Session 402 | CELEBRATING INTERSECTIONALITY: BRINGING YOUR AUTHENTIC SELF IN THE LEGAL WORKPLACE

Lawyers spend a majority of their waking hours working, making it all the more salient to emphasize workplaces that prioritize wellness, inclusion, and authenticity. With the resurgence of anti-Asian violence across the country, the concept of authenticity, or being able to express oneself unencumbered by arbitrary expectations or assumptions, takes on a deeper meaning for Asian-Americans, whose political identities were rendered historically and culturally invisible. For Asian-American lawyers who identify as LGBTQ, the added complexity of intersectionality and multiracialism, makes navigating authenticity in the workplace even more challenging. According to the Human Rights Campaign, 46% of U.S. LGBTQ workers are not out in the workplace, 53% report hearing jokes about lesbian or gay people at least once in a while, and 31% of LGBTQ workers say they have felt unhappy or depressed at work.¹

Yet, the tides are turning, and increasingly, law firms and organizations are recognizing the value of celebrating authenticity, equity, and inclusion in the workplace. There is a growing recognition that companies benefit from attracting, developing, and retaining a diverse workforce and an understanding that creating and maintaining a welcoming and inclusive culture makes talented people want to join and stay.

This panel features accomplished lawyers from different legal sectors who have successfully navigated authenticity in the workplace, in part, by celebrating their intersectional identities. This panel will discuss what authenticity means in a legal environment, how to develop authenticity, and ways to identify resources within and outside of an organization to achieve that goal. Furthermore, this panel will explore the benefits of authentic self-expression in the workplace, for both the organization and the employee, including leveraging authenticity to enhance leadership and drive impact.

Moderator:
Raymond Rollan, Deputy City Attorney, San Francisco City Attorney’s Office

Speakers:
The Honorable Pamela Chen, U.S. District Judge for the Eastern District of New York

Eric De Los Santos, Associate General Counsel, Facebook
Concepcion Montoya, Partner, Hinshaw Culbertson
Grayson Walker, Special Assistant to the Chair of the EEOC
CREATE AN AUTHENTIC WORKSPACE WHERE DIVERSITY MATTERS

Last December, the legal profession was shaken by the release of a picture of a large New York law firm's all-white, almost all-male partner class. The response was strong--letters and counter-letters and counter-letters to counter-letters.

But as someone who teaches diversity and inclusion, I wasn't surprised by the picture. Because it broadcasts a wider truth about diversity, obvious in the legal profession, but just as easily seen across corporate America. That we pay lip service (and a lot of money) to diversity, but we still haven't done the hard work to make that diversity matter.

The legal profession is 85 percent white, which is better than 10 years when it was 89 percent white. It's 64 percent male, which again is better than it was 10 years ago when it was 68 percent male. And in large U.S. law firms--like the one that released the picture lineup--77 percent of partners are men, and 91 percent of partners are white. Those white male partners are the ones with the clients, the ones with the access to power, and the ones who continually reinforce the all-white-male partnership ranks, year in, and year out.

IT STARTS EARLY

How does it work? Let's meet Dave and Sondra. Dave is a young white man. Sondra is a young black woman. They both graduated from different law schools at the same time. They go to work for the same large law firm. They enter the firm at the same level, in the same practice group--but then something changes.

It starts with the assignments. The projects and assignments that Dave is getting are more complex and trickier than the ones Sondra's getting. Because Dave is meeting new people from socializing. He's socializing with those white male partners. They've invited him out *12 places, they meet up for drinks in their neighborhoods, they stop by his office to catch up, talk about their work, and offer him new work.

Meanwhile, Sondra doesn't get invited to these casual social meet-ups. The white male partners don't drop by her office to see if she's busy and wants a chat. She reaches out and to ask what she can help with, but it always seems to be on her to do the work. When she's wrapped up a project, she'll hear that she did good work, but then there's no follow-up.

Then Dave and Sondra get their evaluations. They're both good, but Dave gets a lot more positive growth-oriented feedback, while Sondra's is a lot more neutral--it isn't really positive; it isn't really negative. Just says keep doing what she's doing.

Sondra continues to do her work. She bills and bills, but she doesn't really feel like a part of the workplace; she doesn't feel supported. She has a lot of new ideas but when she brings them up to leadership, they don't go anywhere. She keeps billing the hours, she goes to lunches and dinners, and she makes sure to attend the business development trainings and the affinity group meetings.
Then a leadership position opens up--maybe it's a partner position, or a promotion to get on the partner track. Sondra thinks she's going to get it, but Dave gets it, not her. Sondra asks why, and she's told the truth: “No one knows you. No one talks about you in meetings. Your evaluations aren't great, and there were some concerns about your performance.”

Naturally, Sondra protests--she's never heard any concerns about her performance before, she goes to all the events, she's a mentor, and she's even on the firm's front page touting diversity.

And they say, “That's not enough. How did you not know that? Look at Dave, he got great work, and went to the meetings that mattered. He had the right clients, knew people around here, and partners talk about him--they promote him. He's clearly committed to success, and you really aren't leaning in enough. Partner isn't really where you're going to be. Here are some other ideas for you.”

So Dave gets promoted and Sondra decides that she's going to have settle with the place that she is in--or leave.

WHY DOES THIS HAPPEN?

Now why did Dave get the work and Sondra didn't? Why was Dave given more opportunities and Sondra was not? The reason is race. Race is the reason Dave gets promoted and Sondra does not.

It's because the white partners like Dave. They're comfortable with Dave. They talk to Dave. They take Dave out. They promote Dave. They hang with Dave. They give Dave their clients. They give Dave the good work. They give Dave the growth-oriented feedback.

But not Sondra. They're too uncomfortable around Sondra. She doesn't talk like they do. She didn't go to the same schools that they did. She doesn't live in the same neighborhoods as them. She doesn't like the same sports they do. Socializing with Sondra feels like work. They don't tell her how she does in her evaluations because they're worried about offending her or saying the wrong thing. And there are some whispers, however faint, of the phrase “affirmative action.” All their behaviors and statements send a clear message--Dave belongs here; Sondra does not.

But there's a twist. See the story doesn't end there. Because Sondra knows all of this. She knows that when a white executive says, “I don't see color,” that's not true at all. He sees color in the neighborhood he grew up in, in the neighborhoods he chooses to live in, in the friends he has, in the books on his bookshelf, in the schools his kids go to, in the music he listens to, in the shows he watches, in his doctor, his dentist, his accountant, in the lawyers he promotes in his firm.

So here's what Sondra does. Like so many minorities working in a majority workplace, she has to put on a mask. She code-switches. She lives a double life. She constantly vets her thoughts, checks her behaviors, corrects her actions, works and works and works, trying to conform to workplace norms and values that won't change for her and were decided when people who looked like her weren't even allowed in the room. But it still doesn't work. Because the mask doesn't fit her. It was never designed to.

Sondra doesn't just leave because of the exclusion. She leaves because of the mask as well. She leaves because while the firm says they want diversity, they want it without authenticity. They want it with assimilation.

YOU HAVE TO WANT CHANGE

It's why our diversity numbers will never change. Because diversity without authenticity is diversity without teeth. It's diversity without work. It's diversity that doesn't make anyone feel uncomfortable. It's diversity that doesn't make anyone change. If you are a white male leader asking yourself why the workplace isn't getting more diverse, then I want you to be honest. Do you want the workplace to change, or do you want it to stay the same? A workplace where diverse people must assimilate, where diverse people must mask, because inevitably, do you know what will happen? Those same diverse people will leave.

It's easy to hire diversity. It's much harder to make that diversity matter. We have to create workplaces where diversity does matter, where people like Sondra can enter the workplace, take off their masks, be seen for their authentic selves, and be told,
“There is space for you to succeed. I am willing to do the hard work to make it happen. Because you belong here.” That’s real diversity and inclusion.

Footnotes

Michelle Silverthorn is the Founder and Chief Executive Officer of Inclusion Nation, a diversity consulting firm that partners with forward-thinking organizations to design authentic, inclusive workplaces built for success. A graduate of Princeton University and the University of Michigan Law School, she lives in Chicago with her husband and two daughters.
michelle@inclusionnation.org
www.linkedin.com/in/michellesilverthorn
twitter.com/2CivilityMS
www.2civility.org/author/michelle-silverthorn

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REMOVING THE MASK: WEARING OUR TRUE IDENTITIES BUILDS AN INCLUSIVE CULTURE

A few months ago, I spoke on a panel to a group of diverse students about what to expect after graduation. After a fairly intense hour where we talked about diversity in the workplace, one of the students held up her hand. In a very frustrated tone, she asked, “How much longer do I need to do this?” The panelists and I looked at each other in confusion. “Do what?” I asked. “Wear a mask in the workplace. Pretend to be someone I'm not. I want to be me. Why can't I do that?”

When I tell people why I started my new diversity consulting firm, I tell them about that conversation. Because that conversation is the heart of what we need to do to move forward on diversity and inclusion in the workplace.

Many employees, particularly minority and women employees, come to work wearing a “mask” to hide their authentic selves in an effort to belong. They don't talk about their children. They don't talk about their ethnic identities. They don't talk about their same sex partners. They don't talk about their disabilities. They don't talk about their authentic selves. They silence their identities in the workplace, until the only image that others see of them is one of assimilation, of sameness, of masking--one that they work very hard to project. It's what I call the “Kevin from Yale” dilemma.

KEVIN FROM YALE DILEMMA

Who's Kevin from Yale? I once had a conversation with a white friend who said, “I'd rather be black in this country than white.” My mouth dropped open. “Listen, listen,” he explained in a hurry while I struggled to figure out where to start. “No, no, no. I want to be him.” And that him is “Kevin from Yale.”

Kevin from Yale is the reason many still believe we live in a post-racial society, because if Kevin from Yale made it, everyone can. Kevin from Yale is the successful black man who is valedictorian. Class president. Graduated first in his class. Now he's company vice president. He gets along with everyone. He doesn't have any of those old hang-ups about race. He can hang with anyone. It's so easy for Kevin from Yale.

Kevin from Yale is probably a very nice guy. But do you know what he feels like when he walks into an office where he's the only black person there? Do you know what he feels like when he walks into a meeting and knows that he has to represent every black male professional out there, because it may be that no one else in that room will meet one? Kevin from Yale is everyone's one black friend. Do you know the psychological toll it takes on Kevin from Yale, to be Kevin from Yale? To have been Kevin from Yale his entire professional life, and to have never been anything else except Kevin from Yale? Because to wobble for even a second on that tight rope he is walking on is to have someone turn to him and think, explicitly or implicitly, “Oh, I guess he's just like the rest of them.”
CREATE A CULTURE OF AUTHENTICITY

How do we change that? How do we turn our workplace cultures into ones that welcome authenticity and a sense of shared belonging? We need to actively create environments where people can be their authentic selves, where they can talk about being a parent, or Latina, or gay, or any crucial identity that they have, and they won't feel like they're excluded or judged.

How to do that? Start at the top. If you're a leader, open up about your life outside the organization. Set a culture of authenticity for your teams. Explain that authenticity matters during recruiting and on-boarding. Encourage upstanding, where if someone sees something problematic, they are empowered to stand up and speak up about it. Recognize people for their accomplishments, host town halls and listening sessions, and most of all, make sure everyone is given space to share their stories--both the stories that are the majority narrative, and the ones that aren't.

For example, I grew up playing travel hockey in the Chicago suburbs. I grew up going to Indian weddings every single weekend of my life. I grew up with seven siblings and a single mom in a one-bedroom apartment. I got married to my college sweetheart, too, but had to wait until the Supreme Court legalized same sex marriage. I have three kids and it's really hard when I miss their school activities. I pray five times a day and I do that in the room right over there.


Footnotes

a1 Michelle Silverthorn is the Founder and Chief Executive Officer of Inclusion Nation, a diversity consulting firm that partners with forward-thinking organizations to design authentic, inclusive workplaces built for success. A graduate of Princeton University and the University of Michigan Law School, she lives in Chicago with her husband and two daughters.
michelle@inclusionnation.org
www.linkedin.com/in/michellesilverthorn
twitter.com/silverthornms
inclusionnnation.org

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THE POWER OF L.A.C.E.

According to the latest report from the National Association for Law Placement (NALP), women and people of color continue to be well represented in law school and summer associate positions. Yet, women of color leave law firms at higher rates than their white male counterparts and, as a result, comprise less than 2 percent of law firm partners.

These demographics have remained largely unchanged over the years, despite creative and sometimes expensive programmatic interventions to diversify law firms.

Having watched these numbers carefully for almost two decades while working closely with the legal and higher education communities, I am now convinced that partners, as leaders of their firms, must engage in the individual self-reflection, learning and unlearning that inspire organizational change from the inside out.

Rather than starting with large-scale diversity training, I coach law firm partners and other leaders to use the values of L.A.C.E.--Love, Authenticity, Courage and Empathy--to raise their own self-awareness and enact personal change. This positions partners to create the kind of work environment where women of color want to stay and contribute.

No matter the size or specialty of the firm, I encourage partners to start with love--an idea validated in scholarship on social neuroscience, positive psychology, and teaching and learning. According to world-renowned psychologist Barbara Fredrickson, for example, love is the master value that loosens the hold of negative emotions like fear and anger. Love helps partners understand how their own biases cause them to undervalue the contributions of women lawyers of color.

In L.A.C.E., love is a wholehearted and selfless concern about the welfare of employees in ways that add value. Authenticity is self-awareness and aligning personal values with behavior. Courage is being who we are afraid to be and doing what we are afraid to do. And empathy is recognizing that someone else's emotions and experiences have value too.

The first step is for partners to apply L.A.C.E. to themselves.

Using law review articles and other tools, partners explore self-love through increasing their own knowledge about race, gender and power. Indeed, one of the most insidious and pervasive myths that self-love often exposes is an implicit bias about the racial inferiority of people of color.

