before it can begin its comparative analysis. Ann Hopkins can be classified as a female failing to conform to female stereotypes and then compared to males who are not required to conform to female stereotypes. Diane Schroer can be classified as a male failing to conform to male stereotypes, or as a female failing to conform to female stereotypes, and her treatment can be compared to that of members of the "opposite" sex. As one opinion states, "Transsexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."[137] The difficulty with Title VII cases based on intersexuality is that the plaintiff may, in fact, be gender-less.

Like anyone born with any body, an intersex individual will not necessarily identify as either male or female. The body of an intersex individual, however, is not like that of anyone born with any body because it is not classifiable as male or female. While someone in a female body who identifies as without gender can be labeled as "female" based on body

137. Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-CV-0375E, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

type and then protected by sex-stereotyping theory as a female under Title VII, the doctrine simply does not fit those intersex individuals who do not identify themselves as males or females. There is no starting point for sex-stereotyping theory as it stands without a male or female categorization.

Sex discrimination law must incorporate the fact that sex discrimination is about sex stereotyping into a doctrine that accommodates intersex individuals, as well as everyone else within the sex and gender galaxy. Protection for the growing group of people who self-identify as intersex depends on the development of a new generation of Title VII doctrine redefining what it means to discriminate "because of . . . sex."

III.
TROUBLE WITH CATEGORIES: ANTI-DISCRIMINATION LAW AND MULTIRACIAL PLAINTIFFS

The development of Title VII doctrine in cases involving sexual minority plaintiffs indicates that "because of . . . sex" really means because of sex stereotyping and that intersex plaintiffs should be protected from sex stereotyping as well. What these cases do not address, however, is how Title VII can protect plaintiffs whose uncategorizable nature thwarts the application of current sex-stereotyping doctrine.

Another area of federal anti-discrimination doctrine provides some insight as to how anti-discrimination law addresses those who are "in between the categories": the law of race discrimination. The *McDonnell Douglas* test for disparate treatment was first formulated in a race discrimination decision; it allows courts to find discrimination by comparing the treatment of black employees with that of white employees.[138] But there are those who fail to conform to these 'easy' racial categories. How does federal anti-discrimination law treat multiracial plaintiffs?

A. A Brief History: Law and the Multiracial Individual

American law dealt with the categorization of multiracial individuals long before Title VII or other anti-discrimination legislation was even contemplated. Before anti-discrimination law, multiracial individuals posed a challenge to laws designed to discriminate and oppress. During the United States's era of slavery, the forced servitude of millions was defended by the notion that white domination of blacks was part of a "natural order" based on natural traits. Multiracial individuals threatened the binary conception of race and forced society and lawmakers to

138. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

consider how to classify those who were of part African and part European descent.[139]

During the Colonial era, the states did not respond to this threat in a uniform manner: in the upper South (from Delaware to North Carolina), whites considered biracial individuals to be black, while in the lower South (from South Carolina to Florida in the south and Texas in the west) they were considered to possess an intermediate status between black and white.[140] This intermediate status persisted until pressure from abolitionists forced whites in slave societies to offer some rationale for slavery. The resulting emphasis on the "natural distinction" between blacks and whites transformed the perception of biracial people in the lower South to match the binary system of the northern slave states.[141]

During the antebellum period, this strict binary system was expressed through harsh punishment for miscegenation.[142] It was enforced by statutes categorizing the biracial children of slave mothers as slaves[143] and by legislation revoking the rights of the biracial children of white mothers such that their social and economic status was reduced to that of slaves.[144] Southern courts frequently decided the question of a person's racial identity in order to determine whether this legislation applied.[145] Believing that race was biological and scientifically determinable, courts depended on evidence, including documentation of ancestry, inspection and analysis of physical characteristics, reputation, "expert" scientific testimony, and the individual's behavior within the community.[146] The courts' decisions allowed society to resolve "problem cases" of ambiguity and so maintain a strict racial divide between black and white.[147]

After the Civil War, state legislatures adopted different standards to determine racial identity, although the laws passed generally hinged on

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139. Marie-Amélie George, *The Modern Mulatto: A Comparative Analysis of the Social and Legal Positions of Mulattoes in the Antebellum South and the Intersex in Contemporary America*, 15 COLUM. J. GENDER & L. 665, 668–69 (2006).

140. *Id.* at 669–70.

141. *Id.* at 671–72.

142. *Id.* at 672–75.

143. *Id.* at 675.

144. *Id.* at 673–76.

145. Julie A. Greenberg, *Definitional Dilemmas: Male or Female? Black or White? The Law's Failure to Recognize Intersexuals and Multiracials*, *in* GENDER NONCONFORMITY, RACE, AND SEXUALITY 102, 104 (Toni Lester ed., 2002) [hereinafter Greenberg, *Definitional Dilemmas*].

146. *Id.* at 104–06.

147. In the late nineteenth century, the census added categories for races beyond "Negro" and "white." *Id.* at 104. However, the most important distinction the courts made during the antebellum period was between these two groups because the institution of slavery depended upon this distinction at the same time as large numbers of biracial people were challenging it.

ancestry.[148] Initially, different states required different fractions of European ancestry to make a person "white," but by 1915 these differences were abrogated and the "one-drop" rule (or rule of hypodescent) was well-established almost everywhere in the United States.[149] By the 1920s, biracial individuals and blacks were becoming a single people, not only legally but socially as well.[150] Litigation to determine the race of individuals of both European and African descent all but disappeared. Instead, race determination cases were commonly brought not by biracial individuals but by immigrants seeking naturalization as "white."[151] The Supreme Court ruled that "white" status was not determined based on scientific evidence but instead by a common knowledge standard,[152] thereby supporting the modern conception of race as a socially, rather than biologically, constructed category.[153] Interestingly, in the few race determination cases brought in the late twentieth century, most of the same factors were used to classify individuals as were used in cases a century earlier: physical characteristics, ancestry, self-identity, and reputation.[154] Inconsistent[155] balancing of these factors indicates that courts are still grappling with the challenge of maintaining racial categories.

B. Federal Anti-discrimination Law and the Multiracial Plaintiff

This complexity spills over into the predominant area of judicial race determination today: anti-discrimination law. The creation and maintenance of racial categories is necessary for anti-discrimination law's enforcement. In order to utilize the *McDonnell Douglas* test's comparative analysis and other anti-discrimination statutes' parallel tests, courts must first determine who falls into which racial category. To do this they must address the conundrum of how to classify the multiracial plaintiff.

In doing so, courts have uniformly failed to acknowledge the "in between-ness" of multiracial individuals. Some courts simply state that a

148. Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 924 (2002) [hereinafter Greenberg, *Deconstructing Binary Race and Sex Categories*].

149. Kenneth E. Payson, *Check One Box: Reconsidering Directive No. 15 and the Classification of Mixed-Race People*, 84 CAL. L. REV. 1233, 1244–48 (1996).

150. *Id.* at 1248.

151. Greenberg, *Deconstructing Binary Race and Sex Categories*, *supra* note 148, at 924.

152. United States v. Thind, 261 U.S. 204, 209–10, 214–15 (1923).

153. Greenberg, *Definitional Dilemmas*, *supra* note 145, at 107–08.

154. Greenberg, *Deconstructing Binary Race and Sex Categories*, *supra* note 148, at 926.

155. *Id.* at 927.

mixed-race plaintiff is entitled to protection and do not explain the theory behind that decision.[156] Others hold that a half-African-American, half-Caucasian individual is African-American and do not explain why one half of the individual's ancestry is ignored.[157] The logic behind these types of decisions is ambiguous. Are the courts implicitly declaring that mixed-race individuals will *always* be treated as members of only the minority group in which they claim ancestry, rather than as white or as multiracial? Or do these holdings apply only because, even if there is a theoretical difference in the law's treatment of multiracial plaintiffs, there is no practical difference between the treatment of a multiracial employee and a black employee given the facts of these particular cases?

In a few anti-discrimination cases, the courts have provided some reasoning for their racial categorizations. In these cases, the factual scenarios presented have required the court to address whether federal anti-discrimination law treats multiracial people differently than those who are more easily racially categorized.

Rougeau v. Louisiana is one of these rare cases.[158] The plaintiff, a half-Caucasian and half-African-American woman, sued her employer for racial discrimination, gender discrimination, and retaliation.[159] The fact pattern is crucial: Elaine Rougeau claimed that one Caucasian coworker and two supervisors, one Caucasian and one African-American, all engaged in racial discrimination against her by creating a hostile work environment based on race. The court investigated whether there was evidence of racial discrimination on the part of the white supervisor or coworker and concluded that there was not.[160] When it came to the African-American supervisor, however, the court did not reach the question of whether the facts supported racial discrimination:

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156. *See, e.g.*, Smith v. Mission Assocs., 225 F. Supp. 2d 1293, 1299 (D. Kan. 2002) ("Plaintiffs have all established that they are members of a protected class. Larry and Duane McFadden are both bi-racial, being half black and half caucasian."); Jackson v. Katy Indep. Sch. Dist., 951 F. Supp. 1293, 1302 n.12 (S.D. Tex. 1996) ("The Court rejects Defendants' argument that a bi-racial student is not a member of a protected class, insofar as Brison is the son of an African-American male, himself a member of the group which the Fourteenth Amendment was enacted to protect.").

157. *See, e.g.*, Longmire v. Wyser-Pratte, No. 05 Civ. 6725, 2007 WL 2584662, at *8 (S.D.N.Y. Sept. 6, 2007) ("It is undisputed that Longmire [a biracial plaintiff] has established the first element of a racial discrimination claim—he is African-American and is therefore entitled to the protections of [anti-discrimination laws]."); Jennings v. Autozone, Inc., No. 05-CV-70601, 2006 WL 1984000, at *1 n.2 (E.D. Mich. July 12, 2006) ("During Plaintiff's employment—from June 2, 2003, to July 13, 2004—at the Dearborn store, Defendant employed 26 people—21 blacks (or 20 blacks and 1 biracial) and 5 whites." (emphasis omitted)).

158. Rougeau v. La. Dep't of Soc. Servs., No. 04-432, 2008 WL 818961 (M.D. La. Mar. 25, 2008).

159. *Id.* at *1.

160. *Id.* at *7–8.