According to a nationwide Nextion study, for example, partners gave legal memos lower ratings when told the authors were not white. But women lawyers of color who pushed through barriers to make it to the top echelons of law firms often share that a white partner's sponsorship made their talents and skill visible to others in the firm, opening doors to choice projects and invitations to share new ideas.

As partners dismantle these personal myths, this work also requires authenticity. Research shows that authenticity, or an alignment between our values and behavior, is important for empowering workplace efficacy. As such, partners reflect on the
unique aspects of themselves that they bring into the firm and how they are living out those values with respect to race and gender.

This is especially important for retaining colleagues of color, whose cultures offer different ways of being and engaging. That is why I encourage partners to reflect on the ways in which whiteness—which is the dominant culture in America—is preferred in terms of workplace appearance, culture and speech patterns.

Organizational psychologist Patricia Hewlin has documented how the devaluing of BIPOC cultures in the workplace impairs mental health and well-being. In the end, lawyers of color leave firms where their contributions are unappreciated in search of firms that allow them to bring their entire professional identities into the workplace.

Addressing authenticity also takes courage. This means utilizing self-reflection to show up differently in the firm and also with clients, being more attentive to the subtle but pernicious impact of bias, and embedding appreciation for the cultural insights of lawyers of color into daily operations and performance reviews. It also means welcoming the inevitable resistance and using it as an opportunity to educate others.

And empathy helps partners reflect on the ways in which their bodies respond to the stress and growing pains of personal change. In the book “My Grandmother's Hands,” Resmaa Menakem writes about how racism causes trauma in all of our bodies, but that each of us reacts differently to that trauma. As a result, I encourage partners to lean into rather than ignore their moods, heart rates, breathing and bodily tension as a way to calm and process emotions. By doing so, they learn that fear is a natural part of change, but that self-empathy helps leaders face their fears and show up as their best, most effective selves.

This is how partners engage in the inner work that provides a steady foundation for the organizational change that transforms lawyers and law firms from the inside out.

Footnotes

a1 Yvette M. Alex-Assensoh, a member of the Oregon and Indiana bars, leverages her coaching skills to help people lead more effectively. She is the vice president for equity and inclusion and a professor of political science at the University of Oregon, and adjunct faculty at the University of Oregon School of Law. Reach her at yalex@uoregon.edu.
A TEXTUARY RAY OF HOPE FOR LGBTQ+ WORKERS: DOES TITLE VII MEAN WHAT IT SAYS?

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VII. PERSONAL OBSERVATIONS AND PERSPECTIVES
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*194 Title VII of the Civil Rights Act of 1964 is a landmark federal law which prohibits employment discrimination based on race, color, religion, sex or national origin. 1 In three momentous cases, argued before the United States Supreme Court in the October 2019 term, the Court will decide whether Title VII's prohibition of discrimination “because of sex” necessarily includes a prohibition of discrimination based on sexual orientation as well as a prohibition of discrimination based on gender identity or transgender status. 2 The Supreme Court granted petitions for writ of certiorari in Zarda v. Altitude Express, Inc., Bostock v. Clayton County Board of Commissioners, and EEOC v. R.G. & G.R. Harris Funeral Homes, Inc. 3 All three cases involve the statutory interpretation of Title VII's prohibition of employment discrimination against any *195 individual “because of such individual's ... sex.” 4 This article will briefly highlight some of the important decisions holding that Title VII's prohibition of sex discrimination encompasses discrimination based on gender identity and sexual orientation. As an attorney who worked closely on these issues for the last fifteen or more years and attended the Supreme Court oral arguments for the three cases on October 8, 2019, I will also offer my personal observations and perspectives about these issues. The views expressed in this article are my personal views and not that of my employer.

I. SUPREME COURT PRECEDENT CLARIFIES THE RELEVANCE OF GENDER STEREOTYPING UNDER TITLE VII
Gender stereotyping refers generally to beliefs, perceptions, or expectations about the role, appearance, and behavior of men and women. The existence of conduct based on gender stereotypes can provide proof that an employment decision or abusive environment is motivated by a sex-based factor and in violation of Title VII. For example, gender stereotyping provides evidence to prove sex discrimination when an employer denies a promotion to a woman because she walks like a man, talks in a deep voice, does not wear make-up, jewelry, or a traditionally feminine haircut. If the employer considers such “masculine mannerisms and traits” in an adverse employment decision, the employer has taken gender into account in making an employment decision.

*196 Gender stereotyping also may prove a sex-based hostile work environment; for example, an effeminate male repeatedly insulted by coworkers as “she” and “her,” or “faggot” and “female whore” has a legitimate hostile work environment claim. Such harassment occurs “because of sex” in that the employee is harassed because he is a man who, in the view of the harassers, looks and acts effeminately. Gender has been taken into account in subjecting the employee to a hostile work environment.

In a 1978 Title VII case, *City of Los Angeles v. Manhart*, the Supreme Court made the following pronouncement:

> It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females .... ‘In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes ....’ *Sprogis v. United Air Lines, Inc.* Myths and purely habitual assumptions about [men or women] ... are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less .... Even a true generalization about the [protected] class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.

Later, in *Price Waterhouse v. Hopkins*, the Supreme Court expounded on the legal relevance of such “sex stereotyping,” and how conduct based on sex stereotyping is considered evidence of sex discrimination under Title VII:

> In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender .... [W]e are beyond the day when *197* an employer could evaluate employees by insisting that they matched the stereotype associated with their group ....

In that case, a female employee named Ann Hopkins, was denied partnership at an accounting firm based, in part, on the evaluative comments submitted by several partners to the “Policy Board.” These partners' comments, according to the Supreme Court, “overtly referred to her failure to conform to certain gender stereotypes as a factor mitigating against her election to partnership.” For example, “[o]ne partner described her as ‘macho ... [another] advised her to take ‘a course at charm school.’” Moreover, in what the Supreme Court called the *coup de grace*, the partner, who explained to Ms. Hopkins the reasons for denying her partnership, advised her to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”

On appeal, the Supreme Court held that the trial court had clearly erred in finding insufficient evidence of sex stereotyping, and that sex stereotyping had played a part in the partnership decision. First, the Court emphasized that the expert testimony presented on behalf of Hopkins regarding sex stereotyping “was merely icing on Hopkins' cake,” because the partners' comments obviously constituted “stereotypical notions about women's proper deportment.” According to the Court, “[i]t takes no [expert] to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’” Second, the Court concluded Price Waterhouse undoubtedly took these comments into account in deciding to put Hopkins' partnership on hold—as it had solicited and relied on its partners' evaluations and did not disclaim reliance on the sex stereotyping comments. According to the Court, Price Waterhouse was liable for *198* sex discrimination based on sex stereotyping, thus, in violation of Title VII.
II. TITLE VII DOES NOT EXCLUDE GENDER STEREOTYPING DISCRIMINATION CLAIMS WHERE THE FACTS SHOW TRANSGENDER DISCRIMINATION

Smith v. City of Salem is an important Sixth Circuit decision, applying Title VII to factual circumstances which plainly showed discrimination based on transgender status. In Smith, a transgender firefighter, Jimmie Smith, contended that the employer had engaged in discrimination based on sex in violation of Title VII, “because of ... gender non-conforming conduct and, more generally because of ... identification as a transsexual.” Because Smith failed to state a claim of sex stereotyping under Price Waterhouse based on transsexuality, the district court held that Smith was excluded from Title VII's protection. The Sixth Circuit Court of Appeals reversed and specifically disapproved of the district court's implication that Smith had disingenuously invoked the sex stereotyping term-of-art to run around the “real” claim, which was based on transgender status.

The Sixth Circuit held that Smith's complaint sufficiently pled the gender stereotyping claim by alleging (1) that co-workers began commenting on her appearance, expressing a more feminine manner due to being a transgender woman and (2) that her employer schemed to force her resignation.

It follows [from Price Waterhouse] 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.

*199 In sustaining Smith's gender stereotyping claim, the court made clear that Smith's transgender status did not exclude Smith from Title VII coverage:

[D]iscrimination against a plaintiff who is a transsexual-and therefore fails to act like and/or identify with the gender norms associated with his or her sex-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.

Similar to the Sixth Circuit's application of Price Waterhouse to Smith, three other circuit courts of appeals have held that acts of discrimination on the basis of sex include discrimination based on gender identity.

III. DISCRIMINATION BECAUSE OF TRANSGENDER STATUS IS ITSELF NECESSARILY DISCRIMINATION BECAUSE OF SEX—AIMEE STEPHENS

In EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., the Sixth Circuit held that sex discrimination under Title VII included discrimination of transgender persons based on their transgender or transitioning status. In this case, Aimee Stephens, a transgender funeral director, was terminated from her employment by Thomas Rost, a funeral home's owner. Shortly before being fired, Stephens informed Rost that, due to her transition from male to female, she should represent and dress as a woman in appropriate business attire while at work. Rost admitted that he fired Stephens because she was no longer representing as a man and he wanted her to dress traditionally feminine. The United States Equal Employment Opportunity Commission (EEOC) sued the funeral home alleging, among other things, that the funeral home violated Title VII by terminating Stephens based on her transgender or transitioning status and her refusal to conform to the owner's sex-based stereotypes.

By denying the funeral home's Motion for Failure to State a Claim, the district court determined that Stephens adequately stated a Title VII claim due to her termination because of her failure to conform to sex-based stereotypes. Nevertheless, the
district court limited the EEOC's pursuit of its unlawful-termination claim, ruling that “transgender status is not a protected trait under Title VII, and ... the EEOC could not sue for alleged discrimination ... based solely on [Stephens'] transgender and/or transitioning status.” 38 However, the Sixth Circuit held that narrowing the claim was erroneous because “[d]iscrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex” in violation of Title VII. 39 Thus, Stephens could indeed claim she was discriminated against on the basis of her transgender and transitioning status alone. 40

A. The Sex Stereotyping Claim

In affirming Stephens' sex stereotyping claim, the Sixth Circuit refuted the funeral home's argument that its sex-specific dress code requiring Stephens to abide by the male dress code did not constitute disparate treatment in violation of Title VII--as the dress-code equally applied to and burdened females. 41 The funeral home required women to wear skirt suits and men to wear pant suits, and it viewed Stephens as a male who was required to abide by the male dress code. 42 According to the court, *201 the question as to whether the funeral home's sex-specific dress code violated Title VII was not the issue before it. 43 Rather, the question before the court was whether the funeral home violated Title VII by terminating Stephens--despite her intent to comply with the company's sex-specific dress code--because she refused to conform to the funeral home's notion of her sex. 44

The Sixth Circuit held that the cases relied upon by the funeral home, Barker v. Taft Broadcasting Co. and Jesperson v. Harrah's Operating Co., were incompatible or irreconcilable with Price Waterhouse and Smith. 45 Barker endorsed the traditional concept of sex, but according to the Sixth Circuit, Price Waterhouse eviscerated that traditional concept in its recognition that, under Title VII, “[sex] encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on failure to conform to stereotypical gender norms.” 46

Jespersen's holding that Harrah's grooming standards--requiring only female bartenders to wear makeup--directly conflicted with Smith. 47 Smith concluded that requiring women to wear makeup does constitute improper sex stereotyping. 48 Moreover, the plaintiff in Smith was not required to allege that being expected to adopt a more masculine appearance and manner interfered with job performance. 49

*202 Finally, the Sixth Circuit repudiated the funeral home's suggested reading of Price Waterhouse and Smith, in that sex stereotyping violates Title VII only when the employer's sex stereotyping results in disparate treatment of men and women. 50 In Smith, the court did not compare the difference in treatment between transgender persons transitioning from male to female and transgender persons transitioning from female to male. 51 Indeed, a defense by the employer in Price Waterhouse that it fired both a gender non-conforming man and a gender non-conforming woman would have failed because two wrongs do not make a right. 52 According to the Sixth Circuit, Price Waterhouse and Smith dictate that “an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave.” 53

B. The Claim Based on Transgender and Transitioning Status

The Sixth Circuit set forth two reasons for its central holding that discrimination on the basis of transgender and transitioning status violates Title VII. 54 First, the court reasoned that it was impossible to discriminate based on an employee's transgender status “without being motivated, at least in part, by the employee's sex.” 55 To illustrate this point, the court asked “whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code.” 56 The obvious answer in the negative confirmed that Stephens' sex impermissibly motivated her termination. 57 The court called this “paradigmatic sex discrimination.” 58

*203 Further, the Court analogized discrimination based on religion to discrimination based on sex in the workplace. 59 In doing so, the Court explained that when an employer fires someone on the basis of their religion, such an act constitutes discrimination under Title VII regardless of an employer's biases. 60 Discrimination on the basis of religion inherently
encompasses discrimination on the basis of a change in religion.\textsuperscript{61} Using the same logic, it follows that discrimination on the basis of a change of sex is inherently included in sex discrimination.\textsuperscript{62}

According to the Sixth Circuit, “discrimination because of a person's transgender, intersex or sexually indeterminate status, is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion or no religion at all.”\textsuperscript{63} In \textit{Harris Funeral Homes}, the funeral home argued that the analogy to religion was “structurally flawed” because a person's sex is “a biologically immutable trait” which, unlike religion, cannot be changed.\textsuperscript{64} Therefore, the court held this to be an “immaterial” point that it did not need to decide.\textsuperscript{65} The Sixth Circuit reaffirmed \textit{Price Waterhouse}'s holding that sex should be irrelevant to employment decisions and added that an employer's adverse employment decision on the basis of a sex-change directly disobey\textit{s} \textit{Price Waterhouse}.\textsuperscript{66}

Second, the court reasoned that discrimination against transgender persons “necessarily implicates Title VII's proscriptions against sex stereotyping.”\textsuperscript{67} As in \textit{Smith}, the court recognized the American Psychiatric Association recognizes transgender status as a disjunction between one's individual's sexual organs and sexual identity.\textsuperscript{68} In other words, “a transgender person is someone who ... is inherently ‘gender non-conforming.’”\textsuperscript{69} Because of this, the court concluded that an employer's discrimination because of transgender status always involves the employer's imposition of its stereotypes about the alignment of sexual organs and gender identity.\textsuperscript{70} Thus, the Sixth Circuit held that discrimination because of transgender or transitioning status is inherently discrimination based on gender non-conformity in violation of Title VII.\textsuperscript{71}

\textbf{C. The Sixth Circuit Rejects Arguments Against Interpreting Title VII to Include Transgender Status Discrimination}

In \textit{Harris Funeral Homes}, the court specifically rejected several arguments raised by the funeral home regarding Title VII's interpretation.\textsuperscript{72} First, the funeral home argued that Congress, in enacting Title VII, understood sex to refer only to physiology and reproductive roles--and not to a person's gender identity.\textsuperscript{73} The Sixth Circuit concluded, however, that Congress' failure to anticipate that Title VII would cover transgender status had little interpretative value.\textsuperscript{74}

The Supreme Court teaches that “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.”\textsuperscript{75} Such “reasonably comparable evils” include same sex sexual harassment and hostile work environment claims that Title VII now prohibits, but were initially believed to fall outside its scope.\textsuperscript{76} Moreover, according to the Sixth Circuit, \textit{Price Waterhouse} eviscerated the narrow or traditional view of sex as referring only to “chromosomally driven physiology and reproductive function” by recognizing that “sex” under Title VII refers not only to biological differences but also to gender norms.\textsuperscript{77} Thus, pre-\textit{Price Waterhouse} cases holding otherwise were no longer valid.\textsuperscript{78}

Second, the funeral home argued transgender status was not unique to one's biological sex since both biologically male and biologically female persons may consider themselves transgender.\textsuperscript{79} According to the Sixth Circuit, however, “[a] trait need not be exclusive to one sex to nevertheless be a function of sex.”\textsuperscript{80} To violate Title VII, an employer need not discriminate based on a trait common to all men or all women.\textsuperscript{81} Instead, Title VII focuses on whether a particular individual is discriminated against because of his or her sex, not on whether a particular sex is discriminated against.\textsuperscript{82} An employer who discriminates against an employee based on transgender status is necessarily considering that employee's biological sex, and thus discriminating based on sex--this is so no matter what sex the employee was born or wishes to be.\textsuperscript{83}

Finally, later statutes, such as the Violence Against Women Act, which expressly prohibits discrimination on the basis of gender identity, were of little interpretative value to the Sixth Circuit.\textsuperscript{84} This is because Congress may choose to use a belt and suspenders method to achieve its objectives.\textsuperscript{85}
IV. MIXED RESULTS: TITLE VII SEX DISCRIMINATION CLAIMS WHERE FACTS SHOW DISCRIMINATION BASED ON GENDER NON-CONFORMITY DUE TO SEXUAL ORIENTATION

Before Price Waterhouse's clarification about the relevance of sex stereotyping and the text-focused approach to statutory construction applied to Title VII by Oncale v. Sundowner Offshore Services Inc., two federal courts of appeals held that sexual orientation was excluded from the purview of Title VII sex discrimination.  

First, in Blum v. Gulf Oil Corp., the Fifth Circuit Court of Appeals summarily addressed the issue in one sentence, stating: "[d]ischarge for homosexuality is not prohibited by Title VII ...." In coming to this conclusion, the court relied on Smith v. Liberty Mutual Insurance Co. However, the Smith holding directly conflicts with the Price Waterhouse holding.  

Second, in DeSantis v. Pacific Telephone & Telegraph Co., Inc., the Ninth Circuit Court of Appeals held that Congress had not intended Title VII to apply to sexual orientation and only had "traditional notions of ‘sex’ in mind." DeSantis, similar to Blum, also cites and relies on Smith.  

In the decades following Price Waterhouse, courts have grappled with Title VII sex discrimination suits where facts show there is discrimination based on an employee's failure to conform to their gender due to being gay or lesbian. While parroting and mechanically following the view that sexual orientation was outside of Title VII's purview, some courts attempted to tease apart evidence of sex stereotyping from evidence of sexual orientation discrimination.  

For example, in Prowel v. Wise Business Forms, Inc., the Third Circuit Court of Appeals acknowledged "the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw." Other courts have applied a categorical exclusionary rule—dismissing claims based on gender stereotyping evidence when such evidence was linked to or associated with sexual orientation.  

In Dawson v. Bumble & Bumble, for example, the court stated as follows:

When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.’ ... Like other courts we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap protection for sexual orientation into Title VII."  

Notably, this case law on Title VII's coverage of sexual orientation as a whole has been described as a “confused hodge-podge of cases,” and “an odd state of affairs”—where, for example, Title VII protects effeminate men from employment discrimination but only if they are straight and not gay.  

V. DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS NECESSARILY DISCRIMINATION BECAUSE OF SEX—DONALD ZARDA

In Zarda v. Altitude Express, Inc., the Second Circuit Court of Appeals confronted this confusion head-on: “we are persuaded that the line between sex discrimination and sexual orientation discrimination is difficult to draw because that line does not exist save as a lingering and faulty judicial construct." In Zarda, the Second Circuit, en banc, held sexual orientation discrimination is a form or subset of sex discrimination under Title VII because an employee's sex is necessarily a motivating factor in sexual orientation discrimination.  

In the case, a gay sky-diving instructor, Donald Zarda, told a female client while preparing for a tandem skydive that he was gay. Because of this, the client alleged Zarda “inappropriately touched her and disclosed his sexual orientation to excuse his behavior.” Subsequently, the client told her boyfriend who then informed Zarda's boss. Zarda was subsequently fired.  

Zarda then sued his employer alleging sex discrimination under Title VII on the ground that his non-conformity to male sex stereotypes resulted in his termination. The district court granted summary judgment in favor of the employer, concluding that precedent, such as Dawson, indicated that Zarda had failed to establish a prima facie case under Title VII because a gender stereotype claim cannot be predicated on sexual orientation. A Second Circuit panel subsequently affirmed—declining to revisit binding precedent.
Sitting en banc, the Second Circuit reversed the panel's decision. It provided several rationales in support of its holding that sexual orientation discrimination is a form of sex discrimination under Title VII. First, the court emphasized that sexual orientation, by its nature, is sex-dependent: “[s]exual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted.” Thus, firing a man, like Zarda, who is attracted to men is a decision motivated, at least in part, by sex. “Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.”

Second, the court utilized a comparative test, asking “whether the employee would have been treated differently ‘but for’ his or her sex.” In the context of sexual orientation--a man who is fired because he is attracted to men--would not have been fired had he been a woman attracted to men. Notably, the court rejected the view that the proper comparison should hold everything, including sexual orientation, constant except sex--for example, an employer that discriminates based on sexual orientation treats gay men the same as gay women, showing no sex discrimination.

Accordingly, the court held that the proper purpose of the comparative test is to determine whether a trait, such as sexual orientation, is a proxy for sex. As such, “[t]he trait [sexual orientation] is the control, sex is the independent variable, and employee treatment is the dependent variable.”

Third, the court applied the reasoning in Price Waterhouse to sexual orientation: “we concluded that when ... [an employer] acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,' but takes no such action against women who are attracted to men, the employer ‘has acted on the basis of gender.’” The court's application of Price Waterhouse was consistent with the holding in Hively v. Ivy Tech Community College--where the Seventh Circuit Court of Appeals held that same-sex orientation represented the “ultimate case of failure to conform” to the gender stereotype “that 'real' men should date women, and not other men.” Even where negative views of gay persons are rooted in morality, such moral beliefs cannot be disassociated from beliefs about sex.

Thus, sexual orientation discrimination is sex discrimination under Title VII because it implicates Price Waterhouse's proscription against adverse employment actions based on gender stereotypes. In Zarda, the Second Circuit also rejected the view that sexual orientation discrimination “is not barred by Price Waterhouse because it treats women no worse than men.” Therefore, it follows that the employer in Price Waterhouse could not have defended itself by firing both effeminate men and masculine women.

Finally, the court reasoned that precedent discussing associational discrimination supported its holding that sexual orientation discrimination violated Title VII. In doing so, the court reaffirmed that, “[w]here an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race.” For example, when a white employee is fired for dating a black person, it constitutes racial discrimination.

Such a conclusion is true because “the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.” Thus, firing a male employee for dating another man constitutes sex discrimination. “In most contexts, where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes.” In Zarda, the Second Circuit blatantly rejected the argument that whereas “anti-miscegenation policies are motivated by racism, ... sexual orientation discrimination is not rooted in sexism.” Such an argument was rejected because Title VII is not limited by the colloquial concept of “sexism.” For example, in Oncale, the court held that male-on-male sex harassment--a concept not traditionally seen as sexism--violates Title VII.

Notably, in Zarda, the Second Circuit rejected arguments against interpreting Title VII to include discrimination based on sexual orientation. Specifically, in the majority opinion, the court rejected several arguments raised by the employer and...
the dissenting judges in their opinions regarding Title VII's interpretation—many of which are addressed above. The court painstakingly rejected the dissent's principal argument that interpreting Title VII to include sexual orientation discrimination “misconceives the fundamental public meaning of the language of Title VII.

According to Judge Lynch's dissent in Zarda, Congress “intended to secure the rights of women to equal protection in employment ... [not] to protect an entirely different category of people.” Judge Lynch also argued that the Supreme Court's interpretation of Title VII regarding the coverage of sex harassment and same-sex harassment “do not say anything about whether discrimination based on other social categories is covered ...” However, the majority opinion disagreed with this statement and, relying on Oncale, eschewed reliance on divining legislative intent. Instead, the court was strictly guided by the lodestar of statutory interpretation—the actual text of Title VII. The court viewed sexual orientation discrimination as a “reasonably comparable evil” to sexual harassment and male-on-male harassment, which the Supreme Court has held is plainly covered by the text of Title VII.

VI. SEXUAL ORIENTATION DISCRIMINATION IS NOT PROHIBITED BY TITLE VII BASED ON 39-YEAR-OLD PRECEDENT—GERALD BOSTOCK

In Bostock, the Eleventh Circuit issued a two-page per curiam opinion and held that discrimination because of sexual orientation “is not prohibited by Title VII.” There, a gay man, Gerald Bostock, worked as a child welfare services coordinator for Clayton County. He performed exceedingly well at his job, earning the program multiple accolades. After Bostock joined a gay recreational softball league, he was subjected to disparaging comments about his sexual orientation and later fired. Bostock sued alleging discrimination based on his sexual orientation under Title VII. The district court dismissed his claim, citing Blum as binding precedent. Subsequently, the Eleventh Circuit affirmed the dismissal of Bostock's claim and denied a rehearing.

VII. PERSONAL OBSERVATIONS AND PERSPECTIVES

A. The Court's Legitimacy and the Credibility of Textualism

Justice Neil M. Gorsuch's questions to counsel during Supreme Court oral arguments received considerable press coverage over speculation that his vote might be in play in favor of lesbian, gay, bisexual and transgender workers. Specifically, Justice Gorsuch, asked Stephens' counsel the following:

When a case is really close, really close, on the textual evidence, ... assume for the moment ... I'm with you on the textual evidence .... At the end of the day, should he or she take into consideration the massive social upheaval that would be entailed in such a decision, and the possibility that ... Congress didn't think about it ... and that ... it is ... more appropriate a legislative rather than a judicial function?

Earlier in his questioning to Stephens' counsel, Justice Gorsuch also asked the following:

I'd just like you to have a chance to respond to Judge Lynch in his thoughtful dissent in which he lamented everything you have before us, but suggested that something as drastic a change in this country as bathrooms in every place of employment and dress codes in every place of employment that are otherwise gender neutral would be changed, ... that's an essentially legislative decision .... It's a question of judicial modesty.

In response, counsel argued that (1) the 20-year-old appellate court's recognition of transgender-based discrimination as sex discrimination has not put an end to sex-specific dress codes and restrooms, and (2) Stephens was requesting the Court to
interpret Title VII's text as written and not address a policy question more appropriate for Congress. Justice Gorsuch, however, appeared unsatisfied with this answer when he asked, "[d]id you want to address Judge Lynch's argument or not?" When read in context, Justice Gorsuch's statement about textual evidence being close appears inconsistent with his focus on Judge Lynch's dissent, which clearly rejected the textualism analysis, describing it as "hyperliteral." In Judge Lynch's view, reading Title VII to encompass sexual orientation would not be an application of Title VII's text, but an amendment to Title VII--a task more appropriate for the legislature. Despite Justice Gorsuch's statement about textual evidence being close, his focus on Judge Lynch's dissent could indicate his inclination to outright reject the textualism analysis.

A Supreme Court decision rejecting textual coverage but calling it close will justifiably substantiate criticism about the undue influence of ideological bias in the Court's decisions. Similarly, such a decision will also add credible evidence to bolster the criticism that textualism, as a method of statutory interpretation, is not neutral--but in crucial respects is subject to sham. The arguments for textual coverage are strong and straightforward. Justice Gorsuch and Justice John Roberts, as conservatives, presumably would wish to shore up the legitimacy of the Court, as well as the credibility of textualism. One of them will likely provide the swing vote (joining the four liberal Justices), which represents the best hope for an opinion to hold that coverage under Title VII's plain text is clear.

During oral arguments, Justice Gorsuch also presented the issue of whether the Court--where statutory coverage is a close call--should consider "the massive social upheaval" caused by its decision. Justice Gorsuch appeared to suggest that when the textual analysis is close and the Court's decision would entail profound social change, the Court should, out of judicial modesty, decide against coverage and declare the task to be legislative. This approach, however, raises unwieldy questions for textualism as an interpretative methodology.