> The defendant claims that there is no authority to support a finding of African-American/African-American racial discrimination. However, the likely basis for plaintiff's discrimination claim against Ms. Booker is not racial discrimination, but rather color discrimination, which is recognized, albeit rarely, under Title VII.[161]

Moreover, the court found that the color discrimination claim failed, because "[t]he Court cannot find any indication that Ms. Booker exhibited any discrimination against the plaintiff on account of her skin color, or her bi-racial heritage."[162]

What is striking about the *Rougeau* decision is that race discrimination against a half-Caucasian, half-African-American employee is considered a possibly legitimate claim when the discriminator is Caucasian, but not when the discriminator is African-American. When the individual doing the discriminating is African-American, the suit is only valid as a claim of color discrimination, not race discrimination. When the individual doing the discriminating is white, there is no need to reframe the claim as color discrimination, because the plaintiff's white ancestry is irrelevant. In other words, a biracial plaintiff is not considered biracial when it comes to her claims of discrimination. She is considered African-American, even when it is possible that she was subject to discrimination precisely because she is of biracial descent.

Rougeau is not the only decision with this particular implication. In *Moore v. Dolgencorp, Inc.*, the court refused to allow a race discrimination claim where the African-American plaintiff was terminated and replaced by a biracial man.[163] The court stated that the plaintiff's claim was really one of color discrimination, but that since her complaint only mentioned race discrimination, color discrimination could not be considered as grounds for liability.[164] The court then rejected the plaintiff's race discrimination claim:

> Plaintiff has failed to meet the first prong of the fourth element of the *McDonnell Douglas* framework, because she was replaced by a member of the protected class. It is undisputed that plaintiff's replacement, Young, is the son of an African-American. The court rejects plaintiff's claim that a light-skinned African-American of "mixed race" heritage is not entitled to protection as a member of this particular protected class (i.e., race).[165]

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161. *Id.* at *8.

162. *Id.*

163. Moore v. Dolgencorp, Inc., No. 1:05-CV-107, 2006 WL 2701058 (W.D. Mich. Sept. 19, 2006).

164. *Id.* at *3.

165. *Id.* at *4. Though the plaintiff's racial discrimination claim was rejected where

The court explicitly rejected the opportunity to "take judicial notice of the distinction between the 'protected class of Black persons and the class of persons of mixed race.'"[166]

While it might be the case that Young, as a biracial employee, could claim that he was discriminated against as an African-American (and therefore is entitled to protection as a member of that protected class), it is altogether different to say that he and the plaintiff are automatically, and in all situations, of the "same protected class." This implies that the plaintiff could not be the victim of discrimination by someone who preferred a biracial individual to an African-American who is not (apparently) of mixed-race. It indicates that this type of discrimination could only be color discrimination based on skin tone and not race discrimination based on preference for some white ancestry. It means that a biracial individual could not be discriminated against as such—not for being lighter-skinned or darker-skinned, but for being half-Caucasian and half-African-American. It is unclear why these courts refused to acknowledge such possible types of discrimination, especially given that *Moore* and *Rougeau* were decided in 2006 and 2008, respectively.

One other Title VII decision explicitly takes on the issue of the multiracial plaintiff. *Walker v. University of Colorado Board of Regents* was decided by the Federal District Court of Colorado in 1994.[167] The court explains:

> [The plaintiff] has identified himself as a multiracial person of Black, Native American, Jewish and Anglo descent. The plaintiff's position is that under the four part test established in *McDonnell Douglas Corp. v. Green*, the protected class is limited to multiracial persons. This court rejects that contention because it would be impracticable to apply and could be so self limiting that a particular person is the only identifiable member of the group. Multiracial persons may be considered members of each of the protected groups with which they have any significant identification. Thus, the fact that a Black man was selected for the position of Vice President for Human Resources and an Anglo woman was selected as President of the University do not, in themselves, defeat these claims.[168]

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she alleged that a biracial man was favored over her, her race discrimination claim was allowed to go forward where she alleged that she may have been treated differently than similarly situated white employees. *Id.* at *5.

166. *Id.* at *4 n.5.

167. Walker v. Univ. of Colo. Bd. of Regents, Civ. A. Nos. 90-M-932, 92-M-372, 1994 WL 752651 (D. Colo. Mar. 30, 1994) (internal citation omitted), *aff'd*, No. 94-1146, 1994 WL 722968 (10th Cir. Dec. 20, 1994).

168. *Id.* at *1.

The court denied the plaintiff's claims on the grounds that the defendant had a legitimate, non-discriminatory reason for rejecting his application.[169]

Because the court found another reason for the job rejection, it did not explain precisely how its suggested test for racial discrimination would operate. It seems as though the plaintiff might be able to claim protection as a black, Native American, Jewish, or white individual. If this test were applied in *Rougeau*, the plaintiff could have charged her white supervisor with discrimination against her as an African-American employee and charged the African-American supervisor with discrimination against her as a white employee.[170] Ignoring for a moment the dissonance between that conclusion and the doctrinal foundation of *Rougeau*, there is a crucial judgment that *Walker* shares with *Rougeau* and *Moore*: none of the plaintiffs can claim protection as mixed-race individuals. As with the earlier legislation designed to perpetrate discrimination and subjugation, the doctrine of modern anti-discrimination law works to erase the existence of those "in between" the categories.

What motivates this doctrine? It is possible that the anti-discrimination law, like the older, explicitly discriminatory law, is designed to maintain white purity and racial stratification. At least in the *Rougeau* and *Moore* version, it embodies a one-drop rule conception of whiteness and reinforces strict boundaries between the races. However, it is also possible that this area of doctrine succeeds in empowering most of those whom it is designed to protect.

The classification of multiracial plaintiffs in anti-discrimination doctrine may be likened to the debate over including a "multiracial" category in the census before 2000. Since 2000, there has been an option for the head of household to check off more than one box in order to account for an individual with more than one group of ancestors. Prior to these changes, a heated debate had questioned whether the one-box, one-race system should be replaced with a multi-box system (as adopted) or augmented with an additional "multiracial" box to choose instead of selecting one race. One of the arguments in favor of maintaining the old system was that either new system would dilute racial minorities' political power. Tanya Katerí Hernández argued:

> Multiracial discourse misconstrues the meaning of race used in the group measurement of racial disparity, with an individual-focused assessment of fluid cultural identity. Such a view of race negates its sociopolitical meaning and thereby undermines effective legal mechanisms to ameliorate racial discrimination.[171]

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169. *Id.* at *2.

170. White employees can claim protection from racial discrimination under Title VII as well. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 280 (1976).

171. Tanya Katerí Hernández, *"Multiracial" Discourse: Racial Classifications in an*

Many of the leading organizations advocating for people of color, including the National Association for the Advancement of Colored People, the National Council of La Raza, and the National Asian Pacific American Legal Consortium, agreed with Hernández, reasoning that someone who looks like a minority is likely to face discrimination as such and so should be fully counted as a member of that minority group.[172]

Although these arguments address racial classification in the census, they also have important implications for anti-discrimination law. As Hernández writes:

> [T]he racial hierarchy tends to view biracial persons as inferior, not because they are mixed-race, but because they are non-White. And it is this facet of the discrimination against biracials as persons of color that must be measured and addressed in the struggle for racial equality. Accordingly, the current racial categories and single-box-checking system should remain intact to the extent they reflect the ways in which society ranks its members.[173]

This same reasoning—that the census should reflect the social reality of discrimination—also applies to anti-discrimination law. Racial anti-discrimination doctrine has problems, but it offers at least one strength as well. By counting biracial plaintiffs as African-Americans for purposes of comparative analysis, anti-discrimination law reflects the reality of how discrimination operates: in most cases, the discriminating party identifies and is maltreating the plaintiff not as a multiracial individual, but as an African-American. Since race is a social construction, anti-discrimination law must react to that construction. It is crucial that anti-discrimination doctrine protect employees from discrimination not as it is theorized, but as it exists in American workplaces.

C. "In Between" the Categories: Multiracial and Intersex Plaintiffs Compared

The lessons of the multiracial plaintiff can inform doctrine developed for the intersex plaintiff. Both intersex and multiracial individuals exist in a liminal state, "in between" the categories such that they challenge the hierarchical systems that depend on the maintenance of those categories.[174] Just as the construction of race depends on the cabining or erasure of multiracial individuals, so does the construction of sex require society to

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Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97, 102–03 (1998).

172. Cindy Rodriguez, *U.S. Census Now Recognizes Multiracial Entries*, SEATTLEPI.COM, Dec. 16, 2000, http://seattlepi.nwsource.com/national/cens16.shtml.

173. Hernández, *supra* note 171, at 163.

174. George, *supra* note 139, at 679.

determine how to categorize intersex individuals.

One notable difference between the two groups is that, while the law operates to erase the existence of racially uncategorizable individuals, it is medicine that primarily does so for the sexually uncategorizable.[175] The intersex movement is still nascent, and medical protocols are only now slowly changing; as a result, most intersex individuals with ambiguous genitalia born in previous years and decades were operated on so they would better conform to society's expectations for male or female bodies. These surgeries serve to erase, although not very well, any possible challenge to the sex binary.

Moreover, just as the law operates to create members of the subjugated race out of biracial individuals, so does medicine almost always attempt to create females out of intersex individuals. As intersex activist Kiira Treia writes:

> I've wondered why researchers at Johns Hopkins were so concerned with the genitals of a barely teenaged hermaphrodite from a family of absolutely no standing or financial resources. . . . Why all the unsolicited attention?
>
> Doctors act as enforcers of genital and behavioral conformity for the Penis Club. As high priests of the biological technocracy, and as privileged possessors of "secret" knowledge, they wield their power to ensure that only owners of a medically approved, "viable" penis are granted membership in the Penis Club. All others are by default granted membership in the Vagina Club. The penis does need to be "viable," as its purpose is not seen as being for pleasurable gratification, but as the mechanism by which members of the Vagina Club are penetrated. Intersexed neonates who have no clearly defined membership qualifications for either club are modified at Hopkins to become members of the Vagina Club.[176]

Research indicates that as many as ninety percent of genital surgeries on intersex infants and children are used to create "females" out of intersex bodies.[177] By erasing genitals that challenge the categories and seeking to retain the "purity" of manhood through strict requirements for "viable" penises, society's sex hierarchy is maintained.

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175. *Id.* at 679–80.

176. Kiira Triea, *Power, Orgasm, and the Psychohormonal Research Unit*, *in* INTERSEX IN THE AGE OF ETHICS, *supra* note 21, at 141, 141.