First, how will the Court determine whether textual coverage is a close call? During oral argument, for example, Justice Elena Kagan described the textual analysis as "firmly" in favor of coverage, whereas Justice Gorsuch called it "close." Second, how will the Court determine whether its decision would entail "massive social upheaval?" As Justice Ruth Bader Ginsburg pointed out during arguments, "[n]o one ever thought sexual harassment was encompassed by discrimination on the basis of sex in [1964]."

The Supreme Court's decision in Meritor Savings Bank, FSB v. Vinson--holding that sexual harassment is discrimination because of sex under Title VII--undoubtedly entailed profound social change, particularly when viewed from the perspective of the mores of 1964. Indeed, the "social upheaval" of the Meritor decision continues to reverberate today. Justice Gorsuch's suggested approach could call even the Meritor decision into question.

Moreover, although Justice Gorsuch and oral arguments in general focused on the purported demise of sex-specific bathrooms and dress codes as the "social upheaval" caused by a decision favoring coverage; should the Court also consider the profound social harms implicated by a court decision against coverage? In other words, should the Court shake off its judicial modesty and make the close call for textual coverage because the harms would otherwise be devastating? Justice Sonia Sotomayor raised this point when she asked the question of when the Court should step in to address invidious discrimination against lesbian, gay, bisexual, and transgender persons where--in her view--such discrimination fit the statutory words. A decision by the Court for coverage would address invidious workplace discrimination and clearly promote Title VII's statutory purpose.

B. Opportunities Seized and Lost

One of the most important ways to dismantle discrimination at its roots is through an effective public education campaign. Considering the national conversation about the lack of federal nondiscrimination protections for LGBTQ+ workers, the Supreme Court's decision to hear these three cases provides a valuable educational opportunity about this topic.
coverage about these cases has served to further *217 educate the American public about the humanity of lesbian, gay, bisexual and transgender people, and the role of the Supreme Court in addressing the need for nondiscrimination protections. 175

However, Supreme Court oral arguments in Aimee Stephens' case, in important respects, missed a historic opportunity to provide a platform for correctly educating the public about what it means to be transgender. 176 A transgender person's inherent and deeply held sense of their gender is their authentic identity. 177 That gender identity is deeply felt and inherently sensed—a core aspect of personhood. 178 It means a “transgender woman is a woman” and a “transgender man is a man.” 179 A crucial part of representing transgender persons in discrimination cases is to clearly and consistently present the authenticity of their transgender identity and counter arguments that deny or diminish such. 180

*218 Unfortunately, Stephens' counsel argued that she was fired for being “insufficiently masculine,” as opposed to arguing she was in fact, a transgender woman.” 181 Justice Roberts, for example, suggested that a transgender employee claiming denial of bathroom access consistent with their gender identity would suffer no injury based on biological sex, but would be injured when the claim is analyzed in terms of transgender status. 182 An alternatively framed argument, such as consistently referring to Stephens as a transgender woman who was fired because she did not meet the gender stereotype that all women are assigned the sex female at birth, would have better reflected the reality that Stephens is a woman. 183 Such a framing would also have facilitated arguing that as a transgender woman Stephens must be permitted to use the women's bathroom. 184

C. Perseverance

I often advise prospective law school students that a primary quality for success in law school and in a law career is perseverance. These three Supreme Court cases showcase decades of persevering hard work by countless advocates for LGBTQ+ workplace equality. 185 Indeed, advocacy through strategic litigation is a long road filled with difficulties, *219 failures, opposition, opportunities, and successes. 186 We are at a pivotal and historic juncture in the American LGBTQ+ civil rights movement. 187 The Supreme Court's decisions in these cases could present major and devastating setbacks, surprising and sweeping wins, or muddled and confused compromises. Whatever the outcome, LGBTQ+ legal advocates will continue to have their work cut out for them. 188 For example, the oral arguments showed an utmost need to continue educating ourselves, the judiciary, and the community at large about the shared humanity and authenticity of transgender people. 189 The focus must be to steadfastly continue strategic, prudential, and multifaceted action to achieve LGBTQ+ workplace equality and justice nationwide. 190

Footnotes

a1 Eduardo Juarez is a Supervisory Trial Attorney at the U.S. Equal Employment Opportunity Commission in San Antonio, Texas. He received his J.D. from the University of Michigan Law School and B.A. from the University of Notre Dame. The author dedicates this piece to his parents for their constant guidance, love and support. He also expresses his gratitude to The Scholar Editorial Board and Staff Writers for their inspiration and work.


2 See Zarda v. Altitude Express, Inc., 855 F.3d 76 (2nd Cir. 2001), rev'd en banc, 883 F.3d 100 (2d Cir. 2018) (en banc), cert. granted, 139 S. Ct. 1599 (2019) (examining the parameters of Title VII when an employee revealed his sexual orientation to a customer and was subsequently fired); see also Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), (en banc), 894 F.3d 1335 (2018), cert. granted, 2019 U.S. LEXIS 2927 (U.S. Apr. 22, 2019) (discussing whether an employee's termination was lawful when the reasons for termination included his sexual orientation); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018), cert. granted, 2019 U.S. LEXIS 2846 (U.S. Apr. 22, 2019) (evaluating the lawfulness of a funeral home's actions when it fired a woman after she informed the funeral home that she was a transgender woman).
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1. 883 F.3d 100 (2d Cir. 2018), 139 S. Ct. 1599 (2019); see 723 F. App’x at 964 (holding that binding precedent foreclosed a Title VII action based on sexual orientation discrimination); see also 884 F.3d at 560 (holding that discrimination on the basis of transgender status is necessarily discrimination because of sex under Title VII).


3. See Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989) (discussing that the Policy Board in making its decision did in fact take into consideration comments from partners that were solely motivated by stereotypical notions about women’s proper deportment).

4. See generally id. (“Price Waterhouse also charges that Hopkins produced no evidence that sex stereotyping played a role in the decision to place her candidacy on hold. As we have stressed, however, Hopkins showed that the partnership solicited evaluations from all of the firm’s partners ... including the comments that were motivated by stereotypical notions about women’s proper deportment.”).

5. See id. ([Sex stereotyping does not] require expertise in psychology to know that, if an employee's flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.”).

6. See id. at 239 (evaluating on the many factors that go into an employer's administrative decisions relating to employees).

7. See Nichols v. Azteca Rest. Enter. Inc., 256 F.3d 864, 874 (9th Cir. 2001) (describing the systemic abuse suffered by an individual who did not conform to his co-workers' stereotyped expectations of masculinity).

8. See id. (portraying a situation where there was harassment “because of sex”); see also Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2020) (outlining unlawful employment practices regarding sex discrimination).

9. See id. at 871 (holding “it is ... now clear that sexual harassment in the form of a hostile work environment constitutes sex discrimination”).


11. Id.


13. Id.

14. Id. at 273 (O'Connor, S., concurring).

15. Id. at 251, 257.
23  Id. at 258.

24  See 378 F.3d 566, 568, 571 (6th Cir. 2004) (describing the application of Title VII when a trans woman lieutenant was suspended because of her gender non-conforming behavior).

25  Smith v. City of Salem, 378 F.3d 566, 568, 571 (6th Cir. 2004).

26  Id. at 569.

27  Id. at 571, 575, 578.

28  Id. at 572.

29  Id. at 574.

30  Id. at 575.

31  See Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2018) (“Discrimination against a transgender individual because of [their] gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender.”); see also Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (stating that disparate treatment between a man dressed as a woman and a traditionally-dressed woman would fall into a prohibited category); Schwenk v. Hartford, 203 F.3d 1187, 1202 (9th Cir. 2000) (“Under Price Waterhouse, ‘sex’ under Title VII encompasses both sex-- that is, the biological differences between men and women--and gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.”) (citing Price Waterhouse, 490 U.S. at 250).

32  884 F.3d at 600 (“Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII.”).

33  Id. at 566.

34  Id. at 569.

35  Id.

36  Id.

37  Id. at 570.

38  Id. at 569-70.

39  Id. at 571, 574-75.

40  See id. at 600 (describing the ways in which Stephens was discriminated because of her transgender and/or her transitioning status).

41  Id. at 572-73.

42  Id. at 568, 573.

43  See id. (attempting to narrow the issue in a way that excluded the discussion of Title VII).

44  Id. at 573.
Compare 549 F.2d 400, 401-02 (6th Cir. 1977) (describing why the sex-specific grooming code allowing women but not men to wear long hair did not violate Title VII), and 444 F.3d 1104, 1109-11 (9th Cir. 2006) (understanding that no Title VII violation occurred where a grooming code imposed different but equally burdensome requirements on males and females), with 490 U.S. 228 (finding a Title VII violation where the decision to promote a senior manager was refused based on sexual stereotypes of women), and 378 F.3d 566 (6th Cir. 2004) (holding that allegations that an employee was discriminated against based upon the employee's gender nonconforming behavior and appearance were actionable pursuant to Title VII).


Compare 444 F.3d at 1112 (holding that grooming standards which required women to wear makeup did not constitute a sex stereotype), with 378 F.3d at 566 (elaborating on why a makeup requirement for women was, in fact, a sex stereotype).

Smith, 378 F.3d at 571.

See id. at 572 (stating that the employee need not indicate that the allegedly discriminatory requirement interfered with the employee's job performance).

See R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 574 (describing the court's resistance in using Price Waterhouse and Smith as limiting discrimination under Title VII).

See id. (describing that no difference was delineated in what sex was being transitioned to).

See id. (understanding that a defense as to similar discriminatory treatment will not stand against Title VII).

See id. (citing Zarda, 883 F.3d at 123)

Id. at 575-76.

Id. at 575.

Id.

Id.

Id. at 575-76.

Id.

Id. at 575.

Id.

Id. at 575 n. 4.

Id. at 576.

Id.

Id.
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See id. at 578 (explaining why the reasoning in cases decided before Price Waterhouse are directly counter to modern law).

See id. at 574 (citing Zarda, 883 F.3d at 123); Civil Rights Act of 1964, 42 U.S.C § 2000e-2(a) (2020).

R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 578-79.

See id. at 575 (quoting Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 344 (7th Cir. 2017)).

See 490 U.S. at 251 (describing that “[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender ....”); see also 523 U.S. 75 (1998) (holding sex discrimination consisting of same-sex sexual harassment is actionable under Title VII); Blum v. Gulf Oil Corp., 597 F.2d 936 (5th Cir. 1979) (per curiam) (holding that even if a prima facie case of sex discrimination was presented, the employer had a legitimate reason for discharge which did not involve the employee's race, sex, or religion); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979) (holding that homosexuals are not a protected class within the statutory meaning).

See 597 F.2d 936, 938 (5th Cir. 1979) (citing Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978)).

See id. (dismissing a Title VII sex discrimination claim by a male who had been terminated for being effeminate).
Compare 569 F.2d at 325 (dismissing a Title VII sex discrimination claim by a male who had been terminated for being effeminate), with 490 U.S. at 251 (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender ....”).

DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 332 (9th Cir. 1979) (citing Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam)).


See id. at 287, 291-92 (finding sufficient evidence to warrant a claim for harassment or discrimination under Title VII while affirming the district court's holding that sexual orientation discrimination is not cognizable under Title VII); see, e.g., Hively, 853 F.3d at 341 (“[D]iscrimination on the basis of sexual orientation is a form of sex discrimination.”).

579 F.3d 285, 291 (3d Cir. 2009).

See Hively, 830 F.3d at 344 (addressing a line of cases applying a categorical rule against recognizing sexual orientation as a cognizable Title VII claim); see also Magnuson v. Cty. of Suffolk, No. 14CV3449, 2016 WL 2889002, at *8 (E.D.N.Y. May 17, 2016) (describing that “[s]exual orientation discrimination is not actionable under Title VII, and plaintiffs may not shoehorn what are truly claims of sexual orientation discrimination into Title VII by framing them as claims of discrimination based on gender stereotypes, as Plaintiff at times attempts to do here”).

398 F. 3d 211, 218 (2d Cir. 2005).

Hively, 830 F.3d at 342-44.

883 F.3d at 122; see Hively, 853 F.3d at 346 (concluding “the line between a gender nonconformity claim and one based on sexual orientation ... does not exist”).

883 F.3d at 122.

Id. at 108.

Id.

Id. at 108-09.

Id. at 107.

Id. at 109.

Id. at 109-10.

Id. at 132.

See generally id. at 111-32 (providing a thorough analysis on why discrimination based on an individual’s sexual orientation constitutes sex discrimination under Title VII).
Id. at 113.

Id. at 114.

Id. at 113; see Hively, 853 F.3d at 358 (Flaum, J., concurring) (“One cannot consider a person's homosexuality without also accounting for their sex ....”).

Zarda, 883 F.3d at 119.

Id. at 116; see Hively, 853 F.3d at 345 (describing the comparative test as “paradigmatic sex discrimination”).

See Zarda, 883 F.3d at 116 (recognizing that changing sex also changes sexual orientation--thus showing that sexual orientation is interconnected with sex).

See id. at 116-19 (“To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently ‘but for’ his or her sex.”).

Id. at 117, 119.

See id. at 120-21 (quoting Price Waterhouse, 490 U.S. at 250).

See id. at 121 (quoting Hively, 853 F.3d at 346 and Centola v. Potter, 183 F.Supp.2d 403, 410 (D. Mass. 2002)).

See id. at 122 (“Beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex”).

See Hively, 853 F.3d at 346 (“A policy that discriminates on the basis of sexual orientation ... is based on assumptions about the proper behavior for someone of a given sex”); cf. Price Waterhouse, 490 U.S. at 250-51 (rejecting the notion that “sex stereotyping” lacks legal relevance).

See Zarda, 883 F.3d at 123 (“Price Waterhouse ... stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms.”); cf. Price Waterhouse, 490 U.S. at 251 (“We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”).

Zarda, 883 F.3d at 123.

See id. at 124 (acknowledging that associational discrimination extends to all classes protected by Title VII).

See id. (quoting Holcomb v. Iona College, 521 F.3d 130, 139 (2d Cir. 2008)).

See e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 589 (5th Cir. 1998) (“A reasonable juror could find that [Plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person.”).

Zarda, 883 F.3d at 125.

See id. at 131 (holding that sex discrimination based on a person's sexual orientation is cognizable under Title VII).
128  *Id.* at 124; see [Hively, 853 F.3d at 349](#) (describing that “[t]o the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of ... the sex of the associate.”).

129  [Zarda, 883 F.3d at 126](#).

130  See *id.* (“But the Court need not resolve this dispute because the *amicis* supporting defendants identify no cases indicating that the scope of Title VII’s protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism”).

131  See [Oncale, 523 U.S. at 79](#) (holding that a claim under Title VII is not barred merely because the plaintiff and defendant are of the same sex); see also *id.* at 127 (stating that *Oncale* represents how male-on-male sexual harassment is not traditionally conceptualized as sexism).

132  See generally [Zarda, 883 F.3d at 115, 126-27](#) (holding that an employee had a cognizable sex discrimination claim because his employer took adverse action against him due to his failure to “conform to the straight male macho stereotype”).

133  *Id.*

134  See *id.* at 137-39.

135  *Id.* at 145.

136  *Id.* at 147.

137  *Id.* at 115.

138  *Id.*

139  *Id.* at 132 (quoting [Oncale, 523 U.S. at 79](#)).

140  723 F. App’x at 964.

141  *Id.*

142  *Id.*

143  *Id.*

144  *Id.*

145  *Id.; see Blum, 597 F.2d at 936* (holding that the employer had a legitimate reason for discharge—even if a prima facie case of sex discrimination was presented).

146  Bostock, 723 F. App’x at 964, 965.


See id. (referencing Judge Lynch's dissenting opinion in Zarda concerning the appropriateness of judicial action in altering the meaning of Title VII in a way Congress did not anticipate).

Id. at 27-28.

Id. at 28.

Id. at 26-27; cf. Zarda, 883 F.3d at 144 n.7 (quoting Justice Antonin Scalia, “[a]dhering to the fair meaning of the text ... does not limit one to the hyperliteral meaning of each text.”).

See Zarda, 883 F.3d at 165 (relying on the legislature to enact details for broad statutes).

See Harris Funeral Home Transcript, supra note 148 (recognizing the presence of textual evidence, and stating that this case is not about “extra-textual stuff”).

Cf. id. (rejecting a textualism approach and instead directing the Court towards the “massive social upheaval that would be entailed in such a decision”).

See William Eskridge, Symposium: Textualism's Moment of Truth, SCOTUS BLOG (Sept. 4, 2019, 2:30 PM), https://www.scotusblog.com/2019/09/symposium-textualisms-moment-of-truth/ (emphasizing the importance of theories such as textualism to be used equally and in the same manner across the cases in order for theories to be considered “neutral”).

See Oncale, 523 U.S. at 78-79 (describing Justice Scalia's rationale in applying strict textualism to a Title VII dispute resulting in an opinion supporting a more liberal social policy).

See Eskridge, supra note 156 (“The credibility of textualism as a neutral methodology depends on the court's deciding cases like Bostock's without regard to partisan biases”); see also Transcript of Oral Argument at 59, Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (No. 17-1618) [Hereinafter Bostock Transcript] (demonstrating how a majority of Justice Gorsuch's questioning revolved around the text).

See Harris Funeral Home Transcript, supra note 148 (providing Justice Gorsuch's statements agreeing that the textual evidence is close).

Id. at 26.

Id. at 26-27.

See Eskridge, supra note 156 (explaining that the Supreme Court's legitimacy rests upon a perception that its members are applying existing law in a neutral manner).

See Harris Funeral Home Transcript, supra note 148 (discussing a hypothetical where Justice Gorsuch assumes the textual evidence is very close without the methodology to arrive at that conclusion).

Compare Bostock Transcript, supra note 158 (“[T]he text of the statute appears to be firmly in Ms. Karlan's corner”), with Harris Funeral Home Transcript, supra note 148 (“[T]he textual evidence is close.”).

See, e.g., Harris Funeral Home Transcript, supra note 148 (discussing the change in views on sex discrimination's relation to sexual harassment from 1964 to today).

Id. at 58.


See Harris Funeral Home Transcript, supra note 148 at 58 (cautioning the Court on the implications of its decision causing social upheaval).

See, e.g., id. at 60-61 (describing the consequences of decisions which would in turn then cause the social upheaval).

See, e.g., id. (asking when the Court should step in when it comes to addressing discrimination against LGBTQ+ individuals when the discrimination falls within the relevant statute).

See id. ("... may I just ask, at what point does a court continue to permit invidious discrimination against groups that, where we have a difference of opinion, we believe the language of the statute is clear."); see also Brief of William N. Eskridge, Jr. & Andrew M. Koppelman as Amici Curiae in Support of Emps. at 2, Bostock v. Clayton Cty., 139 S. Ct. 1599 (2019) (Nos. 17-1618, 17-1623, 18-107), 2019 WL 2915046 at 2 [Hereinafter Eskridge & Koppelman Amici Curiae] (arguing that where textual coverage is ambiguous, the “Court should consider the statutory plan or purpose,” and “Title VII's stated purpose is to purge the workplace of criteria that Congress found unrelated to an employee's 'ability or inability to work.'").


See Harris Funeral Home Transcript, supra note 148 at 64 (framing the issue as Stephens' being discharged for appearing “insufficiently masculine” instead of clarifying that Stephens is a woman).


Cf. id. at 5 (citing more than four dozen studies demonstrating the consensus among health care professionals regarding what it means to be transgender).

Id.

See Alexander Chen, The Supreme Court Doesn't Understand Transgender People, SLATE (Oct. 18, 2019, 3:11 PM), https://slate.com/news-and-politics/2019/10/supreme-court-transgender-discrimination-sex.html [https://perma.cc/GZ45-7Q5A] (describing that the presentation of transgender discrimination cases must "embrace[e] the reality of transgender identity, which includes the reality that transgender people thrive when they are permitted to live authentically as the men and women that they are."); see also Paisley Currah, The Aimee Stephens Case: On the Problem with Describing a Trans Woman as an “Insufficiently Masculine” Biological Male (Oct. 15, 2019), https://paisleycurrah.com/2019/10/15/the-aimee-stephens-case-on-the-problem-with-describing-a-trans-woman-as-an-insufficiently-masculine-biological-male/ [https://perma.cc/CR8Q-MUAI] (emphasizing the importance in Title VII cases of consistently referring to a plaintiff who is a transgender woman as female and “to frame the plaintiff in clear and consistent terms that correspond to their actual lived identity and experience”).

See Harris Funeral Home Transcript, supra note 148 at 64 (miseducating what it means to be transgender while presenting significant drawbacks to their legal strategy); see also Chen, supra note 180 (highlighting the drawbacks of
framing Stephens as an insufficiently masculine male by failing “to explain why she must be able to live and work as a woman, including when using the restroom or dressing for work”).

182  See Harris Funeral Home Transcript, supra note 148 at 8-14 (comparing the analysis of the bathroom case on the basis of biological sex with the analysis in terms of transgender status).

183  See Chen, supra note 180 (recognizing the inconsistency between arguing Stephens is a biological man and arguing she should be permitted to use the women's restroom).

184  See Lusardi v. McHugh, No. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015) (holding a federal agency discriminated based on sex by denying a transgender employee equal access to a common restroom used by other employees of the same gender identity regardless of the negative reactions of other employees).

185  See Bostock, 723 F. App’x at 964-65 (11th Cir. 2018) (affirming the lower court's dismissal of Bostock's sex discrimination complaint); see also R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d at 572, 574 (finding discrimination against an employee for failing to conform to the dress code of her perceived gender); Zarda, 883 F.3d at 112-13 (recognizing that discrimination against one's sexual orientation falls under the broader umbrella of “sex discrimination”).

186  Cf. Parloff, supra note 175 (signifying the conflict between the Supreme Court creating precedent by relying on legal principles or by relying on the Court's political biases).

187  See generally id. (emphasizing the major consequences that recent Title VII litigation will have on workplace discrimination for the LGBTQ+ community).


189  See, e.g., Harris Funeral Home Transcript, supra note 148 at 8-14 (demonstrating a lack of understanding of what it means to be transgender and lack of education on the rights of transgender individuals).

190  See generally U.S. EQUAL EMP. OPPORTUNITY COMM’N, supra note 173 (advocating to prevent and remedy unlawful employment discrimination and to advance equality of opportunity in the workplace).
While Canadian law generally provides protection against sexual orientation discrimination, and social acceptance is growing, there are some indications that LGBTQ lawyers face barriers relating to their sexual identity. Although more LGBTQ lawyers are now 'out at work', quantitative data is incomplete, and little is known about the actual experience of LGBTQ lawyers, who enter big firms in Ontario with the hope to advance through the ranks. This article begins to address this gap by providing qualitative analysis of the personal experience of LGBTQ lawyers entering the profession and the extent to which in-firm diversity initiatives shape their experience. Three main themes emerged from the interviews. First, racialized gay lawyers more consciously described their experiences at big law firms as negative and related them to their minority status. Second, the interviews offer insight into the ways in which gays and lesbians are forced to negotiate and perform their identity in a heteronormative workplace. Finally, the insights gleaned from the interviews suggest that the diversity programs devised by law firms may have helped diversify the lower ranks of law firms, but they seem to have failed to address the barriers that equity-seeking groups continue to face in retention and advancement through the ranks. The heteronormative organizational culture, as well as the promotion and compensation structures in firms continue to drive the composition of the leadership ranks and they arguably perpetuate homogeneity.

Text

I. INTRODUCTION

Ontario's legal profession has been grappling with its lack of diversity for a number of years now. The representation of women and racialized minorities in the profession has been the focus of the discussion so far. ¹

¹ Associate Professor, Department of Law & Business, Ted Rogers School of Management, Ryerson, Canada.

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While women comprise over half of the Canadian population, and are now well represented among law school graduates (with more than 50% of those called to the Bar in Ontario), they often pursue careers outside of law firms, and are less likely to become partners when they do join a law firm. Similarly, the proportion of racialized lawyers in Ontario continues to increase (from 9% of the profession in 2001 to 18.6% in 2015). Yet they are more likely to be sole practitioners, in-house counsel or work for the government in comparison to non-racialized lawyers. They are also less likely to become law firm partners or hold other leadership positions.

[42] The Law Society of Upper Canada [LSUC] has worked on several initiatives that aim to address both overt discrimination and implicit bias in the legal profession. These include, for example, the establishment of the Discrimination and Harassment Counsel [DHC] Program, the introduction of the Fair Hiring Practices Guidelines, and the creation of the Equity and Diversity Mentorship Program.

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5 Ornstein, The Changing Face, supra note 4 at 37.

6 Ornstein, Racialization, supra note 4 at 24; LSUC, Snapshot supra note 4; Cukier et al, supra note 1 at 30.


9 Ibid.
Most significantly, in 2012, the LSUC created the Challenges Faced by Racialized Licensees Working Group (WG) with a mandate to identify challenges faced by racialized lawyers (and paralegals) in the practice of law, and consider strategies and best practices to address these challenges. A study commissioned by the WG attempted to identify challenges faced by racialized licensees relating to entry into and advancement in the legal profession. It involved a survey instrument as well as interviews and focus groups.  

The recommendations included in the WG’s final report were approved by LSUC's Convocation on December 2, 2016. These recommendations aim to make the legal workplace in Ontario more inclusive by accelerating a cultural shift, measuring progress, education initiatives and the implementation of support systems.  

When debating these recommendations, the LSUC approved a motion to ensure that “the policies, procedures, measures and initiatives are extended as appropriate to all equity-seeking groups.” This allows for the consideration of challenges faced by gay, lesbian, bisexual, transgender and queer [LGBTQ] licensees as well.  

There are some indications that LGBTQ lawyers face barriers relating to their sexual identity, which would warrant the same type of response offered by the WG’s recommendations. Canadian law generally provides protections against discrimination based on sexual orientation that are more advanced in comparison to other countries. Canadian society has also been relatively receptive to the idea of LGBTQ rights to equality. With the growing social acceptance, more LGBTQ lawyers are now ‘out at work’ and their résumés or social network profiles often reveal their sexual identity. As a result, LGBTQ lawyers are more visible in the workplace than they used to be.  

What does this mean for the ability of young lawyers to enter big firms and advance through the ranks? Available quantitative data is incomplete (for reasons we will explore below), and little is known about the actual experience of LGBTQ lawyers who enter big firms in Ontario with the hope to advance through the ranks. This article begins to address this gap by providing qualitative analysis of the experience of LGBTQ lawyers entering the profession.

Sections II and III of this article provide the context for the discussion by considering the remarkable progress made on the legal protection and social acceptance of sexual minorities in Canada, and the available data on their representation in the legal profession. Section IV considers the steps big law firms have taken to make their organizations more diverse and inclusive. Over the past few years, large law firms have been actively seeking to attract LGBTQ lawyers by modifying their hiring practices and by fostering an inclusive work environment through support for employee groups, through the creation of mentorship programs and through the work of diversity committees. By speaking with gay and lesbian lawyers who work (or have worked) in big law firms, we wanted to learn about their personal experiences in these firms and the extent to which the in-firm initiatives shape these experiences. We discuss the results of these interviews in Section V.

While our sample size was relatively small (with 15 participants), it is the first exploratory study of the lived experiences of gay and lesbian lawyers in big Canadian firms, and the insights they offer are instructive. First,
racialized gay lawyers more consciously described their experiences at big law firms as negative and related them to their minority status. This indicates that belonging to more than one stigmatized social category makes it doubly challenging for gay and lesbian lawyers to create meaningful relationships in a firm that would help them succeed and advance.