177. Nancy Ehrenreich & Mark Barr, *Intersex Surgery, Female Genital Cutting, and the Selective Condemnation of "Cultural Practices,"* 40 HARV. C.R.-C.L. L. REV. 71, 125–26 (2005). *See also* George, *supra* note 139, at 680 ("[T]he intersex are disproportionately sexed female . . . .").

However, as the medical protocols slowly change,[178] fewer intersex babies are subject to genital surgery. In the future, it is quite possible—in fact, quite probable—that a court will face an intersex plaintiff with an anti-discrimination claim. The solutions offered by anti-discrimination cases involving multiracial plaintiffs, problematic as they are in that context, are even *more* problematic when applied to intersex individuals. Wherever one stands in the debate regarding racial classifications, it seems clear that an individual openly identifying as intersex could easily be the victim of discrimination as such—and mere categorization of that person as "female" will do nothing to provide protection. On the other hand, simply classifying intersex people as a third category seems problematic as well, just as it seems problematic to always separate biracial people into their own categories in the race analysis. There are people who identify as intersex women, or as intersex men, and they may present themselves to the world as such. Others, identified by some as intersex, may be perceived by their employers as "normal" males or females. The lesson of the multiracial plaintiff is that anti-discrimination doctrine needs to accommodate the social realities of discrimination—and, in the case of intersex individuals, it seems that this discrimination could take many forms.

How does the doctrine accommodate so many possible types of sex discrimination against the same individual? Perhaps there is something more to be learned from the debate over the census categorization of multiracial individuals. In a 1997 article, Christine Hickman considered the many possibilities for a new census form and rejected all of the standard choices: maintaining the old form, adding a "multiracial" box, or giving the option to check multiple "race" boxes.[179] Instead, she suggested that a new line be added to the census giving the multiracial inquiry its own spot. Thus, an individual could identify as African-American in the regular race section, but additionally check off the "multiracial" box below. Or one could identify as "other" and write in "multiracial" in the first section, as well as checking off the multiracial box. Hickman writes:

> This proposal validates the emergence in our country since *Loving* of a new category of mixed-race persons, but—unlike the other proposals—it does not require the multiracial category to compete with the traditional races for the allegiance of these people. It recognizes that in our society it is perfectly predictable that biracial persons may have allegiance to one parent's race and still wish to be counted as *Loving*'s children. Most importantly, because it does not set up such a "competition" between race and

178. See *supra* Section I.

179. Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U.S. Census*, 95 MICH. L. REV. 1161 (1997).

> mixed race, it allows for the most accurate count of mixed-race people.[180]

Hickman's proposal enables those reading the census to choose which information is relevant to a particular inquiry. For resource-driven issues, consideration of distribution need not be confused by the blurring of categories when blurring is not relevant. But where self-identity and the blurring of categories are important, the second "multiracial" line can offer that information.

Hickman's idea speaks to the difficulties faced by the courts in classifying intersex plaintiffs in anti-discrimination suits. Sometimes these plaintiffs will sue based on a theory of discrimination against intersex people; sometimes they will sue based on a theory of discrimination against men or women; and sometimes they will sue based on a theory of discrimination against men, women, or intersex people with particular characteristics. Hickman's work emphasizes the importance of flexibility. Like the census, anti-discrimination doctrine must develop flexiblity and responsiveness to the reality of each case of discrimination as it occurs. It is particularly important for the intersex plaintiff, who may face discrimination in many forms, that the doctrine protect against sex discrimination in all of its varieties. Hickman's proposal suggests that the same label need not always apply to an individual facing discrimination, that the individual need not always be classified within the same "protected group" when applying the *McDonnell Douglas* test. To truly protect intersex individuals, a flexible response to the variable reality of discrimination must be interwoven into any doctrinal test for illegal sex stereotyping.

IV.
DOCTRINAL POSSIBILITIES: CATEGORIZING INTERSEX INDIVIDUALS FOR THEIR OWN PROTECTION

A. Why Protect Intersex Individuals at All?

Before altering the doctrine, proponents of reforming Title VII protections must consider the possibility that Title VII simply does not protect intersex individuals, and thus that it is not in need of reform at all. One might argue against protection due to a lack of congressional intent: it seems unlikely that many (or even any) representatives or senators had intersex individuals in mind when they drafted or voted for the Civil Rights Act of 1964. The concern can also be derived from textual originalism, arguing that discrimination "because of . . . sex" plainly meant discrimination because of an individual's status as male or female, and to

180. *Id.* at 1263–64.

interpret the law in any other way today would be judicial activism at its worst.[181] However, any originalist argument (based on intent or textualism) will face difficulty. Employment discrimination doctrine has already moved well beyond the simplistic view of "sex" proposed by textual originalists, and the Supreme Court has explicitly refused to limit Title VII's application to traditional, garden-variety sex discrimination cases.[182] The important question now is how far the Supreme Court might take this expansion, and whether it will—or should—apply Title VII to protect intersex employees.

Originalism is a weak ground for argument in Title VII interpretation. There is room for doubt that many of the well-established developments in Title VII doctrine were ever intended by legislators or understood to be included within Title VII by their contemporaries in 1964. As Douglas Cotton writes,

> [C]ourts have expanded the subgroups contemplated by the Act even in the absence of legislative history indicating congressional intent to prohibit discrimination against these groups. For example, courts have extended coverage of the Act to prevent discrimination against women with preschool-age children, single pregnant women, married women, and black women. In addition, courts have extended coverage of the Act to prevent discrimination against whites as well as men.[183]

Title VII doctrine, as developed by both the lower courts and the Supreme Court itself, has moved beyond what was in all likelihood originally contemplated by the drafters and supporters of Title VII. To adhere to such a conservative mode of interpretation ignores decades of judicial interpretation of the statute.

Moreover, the Supreme Court in *Oncale* rejected the use of originalism in this context. As Justice Scalia wrote for a unanimous Court, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[184] This statement was not dicta; in fact, it provided an important principle of Title VII interpretation necessary for the determination of the case. Despite the fact that the gender-comparison

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181. A simpler textualism (reducing interpretation of the statute to only the words on the page) presents no argument against Title VII's protection of intersex individuals. To say that "because of . . . sex" covers only males and females is to beg the question. However, to say that "because of . . . sex" was only understood to cover males and females at the time that it was passed is to begin to create a cogent argument.

182. *See infra* notes 183–83 and accompanying text.

183. Cotton, *supra* note 87, at 1050.

184. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

paradigm of *McDonnell Douglas* did not fit the facts of *Oncale* (a sex discrimination claim arising out of an all-male workplace with no female employees to serve as comparators), the Court found that the plaintiff was entitled to Title VII protection. The Court rejected the idea that "sex" is a stagnant concept that should be applied as the legislators or public of 1964 might have understood it upon creating or reading the legislation.

The *Oncale* standard nonetheless leaves a crucial question unanswered: what is a "reasonably comparable evil"? Is discrimination against intersex individuals reasonably comparable? One might argue that challenging the sex binary is too revolutionary, and, therefore, that protecting intersex individuals is an unreasonable interpretation of Title VII. After all, even the *Price Waterhouse* opinion, which liberalized sex discrimination law and made it possible for transgender and LGB individuals to bring successful Title VII claims, stated that "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,"[185] but ignored the spectrum of disparate treatment of those not easily classified as men or women.

Even so, judges and legislators have good reason to believe that the default in Title VII interpretation should be an assumption of broader, not narrower, coverage. Courts have repeatedly emphasized that, as a remedial civil rights statute, Title VII should be construed liberally.[186] Simple liberal construction, of course, does not mean that any claim of discrimination can properly be brought under Title VII. But it does mean that courts' assumptions should be in favor of inclusion, especially given that the language ("because of . . . sex") so clearly applies to discrimination because of inter*sex*uality, a set of conditions diagnosed by doctors and based on physical sex characteristics.

For those theorists who believe that sex/gender is a social construction and that the "male" and "female" paradigms are simply groups of characteristics joined together as particular assemblages within that construction, it seems obvious to say that discrimination against intersex individuals as such is a "reasonably comparable evil."[187] However, it is still possible for those who believe that sex is an inherent characteristic to compatibly support Title VII protection of intersex individuals. Whether legislators were aware of it in 1964 (and it seems extremely likely that they were not), there exist individuals who do not fit the physical requirements

185. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

186. Cotton, *supra* note 87, at 1051 n.116 (citing cases).

187. Under the social construction model, those identified as intersex should be protected because they do not conform to the social construction of sex. "Sex" implies a social construction that affects those who fall in between just as much as, if not more, than those who fit within its categories. Therefore, discrimination against intersex plaintiffs is a "reasonably comparable evil" to more classic cases of discrimination under Title VII.

used to categorize males and females. While a person who believes that sex is an inherent physical fact might not believe in protecting LGB or transgender individuals, it is nevertheless consistent with the inherent sex theory to consider discrimination against intersex individuals "a reasonably comparable evil" to discrimination against men or women. After all, these theorists deem each group to possess immutable physical sex characteristics. Discrimination against an intersex individual as such, just like discrimination against a woman as such, is discrimination because of "sex," because of a physical sex characteristic that the plaintiff cannot help.

There is further reason to believe that conservative interpreters of "sex" and Title VII might support protection for intersex individuals. Some intersex individuals who are also LGB-identified believe that they experience more discrimination as a result of their sexual orientation than their intersexuality. They speak of relief at receiving a scientific diagnosis explaining their physical characteristics, of the feeling that possessing this justification for their nonconformity means they will be subject to *less* discrimination. Sharon Preves writes:

> [S]ome [intersex individuals] found their intersexuality easier to comprehend than their homosexuality. As Barbara noted, "Coming out [as] AIS is so much clearer, so much more factual than being lesbian. It's sort of a yes or no thing. I feel I can justify AIS just like that [snaps fingers], that nobody in the world can stand against me, or will dare to. I think that [the] issue is simpler. The facts are simpler. I mean, I know why I have AIS. I don't know why I'm a lesbian."[188]

It is because of what Barbara called the simplicity of the issue—her feeling that it is harder to "stand against" her intersexuality than her lesbianism—that it seems possible that protection for intersex individuals under Title VII may garner more widespread support than protection for other sexual minorities. For those who believe that men and women should be protected from sex discrimination because sex is an immutable physical characteristic, protecting intersex individuals under Title VII follows naturally.

This underlying justification for Title VII's protection against sex discrimination—that immutable physical characteristics should not be a permissible cause of discrimination—may provide the basis for *Ulane*'s unexplained distinction between transgender and intersex individuals. Recall that *Ulane*, a very conservative first generation Title VII sex discrimination decision denying Title VII coverage to transgender individuals, noted that transgenderism and intersexuality are not the

188. PREVES, *supra* note 26, at 115.

same.[189] Even conservatives who otherwise reject liberal interpretations of Title VII may acknowledge that employment discrimination against intersex individuals is reasonably comparable to Title VII's original intent.

If we accept that discrimination against intersexuality is a reasonably comparable evil, there remains a more difficult question: how can Title VII doctrine be applied to employment discrimination against intersex individuals? There are many different paths that Title VII doctrine might take to accommodate intersex plaintiffs. The simplest—those requiring the least adjustments to anti-discrimination law as it stands—are (1) categorizing intersex individuals as males or females and protecting them as nonconformers to sex stereotypes or (2) creating a third category for intersex individuals to use in *McDonnell Douglas* comparative analysis. Both of these options are seriously flawed.

B. Maintaining the Traditional Categories of Male and Female

Categorizing intersex plaintiffs within the male/female sex binary and then conducting a comparative analysis would create a doctrine for intersex plaintiffs that parallels the one used in Title VII suits brought by transgender plaintiffs. Intersex plaintiffs, like transgender plaintiffs, would be categorized as "male" or "female" before sex-stereotyping analysis is applied. This approach would also mirror the tests used for multiracial plaintiffs, who are categorized according to their minority ancestry, as in *Rougeau/Moore*-type cases, or according to any one of the "races" from which they descend, as in *Walker*-type cases, but never as "multiracial" per se. This proposed doctrine for intersex plaintiffs would also correspond to the current (but waning) medical paradigm of treatment for intersex individuals. Doctors conduct infant genital surgery if that is what is necessary in order to be able to announce "It's a boy!" or "It's a girl!" This doctrinal development similarly avoids challenging the binary, and thus would be most in accord with the state of the law and medicine today.

The idea that the law can classify ambiguous individuals as male or female has some precedent in American courts. In *In re Heilig*, the Maryland Court of Appeals authorized the use of a multifactor balancing test to determine the sex of the plaintiff, who was attempting to change the "sexual identity" designation on her birth certificate.[190] A Kansas appellate court applied a similar multifactor test, adopted from Julie Greenberg's list of characteristics deemed determinant of sex, in *In re Estate of Gardiner*.[191] In that case, the son of a man who died intestate

189. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1083 n.3 (7th Cir. 1984) (distinguishing transgenderism and hermaphroditism, the older term for intersexuality).

190. *In re* Heilig, 816 A.2d 68, 69 (Md. 2003).

191. *In re* Estate of Gardiner, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001), *rev'd in part*, 42 P.3d 120 (Kan. 2002).

claimed that his late father's marriage to a post-operative transsexual woman was void due to its homosexual nature. After the trial court granted summary judgment in favor of the son, the appellate court vacated and remanded, holding that the trial court needed to consider more than just chromosomes when determining the wife's sex:

> [T]he trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.[192]

Ultimately, the appellate court's decision was reversed by the Supreme Court of Kansas, which held that a transgender person is sexed as he or she was sexed at birth.[193] Nonetheless, the Kansas Court of Appeals's decision in *Gardiner* and the Maryland Court of Appeals's decision in *Heilig* offer a possible solution to ambiguity that could be adopted in the employment discrimination context: the multifactor test.

However, doctrinal expansion of Title VII by means of maintaining the male/female binary has some serious drawbacks. First, it can be extremely emotionally stressful for an intersex person to be required to identify solely as male or female.[194] Sharon E. Preves, who interviewed

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192. *Id.* at 1110.

193. *In re* Estate of Gardiner, 42 P.3d 120, 135 (Kan. 2002) ("The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals. The plain, ordinary meaning of 'persons of the opposite sex' contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to 'produce ova and bear offspring' does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes.").

194. The doctrine requires that transgender individuals identify as either male or female, which can be problematic in itself. While some transgender individuals neatly identify within the binary, others consider their gender to be more complicated. Dylan Vade explains:

> [T]here are those who are neither. Some transgender people identify as trans, tranny, trannyboy, trannygirl, transsexual, transgender, shinjuku boy, boi, grrl, boy-girl, girl-boy-girl, papi, third gender, fourth gender, no gender, bi-spirit, butch, dyke-fag, fairy, elf girl, glitterboy, transman, transwoman—just to name a few. On a San Francisco Human Rights Commission Survey one person described their gender as "[h]ormonally enhanced, pre-op, trans, genderqueer, butch-dyke with recurring femme moments! I'm just your average boy-girl-boy, really." In conversations and community discussions, there are transgender people who identify as both FTM and dyke. Some see themselves as combining aspects of female and male. Some see themselves as falling between female and male. Some see themselves as falling completely outside of the binary gender system. Some who do not identify as strictly female or strictly male identify as "genderqueer." Some do not identify with that term.

many intersex individuals, found a "common thread" among them of "[q]uestioning the authenticity of their sex and gender."[195] Even those who had grown up with a stable gender identity often experienced crises of self-identity when they found out that they were intersex.[196] While some of those individuals still identify solely as men or women and some identify as intersex men or intersex women, other intersex individuals refuse to conform to the sex/gender paradigm at all and identify solely as intersex.[197] By adopting a doctrine that requires clear classification within the binary, anti-discrimination law may do psychological damage to those who struggle with binary sex labels—in other words, it may damage precisely those whom it is designed to protect.

Furthermore, this doctrinal development ignores a crucial type of discrimination—discrimination that specifically targets individuals who pose a challenge to the categories. Treating intersex individuals as if they do not exist fails to capture the idea that individuals might be victimized by employment discrimination not because they are deviant males or females, but because their employers or coworkers have an aversion to intersexuality. Robert A. Crouch explains:

> Having slipped through the "network of classifications that normally locate states and positions in cultural space," liminal persons are "neither here nor there; they are betwixt and between the positions assigned and arrayed by law, custom, convention, and ceremonial." Such persons are, therefore, "structurally 'dead'" and, to this extent, socially problematic. For in their ambiguous state, the liminal person is made to be "an exile or a stranger, someone who, by his very existence, calls into question the whole normative order."[198]

When discrimination is due to the liminal nature of the plaintiff, it is disingenuous for the court to disregard this fact and pretend that the discrimination is about gender nonconforming males or females. By confirming bigots' beliefs that the intersex individual—the liminal person—does not really exist, the law sustains and espouses discrimination against them. Where the law reflects a binary conception of gender, it affirms that liminal persons are "structurally dead" and, therefore, socially

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Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 266 (2005). *See also* RACHEL ANN HEATH, THE PRAEGER HANDBOOK OF TRANSSEXUALITY: CHANGING GENDER TO MATCH MINDSET 171–72 (2006) (discussing transgender individuals who identify as "both/neither" male or female).

195. PREVES, *supra* note 26, at 82.

196. *Id.* at 110–13.

197. *E.g.*, HARPER, *supra* note 18, at 138, 150–54 (describing case of intersex individual who refused to identify as either male or female).

198. Crouch, *supra* note 41, at 36–37.

problematic.

Finally, the theory of gender required to support a doctrine that depends on labeling the sexually ambiguous as male or female is unsound. To classify everyone as male or female while simultaneously acknowledging that some people's classification is ambiguous requires conceiving of sex as a spectrum. At one end of the spectrum is paradigmatic masculinity, and at the other end is paradigmatic femininity. Thus, the multifactor test would enable courts to locate intersex plaintiffs on a point in that spectrum and then designate them as "male" or "female," depending on which end of the spectrum they mostly closely approximate. Some intersex activists espouse the notion of a sex spectrum. D. Cameron, an activist with Klinefelter's syndrome, writes: "It is only fairly recently that I have discovered the term 'intersexed' and how it relates to my body. I like the term because I prefer more choices than male or female. I think there is a continuum of Male - - - - to - - - - Female; like shades of gray from black to white."[199] If such a spectrum exists, perhaps the multifactor balancing test would be a tenable way to tweak the doctrine such that Title VII can protect intersex individuals.

The problem with this possibility is that the conception of a sex spectrum is flawed. Transgender attorney and activist Dylan Vade convincingly argues that gender is not really a spectrum, but more of a galaxy. He writes:

> Often, when we get past the binary gender system, the notion that there are only two genders, female and male, we do so by seeing gender as a spectrum or line running from female to male. A conceptualization of gender that runs from female to male is limiting because it does not leave space for more complex genders. For instance, I have met many FTMs who are less masculine than many butch women. Would the FTM fall more towards the male end of the spectrum because the FTM identifies as male? Would the butch woman fall more towards the male end of the spectrum because she is in fact more masculine? This linear ordering breaks down quickly.[200]

Vade's critique applies directly to the feasibility of a court's applying a multifactor test to gender. In such a conceptually fraught area, where each individual expresses personality and sexuality in a different way, it is asking for the impossible to demand that judges determine in a rational manner whether the transgender man, the butch lesbian, or the intersex person is more feminine or more masculine, and then classify each as a

199. D. Cameron, *Caught Between: An Essay on Intersexuality*, *in* INTERSEX IN THE AGE OF ETHICS, *supra* note 21, at 91, 91.

200. Vade, *supra* note 194, at 261.

man or a woman.

As Vade argues, "Gender is much bigger than a line."[201] He suggests instead that gender is multidimensional, "a space that allows motion."[202] What Vade calls a "gender galaxy,"[203] the wide variety of gender possibilities that may change for a given individual over time, cannot be reduced by a judge to the categories of male and female. The proposed doctrine is therefore disingenuous; as a result, it establishes a test that invites arbitrariness and prejudice in its application.

There are ways to maintain a binary conception of sex within Title VII that are not dependent on judicial determination of sex; however, they are equally problematic. For instance, Title VII could accept the sex assignment given by the doctor at birth instead of that given by a judge at trial. But this approach is problematic because it does not incorporate any particular definition of sex. Just like the judge, the doctor will have no way of permanently or incontrovertibly classifying everyone as male or female—this system would only pass the decision-making buck, and not to someone who has more tools to solve the problem. Moreover, as the medical paradigm for treatment of intersex individuals changes, more doctors will openly assign provisional genders to intersex babies. The medical establishment will therefore likely refuse to accept the buck if the legal system attempts to pass it.