Second, the stories we heard offer insight into the ways in which gays and lesbians negotiate and perform their identity in a heteronormative workplace. Heteronormativity, the gender roles it assumes, and the stereotypes it reinforces, could have negative consequences for gay and lesbian lawyers who choose not to perform the role dictated by a heterosexual, patriarchal culture -- that of the 'normal gay.'

Finally, the insights gleaned from the interviews suggest that the diversity programs devised by law firms may have helped diversify the lower ranks of law firms, but they seem to have failed to address the barriers that equity-seeking groups continue to face in retention and advancement through the ranks.

Section VI considers the diversity practices we heard about and evaluates their likelihood of success in light of the interview findings as well as what the available literature on workplace diversity tells us about what works and what does not work. Big law firms' responses to the diversity gap, we argue, may be viewed as the 'instrumentalization of diversity,' namely the advancement of a social cause for the purpose of gaining organizational presence and enhancing the reputation (or identity capital) of the firm. In other words, the signals big law firms have been sending to their relevant audiences (the regulator, prospective employees, and clients) have been successful in the sense that corporate clients who would like to see the diversity gap closing are kept at bay, and the firm becomes an attractive option for top junior gay and lesbian talent. The heteronormative organizational culture, as well as the promotion and compensation structures in law firms, however, continue to drive the composition of the leadership ranks and they arguably perpetuate homogeneity.

II. LEGAL PROTECTION OF LGBTQ RIGHTS AND GROWING SOCIAL ACCEPTANCE

In a relatively progressive Canadian legal environment, the past three decades have seen both a transformation in the legal protection of LGBTQ rights and broad social acceptance of LGBTQ individuals. In 1977, Québec was the first Canadian jurisdiction to prohibit sexual orientation discrimination. Since then, each provincial jurisdiction has passed laws to prohibit workplace discrimination based on sexual orientation. In 1995, the Supreme Court held that sexual orientation constituted a prohibited ground of discrimination under s. 15 of the Canadian Charter of Rights and Freedoms, and in 1998 it forced Alberta to make sexual orientation a prohibited ground in that province. Recently, some jurisdictions have added protection on grounds of gender identity and expression. Canada was also one of the first countries to legally recognize same sex marriage, and

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17 Compare to the U.S., where only 22 states and D.C. have laws prohibiting discrimination based on sexual orientation in the private sector, there is no federal law or Supreme Court decision banning such discrimination, leaving many LGBTQ unprotected. While the Seventh Circuit held that sexual orientation claims may be brought under the sex discrimination provisions of Title VII of the Civil Rights Act of 1964, other courts have consistently ruled the opposite. See Hively v Ivy Tech Community College, No 15-1720 (7th Cir, 4 April 2017); Evans v Georgia Reginal Hospital, No 15-15234 (11th Cir 2017).

18 S. 10 of the Charter of Human Rights and Freedoms, CQLR c C-12.

19 See e.g. s 5 of Ontario Human Rights Code, RSO 1990, c H19 [OHRC].


other laws have been amended to reflect this recognition. Most recently, the federal government has announced that it plans to clear the criminal records of LGBTQ people convicted of consensual sexual activities.  

The legal protections for LGBTQ individuals reflect a broader trend toward a growing social acceptance of sexual minorities, both in Canada and globally. This trend is often explained through cohort analyses where less tolerant generations are replaced by more tolerant ones. This trend is also evident in the workplace. For example, according to a 2011 Angus Reid online survey, 93% of LGBTQ respondents described their employers' overall attitude toward LGBTQ people in the workplace as 'tolerant' and 72% felt that attitudes in the workplace toward LGBTQ individuals have improved in recent years. Still, over a third experienced workplace discrimination and over a quarter are not 'out at work' as they fear the negative consequences. The next Section focuses on the legal profession and shows that, similarly, while protection is provided and social acceptance is increasing, LGBTQ lawyers experience discrimination and face unique challenges.

III. AVAILABLE DATA ON LGBT LAWYERS IN ONTARIO

The LSUC's Rules of Professional Conduct and the Paralegal Rules of Conduct prohibit discrimination and harassment in the legal workplace, including on the basis of sexual orientation. Under these rules, lawyers, paralegals and law firms have "a positive obligation to develop a work environment that promotes respect for the
personal characteristics of all individuals affiliated with the legal profession.” 30 And indeed, as legal protections and social acceptance are growing, LGBTQ lawyers have become more visible (or ‘out’) in the workplace, and their employers are increasingly aware of their obligation to foster an inclusive work environment.

There is some evidence, however, that LGBTQ lawyers in Canada continue to face challenges in the workplace. 31 For example, according to the Law Society of Alberta, 88% of the gay, lesbian and bisexual lawyers and 68% of the heterosexual lawyers, who responded to a survey in 2004, believed that there was discrimination on the basis of sexual orientation in the legal profession. Further, 40% of the gay, lesbian and bisexual respondents had experienced discrimination in the five years prior to the survey. Discrimination took various forms including lack of promotion, poor work assignments, and dismissal. 32 The Diversity and Harassment Counsel in Ontario reported that out of 586 discrimination and harassment complaints against lawyers and articling students between 2003 and 2012, 5% were on the basis of sexual orientation. 33 The LSUC Articling Task Force Consultation Report found that 13.6% of self-identified LGBTQ candidates could not find an articling position in 2011 (higher than the 10% for the total candidates and slightly lower than the 15% for visible minorities). 34

These findings do not provide a complete picture of substantive diversity in the legal profession. A more direct measure would consider the representation levels of LGBTQ lawyers in the profession, particularly in leadership positions. The LSUC has recently started to publish aggregate results of the demographic data collected through self-identification in the Lawyer Annual Report. In 2014, 2.9% of the lawyers, who answered the sexual orientation question, identified themselves as LGBTQ. 35 It went slightly up to 3.1% in the following annual report of 2015. 36

It is difficult to tell whether 3.1% represents a small proportion of the profession in Ontario, when compared to the representation of LGBTQ individuals in the general population. There is no official data available, as sexual orientation and gender identity are not included on the census form Canadians fill out. According to the Canadian Community Health Survey, 1.7% of Canadians aged 18 to 59 reported in 2014 that they were gay or lesbian and 1.3% that they were bisexual. 37 But other reports provide higher estimates ranging from 6% to 9% and sometimes

30 LSUC, Sexual Orientation, supra note 7 at 5.

31 Ibid at 8. An online survey on sexual orientation and gender identity in the legal profession is currently conducted by Queen’s University and the Canadian Bar Association. Results have yet to be released. See Audrey Kobayashi & Kathleen Lahey, "Sexual Orientations and Gender Identities in the Legal Profession -- Invisibility, Disclosure, and Equality", online: <http://law.queensu.ca/news/sogiSurvey>.


35 While lawyers can skip the self-identification question, the response rate for sexual orientation was very high (82.1%). Law Society of Upper Canada, Statistical Snapshot of Lawyers from the Lawyer Annual Report (LAR) 2014, online: <http://www.annualreport.lsuc.on.ca/2015/en/the-professions/snapshot-lawyers.html>.

36 LSUC, Snapshot, supra note 4. Response rate for sexual orientation was very high (81.9%).

as high as 11%. It is also reported that almost half of the LGBTQ population in Canada is located in Ontario.  

Furthermore, upon examining the distribution across all ranks, it is striking to see how only a few of the self-identified LGBTQ lawyers are in senior positions in law firms. LGBTQ lawyers in Ontario are about two to three times more likely to work in education, legal clinics or the government than non-LGBTQ lawyers, and they are less likely to be law firm partners. This annual reporting is done at the aggregate level, although recent developments suggest that in the coming years, these reports may provide a more detailed analysis of firms’ diversity profiles.  

Data available in the U.S. shows that while more positions are held today by LGBTQ lawyers, these rarely include positions of power and leadership. In 2016, 2.48% of lawyers reported in the National Association for Law Placement [NALP] Directory of Legal Employers were openly LGBTQ. Representation rates have been low but slightly increased over the years; the numbers have more than doubled since 2002 (from just over 1,100 to 2,431). Yet, most of the increase has occurred among associates. While among associates 3.24% were LGBTQ, among partners it was only 1.89% in 2016. Similar to the LSUC report on Ontario lawyers, recent LGBTQ graduates in the U.S. are reportedly much less likely to take a job in private practice and much more likely to take a job with a public interest organization. Some have suggested that in anticipation of discrimination, LGBTQ individuals have lower initial career expectations, espouse more altruistic work values compared to heterosexual individuals, and make career choices based on these values.  

One of the main reasons to publish the data was to spur change. Whether the publication of data in the U.S. has been effective in terms of promoting more diversity among firms that did not perform well in previous reports is debatable. Although the NALP has been publishing data 1993, persons of colour, for example, are still significantly underrepresented among lawyers and even more so among partners. The progress made in the past two decades has not been significant. The LSUC seems to agree that “transparency about firm representation

38 See Evra Taylor, "Is Canada’s Lesbian, Gay, Bisexual and Transgender Community Worth Pursuing?" (9 July 2012), online: <http://www.marketingmag.ca/wp-content/uploads/2012/06/LastQ_LGBT_0612.jpg>

39 In 2015, 9.6% of LGBTQ were law firm partners compared to 16.6% of non-LGBTQ, 3.6% were in legal clinic compared to 1.2%, 22.4% were in government compared to 13.1%, 2.9% were in education compared to 1.3%. See LSUC, Snapshot, supra note 4.

40 See LSUC Committee, Report 2016, supra note 11 at 91 discussed in the introduction above.


44 See e.g. the recent statement of NALP Executive Director on recent findings: “These national benchmark data are helpful in highlighting the overall progress, or lack thereof, in achieving greater diversity among the lawyers working in U.S. law firms...” National Association for Law Placement, "2016 NALP Report on Diversity in U.S. Law Firms: Press Release" (January 4, 2017), online:<http://www.nalp.org/uploads/2016NALPReportonDiversityinUSLawFirmsPressRelease.pdf>. 

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assists in increasing representation within firms.” Yet the argument often heard is that the LSUC cannot directly regulate firms or other legal organizations and therefore cannot require mandatory reporting.

Several organizations, including the Canadian Bar Association and the Ontario Human Rights Commission, have tried to encourage law firms to measure their diversity and collect data on their demographics, with limited success. The Canadian Bar Association has been working with the Canadian Institute for Diversity and Inclusion on tracking the numbers of equity-seeking groups in law firms across Canada (Diversity by Numbers: The Legal Profession). They have finally released their first report in 2016, yet like the reports of the LSUC, it only provides aggregate results.

When Canadian law firms choose to collect demographic data, they do so internally and do not share the results. Even when they partner with external organizations, the information remains confidential. For example, some firms have partnered with Pride at Work Canada and participate in its LGBT Inclusion Index, which was established in 2013. This index is an online benchmarking tool, which helps organizations (including law firms) to review and assess their workplace practices and policies and make their workplaces more inclusive to LGBTQ employees. Each company makes a confidential submission and receives individual comprehensive feedback and strategy support based on its results. While the index may provide an external assessment and support for companies wishing to improve their performance, the score and results of each company remain confidential. The reluctance to collect and publish more specific data could be due to concerns about manipulating the numbers and the impact of blaming and shaming on law firms’ reputation.

But as Lyon and Sossin argue, data collection and


48 Developing Strategies for Change, supra note 46 at 29.


50 The first report does not cover sexual orientation nor provides data on a firm-by-firm basis. It does reveal that both women and racialized minorities are underrepresented overall and in high-ranking roles. See Canadian Centre for Diversity and Inclusion, Diversity by the Numbers: The Legal Profession (30 November 2016), <http://www.ccdi.ca/attachments/DBTN_TLP_2016.pdf>.


52 Pride at Work Canada, “LGBT Workplace Inclusion Index”, online: <http://prideatwork.ca/programs/lgbt-workplace-inclusion-index/>.

53 Lyon & Sossin, supra note at 45 at 109-10.
publication may be a crucial step toward the establishment of better recruitment and retention practices and strategies.  

IV. DIVERSITY PRACTICES IN BIG LAW FIRMS

The limited data available reviewed above suggests that LGBTQ individuals may be underrepresented in the Ontario legal profession, and that they are less likely to advance to leadership positions in law firms. To understand the nature of the barriers that equity-seeking groups face in big firms, it is useful to consider what efforts are made by law firms to diversify their workforce, particularly through hiring and retention practices and their impact on individuals who may not fit a particular mold.

While discrimination is commonly viewed as wrongful and forbidden, diversity tends to raise more controversy. Canadian employers, big law firms included, understand that it is unlawful to refuse to hire or promote a qualified candidate on prohibited grounds. More controversial is the idea that employers have a responsibility to actively pursue measures that would result in a diverse workforce.  

In this view, it is not enough to prohibit the intentional conduct of excluding members of a protected group, thereby providing equal opportunity to succeed. Employers who are truly committed to substantive diversity must also focus on the prevailing conditions, which prevent the hiring, retention and advancement of individuals from underrepresented groups.

At first glance, it seems that most large law firms in Canada have embraced a progressive view of diversity. Many declare their deep commitment to equity issues on their websites. They also often take pride in their diverse and inclusive environment and their engagement in numerous diversity initiatives and events. Most large firms explicitly refer to the LGBTQ community when discussing diversity. Many have established diversity committees, affinity groups, and partner with external diversity-related organizations. Most big firms also offer special diversity training to their workers, boast about progressive parental benefits policies, and offer mentoring programs for junior lawyers.

In addition to attracting a diverse and talented workforce, these signals also serve as a response to demands from major corporate clients that firms engage in activities that promote diversity.

Most notably, several years ago a group of general counsel in some of Canada's largest companies came together to promote diversity in the legal profession. Representing some of the country's largest companies, Legal Leaders for Diversity and Inclusion (LLD) declared their willingness to lead the charge by working with big firms to diversify their ranks. Big firms were listening because the LLD network represents clients that have a major impact on the legal services they provide.