Another option would be to allow intersex individuals to identify themselves as male or female, instead of being assigned a sex by a judge or a doctor. But intersex individuals have no coherent theory on which to make this decision any more than doctors or judges do. Additionally, some intersex individuals (just like some biologically "acceptable" males and females) refuse categorization as male or female. Forcing a choice between male and female from *anyone*, whether the plaintiff considering self-identification, the doctor considering biological factors, or the judge considering any range of issues in a multifactor test, begs deceit and could cause psychological harm—ultimately, such an expansion of the doctrine is untenable as a way to protect intersex plaintiffs from employment discrimination.

C. Adding a Third Category: Acknowledging Intersex Individuals

Some of the problems inherent in imposing the categories of "male" and "female" onto every human could be resolved by adopting an alternate doctrinal development: the creation of a third category of sex

201. *Id.* at 274.
202. *Id.*
203. *Id.* at 275 (emphasis removed).

specifically encompassing intersex individuals.[204] This is not a revolutionary idea: some activists have seriously considered the possibility that the legal solution to employment discrimination against intersex individuals is to establish intersex people as a protected group. When the Employment Non-Discrimination Act was under discussion in 2007,[205] many in the intersex activist community debated whether the word "intersex" should be included in the legislation.[206]

Through a third category, the doctrine could directly address discrimination against intersex individuals *as intersex individuals* without disingenuously claiming that it is protecting them because of their nonconformity as males or as females. For instance, Chris, the victim of discrimination in the second hypothetical that opened this article, could be protected from discrimination in hiring by employers uncomfortable with Chris's open intersexuality. Chris's stance on sex and gender is not only hypothetical: there are real individuals whose bodies resist sex categorization and whose personalities/identities reject it as well. One intersex individual declares that "given the choice of male, female, [or] intersex, I would unhesitatingly select intersex . . . ."[207] Another, self-identified as intersex, states:

> Who I am is a person that doesn't have to conform because in my very DNA I don't agree with the societal norm. There's just no way I could fit either [gender] role. Then why the hell should I bother to try? Why don't I have a little fun? It's been a really freeing experience. I'm a lot happier. I don't blend in ever, so I may as well have fun if I'm gonna get noticed anyway. I might as well get noticed for what I really want to be.[208]

Yet another asserts:

> Part of the reason I'm out is I *want* people to know what I am. I want people to know that I'm gender ambiguous. I don't feel

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204. This third category might be held to apply to transgender individuals as well, especially those who reject categorization as "male" or "female" and consider their sex to be more complicated. Individuals who have received sex reassignment surgery could be labeled "intersex" due to the conflict between their genitalia and their DNA; for those who include gender identity as a determinative factor of sex, all transgender people are intersex.

205. The Employment Non-Discrimination Act was a piece of legislation intended to protect sexual minorities from employment discrimination. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong.

206. *See* Bodies Like Ours, Intersex Community Forums, http://www.bodieslikeours.org/forums/archive/index.php/t-910.html (last visited Apr. 15, 2010) (debating what position the Human Rights Campaign should take on the wording of the Employment Non-Discrimination Act to best protect intersex individuals).

207. Edmund G. Howe, *Advances in Treating (or Not Treating) Intersexed Persons: Understanding Resistance to Change, in* ETHICS AND INTERSEX 115, 128 (Sharon E. Sytsma ed., 2006) (internal quotation marks omitted).

208. PREVES, *supra* note 26, at 137.

> female, but I don't necessarily feel male either. I feel like I am in the middle and feel that very solidly. And that seems very natural. When people say, "Do you identify as male or female?" [I hear,] "What do you pretend to be?" I don't pretend. I just am what I am, which is something in between.[209]

By adopting a third category of sex for the purposes of the *McDonnell Douglas* test and other comparative measures, anti-discrimination law could avoid imposing male and female identities on those who find those categories uncomfortable or erroneous. Instead, by implementing a model of sex that challenges the gender binary, the law could offer confirmation to those whose bodies pose a similar challenge. Anti-discrimination law could affirm that this intermediate identity is recognized and is not a "social emergency" to be hidden through genital surgery or the operation of law.

The creation of this third category could be carried out in a number of ways. One option is for the courts to oversee the categories. Factfinders would designate a plaintiff as male, female, or intersex. Another option is to have those who are generally considered "male" or "female" be designated as such by the courts, while those whom the factfinder finds to be intersex would have the opportunity to choose which of the three categories applies. This option allows an intersex person who wants to self-identify as "intersex" to do so, but also allows those whose preference is to identify as "female" or "male" to affiliate with that group for the purposes of comparative anti-discrimination doctrine. A third option is for everyone to self-identify. Under this option, no matter how the body of the plaintiff appears or the nature of the plaintiff's chromosomal makeup or hormonal condition, the plaintiff will have the choice to self-identify among the three sex categories.

Under the first two options, the court must designate who is male, who is female, and who is intersex (the second option only permits those designated as "intersex" to subsequently self-identify within the three categories). These two doctrinal alternatives require the court to somehow define intersexuality. But what it is to be intersex—what conditions and what human beings should be so categorized—is an extremely controversial question.

Most commonly, this controversy manifests itself in debates about the status of individuals with Klinefelter's Syndrome and Turner Syndrome. The DNA in individuals with Klinefelter's Syndrome includes the typical X and Y chromosomes—and then one or more additional X chromosome as well. Klinefelter's was first labeled as a syndrome by Dr. Harry Klinefelter, who identified it by a group of symptoms he found in some

209. *Id.* (alteration in original).

males: little facial or body hair, enlarged breasts, small testes, and lack of sperm production.[210] Many clinicians, support groups, and individuals with Klinefelter's Syndrome characterize it as a medical syndrome affecting men.[211] The Klinefelter's Syndrome Association (UK) refuses to label the syndrome as an intersex condition; its representatives state that "[t]hose with Klinefelter's Syndrome are born male."[212] Yet there are individuals with female-appearing genitalia and testes who have Klinefelter's.[213] There is even one documented case of an individual with a functioning female reproductive system—she gave birth to three children!—with the Klinefelter's karyotype.[214] It appears that while the syndrome was first noticed in males, humans with the Klinefelter's karyotype exhibit great variety in the form and function of their reproductive systems.[215] For a judge to declare that those individuals are intersex—or for a judge to declare differently and label those with Klinefelter's as men, or some as men and some as women—would be extremely controversial.

A similar debate surrounds individuals with Turner Syndrome, whose DNA includes one X chromosome but is entirely or partially missing a second sex chromosome.[216] The most common manifestations of the Syndrome are short stature (which can often be averted with hormone treatment) and nonfunctioning ovaries.[217] Individuals with Turner Syndrome sometimes have a partial second sex chromosome in some or all of their cells; sometimes this partial chromosome is an X chromosome and sometimes it is a Y chromosome.[218] Arlene Smyth, Executive Officer of the Turner Syndrome Support Society (UK) states that "girls who have Turner Syndrome are girls, and they grow up to be women," and that those with Turner Syndrome "do not like to be grouped as 'Intersex' as this is just not the case."[219] Nonetheless, some commentators include Turner Syndrome within a listing of intersex conditions.[220] The sexual status of such individuals is controversial, and no person—or judge—is fully equipped to determine it.

Moreover, from a medical perspective, the judgment that these individuals are "male," "female," or "intersex" does not need to be made. It is only society—or, in this case, anti-discrimination law—that forces such

210. HARPER, *supra* note 18, at 145.
211. *Id.* at 143.
212. *Id.* at 156.
213. *Id.* at 150.
214. *Id.*
215. *See id.* at 145–46.
216. *Id.* at 171.
217. *Id.* at 173.
218. *Id.* at 172.
219. *Id.* at 171 (citing correspondence with Smyth).
220. *Id.* at 175.

a fraught decision of categorization. This indicates a larger problem with the proposed doctrinal change: it establishes three sex categories. For many, sex is an identity. For some, being intersex is an identity. But for others, being intersex is about having a syndrome or a hormonal condition. As the activists at Intersex Initiative state:

> [M]any people would not even describe their condition as "intersex," as they feel that they simply have a medical condition, like congenital adrenal hyperplasia or androgen insensitivity syndrome, and not "intersex status." Its inclusion along with "lesbian, gay, bisexual and transgender" further spreads the inaccurate perception that "intersex," like "lesbian, gay, bisexual and transgender," is an identity group.[221]

For a court to identify individuals as intersex (whether or not it later allows them to self-identify as male, female, or intersex) requires the court to assert that "intersex" is a sexual identity. To assign a sexual identity to someone who does not necessarily ascribe it to themselves, especially to someone who may have struggled with gender and sex identity issues, seems strange (why make up categories?) and possibly psychologically harmful.

The third doctrinal option for categorization seems to mitigate some of these concerns. If everyone were able to self-identify amongst the three categories, the court would not have to designate anyone as male, female, or intersex. A person with ambiguous genitalia might identify as male; a person with a fairly "typical" male reproductive system might identify as intersex. The law would be a mechanism, not to assign gender, but for the expression of self-identification.

This option is quite popular amongst scholars of intersexuality and the law. Jennifer Rellis suggests that the right to self-identify not only as male or female but also as a third gender is expressive of liberty, autonomy, and personal dignity.[222] Julie Greenberg expands the menu of options to four categories, writing, "For the laws relating to sex and gender to have the maximum therapeutic impact, transgendered individuals should be allowed to choose whether they want to be identified as male, female, intersex, or transgendered."[223] In this way, she states, biology will no longer dictate identity: self-identification will no longer be subordinate to genitals or DNA.[224]

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221. Intersex Initiative, Intersex in Non-discrimination Law: Why We Oppose the "Inclusion" (Sept. 6, 2004), http://www.intersexinitiative.org/law/nondiscrimination.html.

222. Jennifer Rellis, *"Please Write 'E' in this Box" Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J. GENDER & L. 223, 258 (2008).

223. Greenberg, *Defining Male and Female*, *supra* note 23, at 295.

224. *See* Greenberg, *Definitional Dilemmas*, *supra* note 145, at 119 ("Legal

While self-identification certainly seems *better* than the doctrinal options discussed thus far, it is still critically flawed as a proposal for developing Title VII case law. Forcing individuals to identify within three categories[225] (or even possibly four) does not accommodate the reality of the "gender galaxy" described by Dylan Vade. As Vade writes: "Each person has a gender. Trannygrrrl/boy with drag queen tendencies is a location in the gender galaxy. Fierce femme is a location in the gender galaxy. Girl with a hot glue gun is a location in the gender galaxy. Female and male are locations in the gender galaxy."[226] Just as a court's labeling of an individual as "intersex" is mendacious and psychologically harmful, so is requiring an individual to choose from four categories seriously problematic.

The core difficulty with any of the doctrinal options discussed thus far is that, in order to establish that two, three, or four sexual categories exist, that these categories are real, and that they can be applied by a court or through self-identification via some inherent characteristics, we reify the idea that gender categories exist. By instituting this type of test, courts would implicitly support the notion that there is something known as "male," something known as "female," and something in between known as "intersex." Yet these designations do not reflect the reality of the gender galaxy or the many ways that people present and feel about themselves, ways that do not necessarily fit into a precise number of neatly-labeled categories. To expect humans to fit into gender categories is to perpetrate sex stereotyping, even where more than two categories are provided as legitimate options.

Scholar Laura Grenfell has discussed this danger as it arises in anti-discrimination law: in order to find discrimination between categories, the law first requires courts to determine who fits in which category and which characteristics make that individual belong to that category. Grenfell writes:

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institutions must also examine whether the law should continue to define the terms *male* and *female* according to strict biological criteria . . . or whether these factors should be subordinated to self-identified sex.").

225. Allowing individuals to self-identify and label themselves however they would like, regardless of categories, is not a real option for anti-discrimination law, either. Because anti-discrimination law depends on comparison, it would be untenable for every individual to make up her own category. Comparative statistics would be stymied by the proliferation of "categories of one," and anecdotal evidence would be limited in its applicability to the experience of other similarly situated employees. It is crucial that the doctrine provide a means for courts to find discrimination in cases where there is no direct evidence of discrimination. Categorically-based comparison provides a vital source of indirect evidence that is relied on by plaintiffs to prove their employment discrimination claims; undermining this tool would make it extremely difficult, if not impossible, for courts to find discrimination under the current doctrine.

226. Vade, *supra* note 194, at 276.

> [C]urrent U.S. anti-discrimination law appears to operate by attempting to eliminate gender norms and stereotypes of the "real woman" and the "real man." But it is clear that in order to eliminate such gender norms and stereotypes, the law must at first construct and reiterate them. This raises the following questions: Do legal categories effectively operate to enforce the gender norms and stereotypes of appearance and behavior? Is there a possibility that these norms and stereotypes can be eliminated, disrupted or transformed in, or by, the law? Should law regulate discrimination by aiming to eliminate differences, such as gender non-conformity, so as to treat everyone "the same"? Or should law aim to accommodate and affirm such differences? What effect does legal recognition of such differences have on identity?[227]

Grenfell's point is crucial: in an attempt to eradicate discrimination, anti-discrimination law reifies the very categories it endeavors to make irrelevant. Grenfell worries that "[t]he reiteration of these stereotypes enforces the idea that a 'real woman' or a 'real man' exists, rather than being a historical and cultural fiction."[228] By including a third possible category, the law does nothing more than add a "real intersex person" to that list.

Even those who study intersex individuals and appreciate the challenge that intersexuality poses to the sex binary do not seem to appreciate that intersex individuals challenge not only binary categories, but also the existence of categories at all. Julie Greenberg, probably the foremost scholar of intersexuality and anti-discrimination law, states, "The dialogue must focus on whether sexual categories should be limited to the two traditional classifications of male and female or whether sex categorization should be expanded to include intersexuality as a sex category."[229] Thus, the dialogue is reduced to *which* sex categories the law should reify instead of *whether* the law should be reifying sex categories at all. The focus for the dialogue should be whether the law can avoid reifying sex categories, or whether it can reinforce them to a lesser extent, while still providing protection to victims of sex stereotyping.

If the goal in formulating Title VII doctrine is that the law should eliminate rather than reinforce stereotypical categories, then courts should not assign individuals, or require individuals to assign themselves, to sex categories. Employment discrimination law should not be about creating categories; rather, it should be about reacting to how those who discriminate assign employees to categories and then enforce sex-

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227. Laura Grenfell, *Embracing Law's Categories: Anti-discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 53 (2003).

228. *Id.* at 94.

229. Greenberg, *Defining Male and Female*, *supra* note 23, at 294.

stereotyped expectations based on their categorizations. The relevant consideration for anti-discrimination law is not the inherent "identity" category to which the plaintiff belongs, but rather how coworkers and employers perceive the victim's sex, and what discriminatory actions they pursue based on that categorization. "Because of . . . sex" really means *because of perceived sex*, and the relevant perceiver is none other than the discriminating party.

V.
RECONCEPTUALIZING SEX DISCRIMINATION: PERCEIVED SEX

A. What Is Perceived Sex?

Under the "perceived sex" doctrine, it is not the inherent sexual categorization but rather the perceived sex of the victim that serves as the basis for comparative tests to identify sex stereotyping. It is important to be precise about the meaning of "perceived sex" in order that the proposed doctrine can be correctly applied. Understanding David Ozar's categorization of the three ways in which people are categorized by gender[230] is helpful in clarifying the proposed doctrine.

The first of Ozar's modes of categorization is gender assignment. Ozar writes, "People typically perceive each other as belonging to one or another of the culture's two genders and then treat each other accordingly."[231] In general, most people identify all others as male or female. However, not everyone limits the gender assignments she makes in this way. Some may consider intersex to be a gender category of its own. Others may consider transgender men and women as constituting one or more additional gender categories. Still others may conceive of many more gender possibilities or the possibility of subverting gender altogether. The limit on the possibilities for gender assignment depends on the individual doing the assigning.

Ozar's second mode of categorization is gender identity, or "self-definition or self-categorization"[232] within a gender category. This is similar to gender assignment in that the possibilities in terms of gender categories depend on the individual doing the assigning; the difference is that the individual doing the assigning is also the individual who is being categorized; as a result, that individual's internal thoughts and feelings will likely play a greater role in how the assignment is made.

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230. David T. Ozar, *Towards a More Inclusive Conception of Gender-Diversity for Intersex Advocacy and Ethics*, *in* ETHICS AND INTERSEX, *supra* note 206, at 17, 27–44.

231. *Id.* at 27.

232. *Id.* at 31.

The third mode of categorization is gender expression. Gender expression is composed of the "publicly observable marks of gender" that "are the principal determinants of a person's informal Gender Assignment by others."[233] Gender expression might perfectly accord with gender assignment in some individuals; however, for others, some aspects of their gender expression might conflict with their gender assignment. For instance, an employer who had assigned a transgender woman employee a "male" gender might consider certain elements of the employee's gender expression—such as wearing feminine clothing, growing long hair, or having a curvy body—as in conflict with the gender that the employer assigned to the employee (and which the employer may therefore believe is that employee's "true" gender).

Perceived sex thus refers to (1) the gender assignment applied by the discriminating party to the employee and (2) the gender assignment applied by the discriminating party to the gender expressions of the employee. Where a supervisor is charged with disparate treatment discrimination, the perceived sex doctrine asks: Does the differential treatment of an employee correspond to the gender assignment applied to her by that supervisor? Does the differential treatment correspond to particular interactions between the employee's gender assignment and her gender expressions as perceived by the supervisor? The latter question finds discrimination where the supervisor's treatment of employees is different when the correlation between an employee's gender assignment and gender expression is not what the perceiver/discriminator might have expected or preferred. Under the perceived sex doctrine, instead of the court or the plaintiff assigning a sex category to the individual, the relevant question is what categorization (or conflicted categorization) is perceived by the discriminating coworker, supervisor, or employer. Gender identity is not relevant for the operation of the doctrine.

By interpreting "because of . . . sex" to mean because of *perceived* sex, the proposed doctrine is responsive to discrimination *as it occurs.* The doctrine is sensitive to the social reality of discrimination in the same way that one might argue the doctrine regarding multiracial plaintiffs is responsive to the predominant form of race discrimination against multiracial people today. However, the perceived sex doctrine is significantly more flexible. If the social reality of discrimination changes—for example, if the discriminating party has a conception of sex that is different from the norm and applies a different gender assignment to the plaintiff than others might—the doctrine's treatment of the plaintiff changes correspondingly. The same plaintiff could be categorized as a woman under the *McDonnell Douglas* test in one case and as an intersex individual in another, depending on the perceptions of the discriminating

233. *Id.* at 39.

parties.

Various types of evidence could be used to determine perceived sex. In most cases, perceived sex would depend on the relationship between the employee and the discriminating party. The employee could show that she called herself "she" and filled out office paperwork indicating that she was a female, and that the discriminating party responded by calling her "she" and referring to her as a woman. Sometimes the relationship will show that the employee did not identify herself in the same way as the discriminating party identified her. Perhaps, for example, the discriminating party found out that the employee was born with ambiguous genitalia and consistently called the employee "he-she" despite the fact that the employee clearly called herself "she." In that case, the employee would be categorized as intersex for the sake of the *McDonnell Douglas* test. It is the *perceived* sex that dictates how comparative tests will be employed to find sex stereotyping.

To show that she subjectively assigned the employee a different gender than is immediately obvious from her interactions with the employee, a supervisor would need to present some evidence of her state of mind, perhaps by bringing in witnesses who had discussed the plaintiff with her or paperwork she had completed regarding the plaintiff. It is unlikely that this technique will allow the discriminating party to escape liability: when discrimination occurs because of a plaintiff's failure to conform to sex stereotypes, the plaintiff generally fails to conform to most or any of the sex stereotypes conceived of as paradigms of sex categories by the discriminating party.

One objection to the perceived sex doctrine is that, where a case requires the statistical comparison of large numbers of employees (as is often the case in disparate impact litigation), the perceived sex doctrine could seriously complicate collecting evidence. However, it is unlikely that evidence collection would prove to be a practical impediment in most cases. Plaintiffs' attorneys could collect employment records that indicate gender, conduct brief interviews with supervisors or hiring managers about how employees present gender, or subpoena a human resources manager or some other representative of the employer and request sex identifications of the employees in question. Most likely, the same employment records that are used today in sex discrimination cases would be used to determine perceived sex under the proposed doctrine to create a rebuttable presumption that the employer perceives the sex of the employee in the manner indicated on the documentation.

Whether the litigation requires determination of perceived sex for large groups of employees or for the plaintiff alone, the doctrine does not generally complicate the *McDonnell Douglas* requirements for a prima facie case. It provides an interpretive option that is practical and

administratively viable without ceding theoretical ground to those who claim that sex categories are real and biologically inherent.