In response to pressures by the LLD to tackle diversity issues, sixteen of the largest law firms in Canada formed in 2013 the Law Firm Diversity and Inclusion Network (LFDIN) and signed the Statement of Principles. These law firms...

54 Ibid at 107, 116-23.


56 Ibid at 1142.

57 This information can be found on the websites of the leading law firms listed in Lexpert Directory, "Canada's Largest Law Firms", online: <http://www.lexpert.ca/500/canadas-largest-law-firms/>.


59 Legal Leaders for Diversity and Inclusion (LLD) is a group of Canadian General Counsel which aims at creating a more inclusive legal profession and supporting diversity initiatives. See: online:<http://legalleadersfordiversity.com/>. 

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firms agreed, among other things, to share ideas on how to promote diversity, to work with the LLD and to evaluate their own efforts to diversify. 60 Since then, more law firms have signed the Statement. 61 And an increasing number of firms now have diversity committees, which had initially focused on gender issues and gradually expanded to other equity seeking groups such as racialized minorities, people with disabilities, and more.

A review of law firm management practices based on publicly available information, however, suggests that these initiatives have largely failed to shift the conversation from general efforts to increase diversity appearance, specifically at the entry-level, to tackling challenges to substantive diversity across all ranks in a meaningful way. In an effort to recruit and retain the best and brightest, law firms claim to base their hiring decisions on merit, regardless of any personal characteristics. 62 But this insistence on evaluating lawyers on the basis of their individual merit, what Pearce et al termed "difference blindness standards", poses a significant barrier to substantive diversity. 63 It may help reduce intentional discrimination, but not implicit and institutional bias, because it creates the illusion that lawyers are accountable to neutral standards and that success or failure depends on the individual rather than on structural constraints. 64 As Pearce et al argue, "the work of lawyers, like that of all workers, is grounded in relationships;" and therefore law firms should not overemphasize individual outcomes "without paying attention to the surrounding interactional and institutional processes that produce them." 65 That is, it is not enough to remove explicit barriers by prohibiting comments or conduct which intentionally exclude equity-seeking groups, it is also crucial to examine the prevailing conditions, practices, and policies which inhibit their entry into, and participation in, the organization. 66

Consider the hiring practice of law students, for example. The law firm recruitment cycle in Ontario typically begins with applications for a summer job for students. A successful summer job at the end of second year in a big law firm often leads to an articling position at the end of third year, and an opportunity to be hired as an associate upon completion of articles. In Ontario, the LSUC developed extensive procedures that govern the recruitment of students for summer positions through on-campus interviews [OCIs]. 67 Interviews at each stage of this process do not attempt to assess knowledge or skills; they tend to be conversational and casual, for the purpose of determining whether the candidate would be 'a good *[50] fit'. 68 Candidates meet with different lawyers at the


63 Pearce et al, ibid.

64 Ibid at 2412-13, 2434.

65 Ibid at 2413.


67 See 2018 Toronto Summer Student Recruitment Procedures, online:<https://www.lsuc.on.ca/licensingprocess.aspx?id=2147500218>.

firm, are interviewed by a student hiring committee, and get to mingle with others in various settings, including sport bars or restaurants. As Gray puts it, "[s]electing the students with the best marks or résumés is not enough: Confidence, poise, and the ability to fit in with a firm's culture are just as important to success." 69

One law student described this process as an "idiosyncratic game of cloak and dagger, and a 'make or break' moment for those aspiring to a career in big law." 70 He conducted a survey of his class (to which two thirds responded) and found that the majority of the students found the process very stressful. Of the students who reportedly received at least one offer from a big law firm, zero were gay or lesbian candidates. In his view, the problem lies in the search for good 'fit' with the firm culture which is prone to unconscious biases. 71 Some additional insight into recruitment practices was offered by our research participants, as we discuss later in this article. 72

Extensive empirical studies have shown that subtle and unconscious bias in the workplace is pervasive and it can significantly influence decision-making processes. 73 Since it is unconscious, even well-intentioned people are prone to discriminate against others in the workplace. 74 Law firms, as shown in the American context, are not immune to implicit bias concerns. Implicit bias is often embedded in their daily practices, policies and corporate culture. Despite their good intentions and general commitment to equality and diversity, law firm partners, who are still mostly white heterosexual men, often bring their biases to their workplace and feel most comfortable working

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69 Gray, ibid.
70 Motala, supra note 68.
71 Ibid.
72 The issue of "fit" was also identified as a significant barrier in the context of racialized lawyers both in the hiring process and in opportunities for advancement. See Developing Strategies for Change, supra note 46 at 12-13. See also Lauren A Rivera, Pedigree: How Elite Students Get Elite Jobs (Princeton: Princeton University Press, 2015), who investigated the hiring process in U.S. law firms (among other "highest-paying entry-level jobs") and documented the numerous ways in which "criteria" and "metrics" were used to filter students based on their parents' socioeconomic status.

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with and mentoring people who are most like them, leaving others with less opportunities to develop the skills and relationships required to become partners.  

[51] The case of sexual minorities is even more complex and evasive than that of other marginalized groups, as issues such as disclosure, identity and classification pose unique challenges.  

For example, a recent study by the Canadian Centre for Diversity and Inclusion, which included an online survey of individuals (including heterosexual) about the workplace experience of LGBTQ across Canada, found that heterosexual respondents did not understand the significance of being ‘out at work’, perhaps because they are already inadvertently out with their identity as they wear a wedding ring or have family photos on their desk and their identity is considered the norm in our society. By contrast, for LGBTQ respondents, disclosure at work is an important matter but is much more challenging. If the workplace environment is not inclusive, they might not feel comfortable disclosing important aspects of their identity.

Unfortunately, there has been very little discussion on how to enhance LGBTQ inclusion in the legal profession in Canada. In Ontario, the LSUC has recently issued a Guide recommending that law firms adopt a variety of policies and procedures to eradicate LGBTQ discrimination and enhance diversity. These include, for example, workplace policies and practices relating to washrooms, dress code, name change, medical and leave benefits and privacy and confidentiality.  

The LSUC has also worked on several initiatives to promote diversity in the workplace, more generally, which may have impact on LGBTQ issues.  

It is yet unknown to what extent these policies are being used by law firms and whether they are effective. Much of the research conducted on American corporations has not found diversity training and other diversity initiatives to be very effective, unless they included some form of structural and systemic changes in the organization's approach.


78 LSUC, Sexual Orientation, supra note 7 at 20.

79 See text accompanying supra notes 7-9.

80 See e.g. Steve Kolowich, "Diversity Training is in Demand" (2015) 62:13 The Chronicle of Higher Education A6 (training programs on racial diversity may change how people think about racial differences but cannot change their real attitudes); Tessa L Dover, Brenda Major & Cheryl R Kaiser, "Diversity Policies Rarely Make Companies Fairer, and They Feel Threatening to White Men" (4 January 2016) Harvard Business Rev (diversity initiatives did not convince minorities that companies would treat them more fairly); Joan F Marques, "Colorful Window Dressing: A Critical Review on Workplace Diversity in Three Major American Corporations" (2010) 21:4 Human Resource Development Q 435 (many American corporations are going out of their way to post diversity statements on their websites and to collect diversity-based awards from numerous minority-promoting organizations, but they are not actually so diverse in terms of their demographic composition); Alana Conner Snibbe, “Diversity Training Doesn't Work” (2007) 5:1 Stanford Social Innovation Rev 15 (diversity training might not be effective if it does not include a more systemic and structural view on discrimination).
As noted above, the practice of hiring law students (which is a significant, if not the sole entryway of future junior lawyers into big firms) raises some concerns regarding structural barriers that could disproportionately impact candidates who may not fit a particular mold. What we know about the pervasiveness of bias and the limited effectiveness of training to reduce it suggests that these barriers may continue to impact the experience of junior lawyers who successfully entered the firm.

While hiring practices are somewhat transparent, much less is known about the practices relating to advancement within firms. Information on retention and promotion practices is not publically available [*52] and even less is known about the impact of big firms’ organizational culture on law students, articling students and junior associates hoping to advance within the firm. The research commissioned by LSUC offered some insight into the experiences of racialized licensees in the profession. It documented challenges reported by racialized lawyers in three areas. The first was discrimination and stereotypes, specifically the assumption by legal professionals that racialized lawyers are less competent, skilled or effective in their work. Almost half of the racialized respondents felt that they had to prove themselves competent at work more than non-racialized colleagues. The second concern raised relates to cultural difference, and the sense that the quest for the ‘best fit’ for a job often translates to non-racialized identity. Thirdly, while respondents acknowledged that most firms have formal mentoring programs, they indicated that more informal, organically developed mentoring relationships are much more crucial for the success of junior lawyers in firms, and racialized lawyers felt that they are less likely to have access to advice and guidance from senior colleagues than non-racialized colleagues. 81

The perspective of LGBTQ lawyers has not been documented in the same way, and we were interested to learn about the impact sexual orientation and sexual identity may have on the lived experiences of lawyers in big firms. Against the social and legal backdrop described earlier, where growing protection and acceptance of sexual minorities is evident, we wanted to hear from individuals who have worked in big firms over the past ten years, in order to understand whether from their perspective, there are barriers to entry and advancement that are unique to LGBTQ lawyers. The insights they offered are discussed in the next Section.

V. THE EXPERIENCE OF GAY AND LESBIAN LAWYERS IN BIG FIRMS

Our data derives from research involving fifteen gay and lesbian lawyers who work (or have worked) in twelve of the largest law firms in Ontario (all have 100 or more lawyers employed). 82 The Canadian Bar Association’s interest group SOGIC (Sexual Orientation and Gender Identity Community) was the first point of contact in our recruitment efforts. 83 After hearing from several of their members, we used snowball sampling to increase the number of participants. We also contacted diversity committees in various big law firms, as well as the organization Pride at Work Canada and similarly asked them to circulate our request to participate through their networks.

The fifteen lawyers included in this study represent a broad spectrum of experiences and backgrounds. Their level of experience ranges from two years to several decades, with eight who work (or have worked) as associates, and seven who are currently partners at a big firm. Their areas of practice are diverse, and some continue to work in big firms while others have left their firms, for various reasons. Thirteen of them self-identified as gay men, and two as lesbian women. We were unable to find participants from other members of the LGBTQ community. Therefore, while the insights offered in our interview findings have relevance to all sexual minorities (and perhaps members of other equity-seeking groups more broadly), they are limited to the experience of gay and lesbian lawyers. The discussion that follows will thus refer specifically to these identity groups rather than the broader acronym.

81 Kraft, Willis & Charles, supra note 10 at 10-16; LSUC Committee, Report 2016, supra note 11 at 103-04.

82 We consider them “Ontario firms” for the purpose of this article even though they are all national firms. While the observations made by participants may apply to firm practices across its offices, their lived experiences are limited to the Toronto office of each firm.

83 On SOGIC, see: online: <http://cba-mb.ca/Sections/SOGIC>.
The interviews began with an invitation to the participants to describe their professional journey, the process of applying for their first law job, and their experience in the firm. In follow up questions, we tried [53] to explore together with participants their understanding of the firm culture, and the workplace sensitivities toward sexual minorities. We specifically wanted to know whether they disclose their sexual identity at work, whether they experienced any challenges as gays and lesbians, and if they believe sexual identity can impede a lawyer's success in big firms. We also asked them what their firm is currently doing to enhance LGBTQ diversity, whether they find these measures effective and what in their view can be done to enhance the diversity of firms. To protect participants' privacy, the discussion below uses pseudonyms and the transcripts are coded for confidentiality purposes.

While all participants thought that this study is very important, the majority began by stating that in their view, being gay or lesbian on Bay Street (where many Toronto big firms are located) today is a "non-issue." They described their experience as very good and they thought that their sexuality had no material impact on their careers ("I was lucky" or "fortunate" were phrases we heard often). 84 The narrative of coming out to colleagues in the firm was also largely positive, where initial anxiety was followed by surprise at how accepting or indifferent were the reactions of supervisors or colleagues ("the biggest yawn"). 85

Research suggests that being out at work is very important for LGBTQ individuals, and most of the lawyers we spoke with agreed with this observation. 86 The act of coming out was an important aspect of our participants' lived experiences in their firms. 87 They explained that this is especially important in large law firms where lawyers work long hours in close collaboration with colleagues. 88 Some participants described coming out as "liberating", 89 and the feeling of working in such a demanding environment without being able to speak freely as "suffocating." 90 Some expressed a concern that the inability to talk freely might have the potential to negatively affect the performance of LGBTQ lawyers and their capacity to develop personal relationships at work, which are crucial for their success. 91

While observing that large law firms are by and large conservative environments, some participants also viewed law firms as a relatively good place for gay and lesbian lawyers. 92 Several participants shared stories about an overall inclusive environment at the firm, where they felt comfortable having photos of their partners and children displayed in their office, for example, or bringing spouses to work events. 93 They generally felt that there is more social acceptance today than in the past, especially in a diverse city like Toronto, 94 and that over the past two decades, students applying for law firm positions have been flagging their sexual identity explicitly on their resumes. Some candidates even asked related questions on the work environment during their job interviews. 95

84 R1, pp 2-3, 5; R3, p 12; R5, pp 17-18; R6, p 3; R7, pp 4, 10; R9, p 11; R10, p 13; R12, p 6; R13, p 2.
85 R1, pp 3-4; and also, R6, p 3; R8, p 24; R11, p 3; R13, pp 3-4.
86 See text accompanying supra note 77. While the majority of participants in this study agreed that being out at work is important, several believed that if a lawyer does excellent work, discretion would not affect his or her promotion. See R3, p 12; R5, p 15; R7, p 8.
87 R4, pp 4-5; R5, pp 17-18; R6, p 10; R8, p 3; R10, p 4; R12, p 5; R14, p 6; R15, pp 3-4.
88 R5, p 15; R7, p 8; R8, p 8; R9, p 17; R12, p 6.
89 R1, p 3; R4, p 20; R12, pp 4, 6.
90 R8, p 24.
91 R3, p 12, R5, p 15; R9, p 17; R14, p 7.
92 R1, p 12; R6, p 6; R8, p 6; R9, p 5; R10, p 25; R14, pp 3, 15; R15, p 3.
93 R6, pp 5-6; R9, pp 10-11; R10, p 6.
94 R1, p 4; R3, pp 12-13; R6, p 6; R10, p 24; R11, p 4; R12, pp 14-15; R13, p 4; R15, pp 3, 5-6.
95 R1, pp 4, 15; R2, p 4; R4, p 11; R9, pp 7, 17; R11, pp 3, 10; R13, pp 4-5; R15, p 4.