B. Application of the Doctrine

A 1997 case demonstrates how the perceived sex test can be applied without difficulty. In *Miles v. New York University*, the court identified the plaintiff as a transgender woman.[234] She sued the university under Title IX because of a professor's alleged sexual harassment. The professor believed the plaintiff, a student, to be female. The court allowed the plaintiff to claim Title IX protection as a female without significant debate as to the nature of her sexual identity.[235] *Miles* shows the importance of the perceived sex doctrine, which the court applied in this instance without discussion or justification. The plaintiff was not categorized as a transgender person or a male for the sake of comparing her treatment to others—that would have been nonsensical and, further, might have prevented the finding of discrimination. The court treated the plaintiff as a female for purposes of Title IX doctrine *because that is how she was perceived by the professor.* If she were discriminated against as a transgender individual instead of as a female, then she would still be protected under the perceived sex doctrine, regardless of whether the discriminating party believed that she was a deviant male, that transgenderism is a sort of gender unto itself, or that she subverted gender categories altogether.

The strength of the perceived sex doctrine is its flexibility: it can protect any victim of sex discrimination, whether the victim is perceived as male or female, or as a sexual minority. It can protect all types of intersex people who are discriminated against in all types of situations. In the hypotheticals opening this article, Pat and Mark can be protected as a perceived man and a perceived woman, respectively. Chris, meanwhile, can be protected as an intersex individual (if that is how Chris is perceived). There is no need for a single categorization to cover all of these plaintiffs.

The perceived sex doctrine can protect perceived LGB individuals as well—and in a far more comprehensive manner than they are protected under the doctrine in its current state. Today, if a factfinder believes that an employer discriminated against a plaintiff's sexual orientation instead of her gender nonconformity, the plaintiff will lose. Under the perceived sex doctrine, discrimination against an employee for being LGB is clearly illegal. It is only because the employer has perceived the employee as "female" and her girlfriend as "female" that the employer believes the

234. Miles v. N.Y. Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).
235. *Id.* at 249–50.

employee to be LGB and, therefore, worthy of lesser treatment. The perception of sexual orientation is based on the perception of sex—if neither the employee nor the employee's significant other has an inherent "sex," then who is to say if they are in a "homosexual" or a "heterosexual" relationship? The emphasis on "sex" under Title VII as merely a *perception* undermines the categories of "homosexual" or "heterosexual," so that it is clear that, just like any other type of sex discrimination, discrimination against LGB individuals is discrimination because of the employee's failure to conform to the employer's stereotypes of the perceived sex category—meaning that the employer has perceived a particular sex assignment regarding each of them and discriminated against the employee based on these perceptions. Title VII as interpreted through the perceived sex doctrine plainly prohibits discrimination on the basis of sexual orientation—a result that is quite different from that which would occur under the current doctrine, where many, if not most, cases brought by plaintiffs challenging discrimination against LGB individuals under Title VII are dismissed.

The perceived sex doctrine also provides protection for those who undergo genital surgery or who otherwise consciously change their gender expression from male to female or from female to male. In *Miles*, the plaintiff was successfully protected as a "female" without any protracted discussion of what categorization "really" applies.[236] In the third hypothetical, Tal can be protected as a transgender individual, or as a deviant female, if that is how the employer perceives her. No balancing test of gender identity, genitals, DNA, and other designated characteristics is necessary.

Some transgender people might object to the perceived sex doctrine on the grounds that it questions sex categories. After all, they have often experienced very difficult transitions for the sake of expressing their "true" genders, and so the idea of a single sexual identity within the binary may therefore be very important to some transgender individuals. However, the perceived sex doctrine does not question the personal importance of self-identity or refuse the right to self-identify in one's daily life; it simply expresses that, for the purpose of anti-discrimination law, it is the discriminating party's perception, and not the plaintiff's personal identity, which is relevant. Moreover, to the extent that the doctrine does question sex identity (after all, it is the challenge that intersexuality poses to the sex binary that motivates it), it does so to the same extent for both transgender and cisgender[237] people. The law makes no differentiation, no "special"

236. *Id.*

237. Cisgender people are those who are born with bodies that conform to expectations of either "male" or "female" and who also identify themselves with the "matching" gender.

category for transgender individuals. It expresses that, to the extent that gender self-identity is a meaningful category, it is such for everyone—and that no greater or lesser weight will be accorded to self-identification by an individual of any given physical or psychological makeup.[238]

Unlike perceived LGB individuals, perceived transgender individuals will not face an entirely new set of results under Title VII if the perceived sex doctrine is adopted. Under either Judge Robertson's "plain meaning" interpretation of "sex" or the earlier paradigm focusing on sex stereotypes, the tide has already turned in favor of plaintiffs challenging employment discrimination against transgender individuals. However, the perceived sex doctrine nevertheless offers a step forward for transgender Title VII plaintiffs, because it addresses the one type of case that they still consistently lose: cases involving bathroom usage. When a transgender employee claims discrimination in the terms and conditions of her employment as a result of being denied use of the restroom she prefers, courts almost uniformly deny protection.[239] Courts justify these decisions on grounds of legislative intent[240] or a supposed distinction between expectations regarding appearances and expectations regarding bathroom use.[241]

Under the perceived sex doctrine, the outcome of these cases would be entirely different. Not only should there be no distinction between a transgender and a "normative" female in terms of bathroom usage, there should also be no distinction between a "normative" female and a "normative" male. Regardless of whether there is a transgender person or some other sexual minority at a particular workplace, to expect an employee to use a particular bathroom based on their perceived sex is discrimination. It is differential treatment *because of perceived sex.* If it is

238. There is one possible side effect of implementing the perceived sex doctrine that could be deemed seriously destructive by some transgender individuals. If the notion that gender and sex are social constructs grows popular enough, the conception of transsexuality as a condition requiring medical treatment could be eradicated, and, along with it, what medical insurance coverage exists for sex reassignment surgery or hormone therapy. Today, the idea that transgenderism is a medical disorder is already quite controversial amongst transgender individuals and their supporters. It is difficult to predict what the reaction to the eradication of this idea would be in a society in which gender categorization was already significantly undermined and how that change in attitude might alter the perspective of individual transgender people (who might not *be* transgender people in this hypothetical society).

239. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 999–1001 (N.D. Ohio 2003); Goins v. W. Group, 635 N.W.2d 717, 722–25 (Minn. 2001). *But see* Kastl v. Maricopa County Cmty. Coll. Dist., No. Civ.02-1531, 2004 WL 2008954, at *3 (D. Ariz. June 3, 2004) ("[T]o create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII.").

240. *See, e.g.*, *Goins*, 635 N.W.2d at 723.

241. *See, e.g.*, *Fresh Mark*, 337 F. Supp. 2d at 1000.

the case that, were the employer to perceive the employee to be of a different sex, the employee would be allowed and expected to use a different bathroom, then the bathroom rules clearly arise from the employer's perception of her employee's sex. There should be no gender designation at all for bathroom usage; such designation is precisely the type of policy that violates Title VII's prohibition on limiting, segregating, or classifying employees because of sex.

The notion of unisex bathrooms has been criticized. Terry S. Kogan's evaluation is representative. He writes:

> Rothblatt's vision of unisex bathrooms is probably too threatening to too many people to have a realistic possibility of implementation. Unisex restrooms do not respect the choices of those who self-identify as male or female and who want to have their privacy respected along biologically defined lines. Similarly, these restrooms do not respect the choices of MTF transsexuals who want to use the female restroom as an important component of the gender identity they have assumed for themselves.[242]

These criticisms are not compelling. Prohibiting discrimination is often "threatening," but that is not a persuasive reason to permit discrimination to continue. The unisex restroom may not "respect" those "who want to have their privacy respected along biologically defined lines," but that simply means that the unisex restroom policy does not "respect" (by accommodating) those who want to discriminate based on sex (which is *not*, in fact, biologically defined). As for transgender women, if a unisex bathroom is a norm, then using a female bathroom will not be an essential component of living within the "female" gender. Bathroom use will be rendered gender-neutral, just like other components of the work environment such as computers and desks. Furthermore, the assumption that a transgender woman would find it very important to assume every possible aspect of a traditional or normative feminine identity is outdated. Not every transgender individual is determined to conform to every stereotype regarding her adopted gender; gender identities are often more complicated.[243]

Despite the weakness of the objections to unisex bathrooms, the bathroom does seem to be the last frontier in Title VII cases involving transgender plaintiffs. This most likely arises out of a sense that gender-based privacy is required when it comes to anything involving genitalia. Ultimately, though, Title VII prohibits employers from treating employees

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242. Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1250 (1997).

243. *See, e.g.*, ANNE FAUSTO-STERLING, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 107–08 (2000) (discussing the complexity of gender identies and their failure to conform to a dualism).

differently based on sex. The perceived sex paradigm makes it clear that there should be no privileging of genitals such that employers are excluded from this rule. Because "sex" is only "perceived sex," there is nothing *inherent* about genitalia that makes the gender ascribed to them more or less a matter of perception than other traits. The language of Title VII does not exclude bathrooms from the prohibition on sex discrimination, and neither should the doctrine.

The perceived sex doctrine would therefore expand protections for perceived intersex, LGB, and transgender individuals in the workplace. However, "perceived sex" does not only apply to protect those identified as sexual minorities. The doctrine also applies to more "garden variety" sex discrimination cases. It protects plaintiffs in cases where a perceived woman is treated worse, or paid less, than perceived men—this too is discrimination because of perceived sex.

Some feminists might be concerned that, if the doctrine acknowledges intersex individuals in a way that undermines gender categories, the power of the law to protect women will be compromised. Many feminists are concerned that inclusion of gender nonconformists within the movement will undermine the category of "woman" and the coherence (and power) of feminism.[244] But the proposed doctrine takes no stance on what type of gender category might or should be constructed by feminists or what individuals they should include within their group. It takes no stance on who is a "woman" and who is not, nor does it force the inclusion of transgender individuals, intersex individuals, or other sexual minorities in the "female" category. Instead, it responds to the gender categories applied by the discriminating party without ratifying them in any way.

Thus, perceived women will be protected, just as they are under sex discrimination law today. That is not to say, however, that the implementation of the perceived sex doctrine would have no impact on cases brought by individuals who are perceived to fit within the traditional sex binary. One important area where the perceived sex doctrine would influence the law's direction is in dress code cases. Courts have generally preserved employers' right to enforce dress codes differentiated by gender. The decision in *Jespersen v. Harrah's Operating Co.* is representative.[245] It required the plaintiff to show that her employer's dress code placed an "unequal burden" on the sexes and made it more onerous for one gender to comply.[246] Otherwise, sex-differentiating dress codes are held to be

244. *See, e.g.*, RIKI WILCHINS, QUEER THEORY, GENDER THEORY: AN INSTANT PRIMER 124–25 (2004); Cheryl Chase, *"Cultural Practice" or "Reconstructive Surgery"? U.S. Genital Cutting, the Intersex Movement, and Medical Double Standards*, *in* GENITAL CUTTING AND TRANSNATIONAL SISTERHOOD: DISPUTING U.S. POLEMICS 126, 145–46 (Stanlie M. James & Claire C. Robertson eds., 2002).

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

246. *Id.* at 1110.

legal.[247]

It is difficult to square this line of decisions with the sex-stereotyping decisions regarding transgender individuals. In *Smith v. City of Salem*, the Sixth Circuit wrote:

> After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[248]

Discrimination is found where transgender employees are fired for dressing in gender-nonconforming ways, and a parallel is drawn to protecting cisgender employees in the same situation. However, dress codes often do precisely what is prohibited in *City of Salem*: they require women to wear dresses or makeup in order to remain employees. It is difficult to understand why "normative" men and women are not protected through sex-stereotyping theory from appearance requirements that have been ruled illegal in the context of transgender employees.

Under the perceived sex doctrine, this discrepancy is eliminated. If an employee is required to wear something particular because of the sex that the employer perceives, then that is discrimination. In the case of dress codes, it is because an employee is perceived as a woman that she is required to wear one uniform and because an employee is perceived as a man that he is required to wear another. This is clear discrimination in terms and conditions of employment because of perceived sex.

While numerous problematic areas of Title VII doctrine become less difficult when the concept of "sex" is fleshed out to mean "perceived sex," the proposed doctrine is obviously an imperfect rule. One serious practical concern is that most American workplaces are simply very far from accepting all of its ramifications. The most widespread consequence of its adoption would be the requirement to adopt unisex bathrooms. It may be that workplaces will refuse to do this for some time. However, there is a difference between recognizing that *enforcement* of a law will be difficult, and perhaps should be implemented through slow progressive steps, and asserting that the *interpretation* of the law is incorrect. While many would argue that enforcement of school desegregation under *Brown v. Board of Education* was far too slow, the *Brown* Court's idea that the new law

247. *Id.* ("Under established equal burdens analysis, when an employer's grooming and appearance policy does not unreasonably burden one gender more than the other, that policy will not violate Title VII.").

248. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

should be enforced with "all deliberate speed,"[249] rather than immediately, may be sensible in the case of workplace bathrooms.

There is, however, a much larger issue with the perceived sex doctrine—an issue that is not limited to problems of enforcement. The doctrine acknowledges that there is something called "perceived sex," which presumably differs from "perceived warmth of personality" or "perceived intelligence" or other perceived traits. What makes something perceived *sex*? Any anti-discrimination law that prohibits discrimination based on socially constructed categories must at least identify the class of categories against which discrimination is prohibited.[250] While perceived sex doctrine does not require courts to define the particular sex categories in question (leaving that instead to the discriminating party), it does employ a general concept of "sex," an identification of what type of categories are prohibited bases for discrimination. By using this concept of "sex," the doctrine reinforces the idea of sex and the use of sex categories in our culture.

The perceived sex doctrine is proposed here with the knowledge that it is imperfect, because it is impossible for any anti-discrimination law forbidding discrimination based on a class of socially constructed categories to avoid determining what it is prohibiting. What the doctrine offers, however, is an improvement over other definitions of "because of . . . sex" that have been proposed. The perceived sex doctrine avoids judicial determination of the categories within sex. Avoiding the reification of these categories—categories defining what it is to be a man or a woman or an intersex individual, for instance—is an important step towards minimizing the law's reinforcement of sex stereotyping. The expressive value of defining "sex" as "perceived sex" further undercuts the idea that there is any inherent, biological meaning to sex categories. This doctrine maximizes the ratio of eradication to reinforcement of notions of "sex."

Finally, the perceived sex doctrine differs from other interpretations of sex discrimination in a crucial way: there is a theoretical, built-in endpoint to its application. The more that gender is eradicated, the more difficult it will be to prove a gender perception (and therefore to apply comparative

249. Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955).

250. The solution is not to eliminate employment at will and require employers to have good business reasons for all adverse employment actions they take. This would not get rid of discrimination in employment, because there are rational business decisions that are nonetheless based on discrimination. For instance, if an African-American employee is fired because the employer's customers are racist and, therefore, the employee's presence reduces sales and income for the business, firing the employee would be a rational, albeit discriminatory, decision on the part of the employer. Moreover, there could arise a pattern whereby rational business reasons for adverse employment actions are applied to some sex categories but not to others such that the same faults are not recognized, for instance, in perceived men as in perceived women. Only a comparative doctrine, such as the *McDonnell Douglas* test, is able to impose liability for that kind of discrimination.

analysis). If, decades in the future, there is no evidence that an employer is being disingenuous or misleading by refusing to answer when asked to what gender category an employee belongs, then the perceived sex doctrine cannot proceed. If the goal is the eradication of gender categories within the workplace, then this doctrine has an important feature: the point at which Title VII is no longer applicable corresponds with the point at which Title VII *should* no longer be applicable. Liability for sex discrimination under Title VII is impossible to find at the point when the law's enforcement does more to reify rather than to eradicate sex stereotypes. Like the case law regarding affirmative action, which generally requires that any affirmative action plan be temporary,[251] the perceived sex doctrine recognizes that the law is only necessary to protect perceived members of socially constructed categories so long as those social constructions remain operative in our workplaces.

CONCLUSION

The perceived sex doctrine is an overarching theory of how "because of . . . sex" should be interpreted, no matter what type of plaintiff is suing for sex discrimination under Title VII. The doctrine could be adopted either legislatively (through an amendment to the statute) or judicially (as an interpretive measure). Either way, the perceived sex doctrine could accommodate a wide range of plaintiffs, including those who identify both inside and outside of the traditional sex/gender binary, whether they be self-identified males, females, intersex individuals, or any other possibility in the gender galaxy.

If the doctrine were adopted legislatively, Congress could adopt a law defining "sex" in Title VII to mean "perceived sex, which includes discrimination against any perceived sex category or against the failure to conform to the discriminating party's expectations of appearance, body, or behavior for any perceived sex category." By adopting the doctrine through the definition of "sex" as it exists in Title VII, Congress would avoid separate legislation addressing sexual minorities and acknowledge that the same binary sex framework that harms perceived intersex individuals also harms perceived males and females. It is the creation and maintenance of sex stereotypes that affects any victim of sex discrimination, regardless of whether that victim falls within or between the binary.

This formulation would be preferable to simply adding gender identity and sexual orientation as protected categories, as has been proposed by

251. *See, e.g.*, Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 479 (1986).

some members of the House of Representatives.[252] By creating a separate group of protections for transgender and LGB individuals, H.R. 2015 suggests that sex is somehow different from sexual orientation and gender identity. As Katherine Franke once wrote, "biology is both a wrong and dangerous place to ground antidiscrimination law."[253] The existence of those whose bodies defy the sex binary indicates that there is nothing special about categorization based on biology; it, too, is a social construction. Susanne Kessler and Wendy McKenna write, "Unless and until gender, in all of its manifestations *including the physical*, is seen as a social construction, action that will radically change our incorrigible propositions cannot occur. People must be confronted with the reality of other possibilities, as well as the possibility of other realities."[254] Unlike the Employment Non-Discrimination Act,[255] a Perceived Sex Statute would not imply a privileged place for the physical—it would leave room for any range of sex categorizations.

A Perceived Sex Statute is not the only way to implement the new doctrine: the perceived sex doctrine could also be judicially adopted. However, legislative adoption is clearly preferable. If the perceived sex doctrine were adopted judicially, progress would be slow and halting, and there is reason for concern about the direction in which some conservative judges might take the idea of an evolving interpretation of "sex."[256]

However, judicial adoption of the perceived sex doctrine by liberal judges may prompt a conversation between the judiciary, the public, and the legislature. This conversation, of course, might result in either more conservative or more expansive law regarding sex discrimination in employment. But given that more expansive versions of employment discrimination legislation have recently been seriously discussed[257] while more conservative versions have not, and also given the current composition of the House and Senate, it seems more likely than not that the results of such a conversation would be positive or neutral rather than

252. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong.

253. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 98 (1995).

254. Suzanne J. Kessler & Wendy McKenna, *Toward a Theory of Gender*, *in* THE TRANSGENDER STUDIES READER 165, 179–80 (Susan Stryker & Stephen Whittle eds., 2006).

255. In fact, H.R. 2015 is only one iteration of the Employment Non-Discrimination Act of 2007. The second, H.R. 3685, is even less liberal in its interpretation of sex, failing to include gender identity as a grounds for protection. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. It is this version which was passed by the House in November 2007.

256. It is certainly foreseeable that an "evolving" conception of sex might lead some judges to prematurely consider sex to be eradicated as a workplace issue and to eliminate the tool of disparate impact litigation at a point when it is still necessary for obtaining equality.

257. *See* Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong.

negative from the perspective of the intersex plaintiff. Moreover, the implementation by individual judges and circuits of different judicial interpretations of "sex" in an effort to accommodate the issues presented by the intersex plaintiff might allow the courts to operate as a laboratory, testing various doctrinal options for the legislature to consider.

Judicial or legislative implementation of the perceived sex doctrine would emphasize that sex categories are not biological, but socially constructed. Without social construction, there would simply be bodies of various types, some with large phalluses and others with smaller phalluses, some with a 46,XY karyotype and some with a 48,XXXY karyotype, some with Turner Syndrome, some with Klinefelter's Syndrome, and some with CAH. It takes social construction to turn those bodies into male bodies, female bodies, and intersex bodies. It takes *perception.* To adopt the perceived sex doctrine, a judge need only confront the fact that sex categories are *always* a matter of perception, that "because of . . . sex" is *always* because of perceived sex.

The existence of (perceived) intersexuality leads to the conclusion that sex categories are none other than "perceived sex." As our comprehension of sex progresses towards an acknowledgment of its social construction, our interpretation of the protections provided by the phrase "because of . . . sex" in Title VII should do the same. Under the perceived sex doctrine, the law need not label individuals or assign them to sex categories. By adopting the perceived sex doctrine, we can extend Title VII's protection to every expression within the gender galaxy.