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A. Challenges at the Intersection of Identities

Four of the fifteen lawyers we interviewed self-identified as racialized. Their personal experiences provide insights into the complex ways in which socially constructed categories of identity interact with each other. Their stories may be viewed as examples of the way in which belonging to more than one stigmatized social category results in more pronounced feelings of 'otherness' in the workplace, especially in big law firms, where success often depends on one's ability to fit into a dominant culture.

Nader, who worked as an associate in a big firm, recalls that it was one person at the firm who created a hostile work environment that drove both racialized and LGBTQ lawyers away from the firm. It seems that the will to control such behaviour by a powerful figure at the firm was limited:

*People would not necessarily stand up to him and there was a lot of turning a blind eye to what was being said. A lot of these comments that I mentioned to you were being said to me in front of other partners; including in elevators with other people and everyone else in the elevator just aghast as to what they were hearing.*  

The comments Nader was referring to were not homophobic; they were directed at his ethnic heritage, but he also had knowledge of anti-*gay* sentiments expressed by the same person on other occasions. He was therefore apprehensive about coming out at the firm, worrying that he would be under attack for yet another reason (*"If people were to find out at my former firm, I'd be mortified."*). In other words, quite far from being a 'non-issue,' Nader's *gay* identity has defined his experience as a young lawyer, and he views it as inseparable from the other components of his identity:

*I can't even tell you all the things I've been through personally in my own experience; whether it be a member of the South Asian community, whether it be a member of the LGBT community, whether it being a Muslim. We've been pushed down and pushed down that we do need some assistance to get into the higher ranks.*  

Nader is now a partner at a different firm, where he feels the culture is very different. A second illustration of the singular impact a handful of senior people at the firm could have on the experience of junior lawyers was provided by Aaron, who worked at a big firm and described the head of his practice group as one of the 'dinosaurs' at the firm:

*I heard overtly racist comments from white partners at that firm and there's a huge gulf between the appearance they want to put out and the reality. These dinosaurs...there is nothing you can do about them when you're in a large firm. These men -- and I'm using this word consciously, these men who are major rainmakers at firms; there are no rules that apply to them. You can have the most beautifully drafted sexual harassment and diversity policies but these men who are really important rainmakers at these firms... are so important -- the money they bring in is so important, no rules apply to them.*  

Aaron left this firm for several reasons, one of which was the untenable relationship with the 'dinosaur' he worked for at the firm. In reflecting on his experience, he remembers the hostile behaviour as being a *'substantial' factor in his decision to leave, whereas the 'primary' reason was the realization that the long work hours and the lifestyle dictated by this area of practice were not suitable to him. Interestingly, however, his next move was to another large firm, in the same area of practice (and comparable workload).  

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96 R12, p 4.  
97 R12, p 11.  
98 R5, pp 2-3.  
99 The hindsight rationalization may be influenced by his choice to leave private practice altogether, which came several years later.
The compounding effect of race and sexual orientation was also evident in the case of Sam, who believes he was not able to secure an articling position in several firms where he was interviewed as a student because he did not fit the mold:

I was put in front of men much like that, who were white, able-bodied, heterosexual males who wanted to shoot the shit with me because these were not structured interview processes and there was no way for me to connect with them in any meaningful way based on their particular interest and I think that played a role. 100

After eventually joining a big firm in Toronto, Sam spent several years there before leaving. He was passed over for promotion to partner despite being one of the top performing associates at the firm. He describes exclusionary practices which impacted his ability to socialize with colleagues at the firm and resulted in biased work allocation and denial of mentorship opportunities:

[T]he boys’ club happened outside of the firm because they became friends through this. There were now poker nights, there were now trips to Buffalo for football games and there were all sorts of social opportunities that were denied. That's not a LGBT thing; that's a broader minority and marginalized group thing. I don't think that my experiences are necessarily specific to me as a gay man. I think they are more specific to people who don't fit the mold. 101

Sam's reflection on the reasons he left that firm, similar to Aaron's, explicitly acknowledges his efforts, at the time, to rationalize his departure (to himself and to others) as a 'lifestyle choice,' given the challenging work realities of a junior associate:

The reality with a lot of Bay Street law firms is that we are all service lawyers except for a few rainmakers. So, you work incredibly long hours to create something that isn't your own. That was becoming increasingly challenging for me and that was what I presented. The reality was that I felt, in a lot of ways, that I have fallen through the cracks. I didn't have an advocate at the firm and as a result, my career was going to suffer. That was indirectly related to my sexual orientation. 102

After leaving the firm, Sam became a partner in a smaller firm. While he recognizes that unlike 15 years ago, when his career started, firms today make conscious efforts to welcome diverse cohorts of articling students and associates, in his view the challenges remain with retention and promotion because of the persisting social hierarchies within the firms. Nader, Aaron and Sam started their legal careers between 10 and 15 years ago. Robert, another gay lawyer who identifies as racialized, has a more recent experience. He began working as a summer student about 7 years ago, in a firm he describes as 'old school.' The conservative work environment, although not overtly unfriendly or hostile to employees from diverse backgrounds, made him uncomfortable ("you couldn't bring your entire self to work, I guess… I never really knew where I stood in terms of what I could say about my personal life."). 103 For this reason, he decided not to pursue a position with this firm after graduating. Robert is now a senior associate at another large firm. To him, the barriers to advancement in the legal profession are more about race than sexuality:

I personally find it much harder to advance as a person of colour than I do as a gay man on Bay Street. Based on what I've seen, I think white, gay, men do quite well; people of colour, of any sexual orientation, or gender identity… I find people of colour face greater barriers. So, as a gay man of colour, I find it sometimes a bit rich, when white gay men complain about advancing. 104

100 R2, p 4.
101 R2, p 9.
102 R2, p 2.
103 R8, p 4.
104 R8, p 2.
In his conversations with friends who are gay white lawyers, Robert says, he hears that they do not see any reason why they could not succeed in their firms, sometimes at the cost of some degree of self-censorship (namely, passing as 'straight'). For him, however, the visibility makes his 'otherness' experience unavoidable:

[O]n my side, I can talk about my dating life -- my boyfriend -- quite openly. It's more the other things that I find make me the 'other' -- like, being Chinese and I grew up in a working-class household. Those are the barriers, I feel, that make me different from the [average] partner; it's not me being gay. 105

Later in the conversation Robert explained that the statement "it's not me being gay" is not meant to imply that his sexual identity is not a potential barrier. But while racial identity cannot be concealed, 'gayness' may be regulated:

[Y]ou can calibrate your degree of 'gayness' based on whom you're with, right? I actually do this. When I'm with whom I know to be a really kind of 'bro's bro' partner -- and I do this and there's quite a few of them, I do calibrate my gayness. I become more 'bro'. 106

Robert is on a partnership track at the firm and he is hopeful about his prospects of making partner, although he is also acutely aware that out of the dozens of partners at the office, only a few are of Asian heritage. A white associate (straight or gay), he believes, has better opportunities for advancement in this firm because he could better connect with a senior partner, who comes from a similar background. He sees around him (white) colleagues, who are able to forge meaningful relationships with influential partners. These mentoring relationships result in opportunities to work on significant files, frequent introduction to important clients, and they consequently better position the associate when he is up for partnership.

[*57] While our sample of lawyers in this study is quite small, the fact that four out of the five negative experiences shared with us were by gay men who are also racialized may not be coincidental. It confirms the research on the effects of intersectionality in the workplace and it suggests, in our context, that the combined impact of race and sexual orientation could be doubly damaging in a predominantly white, heteronormative environment such as a big law firm. We would expect gender and sexuality to have a similar compounding effect, but given the low number of female participants in our study we were unable to draw similar conclusions. 107

B. Navigating through a Heteronormative Workplace

David worked in a large Toronto firm for a decade, advancing from the associate level to a non-equity partnership. Reaching the next level (of equity partner) required the kind of relationship building with senior colleagues that was made difficult by the culture of the firm. David was out at work to close colleagues but had to use caution when interacting with others. He first described his experience in the firm as an outsider, mostly because the lifestyle did not suit him:

[N]ot everyone wants to work in a law firm. You have to have certain personality to work in a law firm for a long period of time. I came to the realization that fundamentally -- it's not because I was LGBT or not -- it was because it wasn't what I wanted to do. 108

Five years ago, David left the firm to work as in house counsel in a Fortune 500 company, where he finds the organizational culture much more inclusive. Upon further reflection on how different the work environment in the law firm was, he observed:

The fact that you're different and that you feel different and also probably you don't share as much as someone who would have a family and a wife who just had kids and all that. You tend to filter things so you're not as free

105 R8, p 3.

106 R8, p 31.


108 R14, p 14.
with details about your own personal life, and you're always a bit guarded so it affects your behaviour. I've never really been a guy's guy; I don't like going to hockey games, sports, and all that...it's just who I am. But that's not a LGBT thing, it's just who I am. 109

While repeatedly separating the outsider experience from his sexuality, the exclusionary practices David experienced created a culture he believes was not friendly to all women and to men who are not 'guy's guys'. He described a lounge in the firm, where partners would socialize and engage in 'boy chat':

Women would come in and never felt really comfortable and LGBT as well. It was the weirdest thing. I've never seen that even in high school... I would go there because I had to but it was like taking bad medicine. 110

[58] David, like other lawyers we spoke with, describes an organizational culture that is not characterized by overt discrimination against women or explicit homophobic actions. Rather, they describe a culture that maintains a heteronormative order, where gender roles and sexuality are defined in complex ways. 111 The concept of heteronormativity is useful in understanding the institutional and rhetorical effects of practices such as the 'lounge' described by David. Whereas homophobia manifests itself through direct discrimination (and can thus be outlawed), heteronormativity operates in more subtle ways and it is therefore much more challenging to address:

The concept of heteronormativity reveals institutional, cultural and legal norms that reify and entrench the normativity of heterosexuality. In other words, 'heteronormativity' tells us that heterosexual desire and identity are not merely assumed, they are expected. They are demanded. And they are rewarded and privileged. 112

'Heteronormativity' captures two related but distinct aspects of a heteronormative workplace: It is both patriarchal (namely, male-dominated) and it renders other sexualities marginal. The impact it has on the experience of both women and sexual minorities is particularly pronounced in law firms, where relationship building is so critical for success, and therefore socializing practices with colleagues and clients can make a real difference to lawyers, who try to work their way to the upper ranks.

A heteronormative workplace is where heterosexuality is presumed, and where everyone, straight or gay, is judged against the 'normality' that gender and sexual norms dictate. 113 The need to constantly perform the act of coming out to colleagues and clients (because of the presumption of heterosexuality) was a common experience of the gay and lesbian lawyers we spoke with. Several of them contrasted the 'straight' way in which they had to carry themselves at work and a flamboyant behaviour (described as 'flaming' or 'out there') they would avoid because they thought it would not be acceptable on Bay Street. Recall Robert's comments about how he 'calibrates gayness' and matches it to his audience. His concern was that performing his sexual identity could make it as visible as his ethnicity, and would therefore come at a cost. Such passing into 'normality' was a common theme in the comments we heard. 114

The heteronormative workplace is also where (heterosexual) men assume the role of breadwinner in their household and are typically not involved in child rearing. This allows them to spend long hours at the office and ambitiously work their way up to leadership positions. Sam, who we met earlier, believes that in this context, gay men could have an advantage in a work environment that rewards complete devotion to the firm:

109 R14, p 7.
110 R14, p 15. Comments, such as law firms are still often run like boys' club, were also made by R2, pp 2-3, 9; R4, p 16; R7, p 9; R10, p 19; and R11, p 9.
111 Where friendships are formed over a glass of beer, in a sports bar or at a golf retreat (R6, p 10; R8, p 22) and where conservative clients or the traditional corporate culture of law firms impacts one's ability to form relationships and get work assigned (R1, pp 5-6; R2, pp 3-4; R4, p 16; R6, p 10; R10, p 14; R15, p 9).
114 As David noted: "You don't want to rock the boat and you don't want to draw attention to yourself" (R14, p 6).
The reality is, we are still unlikely to have children. A lot of us have a chip on our shoulder and have something to prove. We are the new white, able-bodied heterosexual male. We are prepared to give up everything for our careers because we want to prove something to the world, and so we tend to be very high performing.  

But an increasing number of gays and lesbians are now partnered and have children. In fact, part of the normalizing process of lesbian and gay individuals and their induction into the heteronormative culture began with the decoupling of homosexuality from sex, and in their inclusion in heterosexual social institutions such as the family. Some of our participants were acutely aware of this normalizing process:

Back in the 70s, when people thought of gay men, they thought gay sex... but now it's much more: you're gay because you have a gay boyfriend at home... I think it helped advance [gay men]. That's why I feel on Bay Street, white gay men can advance because it's no longer about them being 'perverts'. It's about 'They're just like me!'  

The political project of the LGBTQ movement is often criticized because its rights-based fight for equality is centered on a 'sameness' argument, which has the potential to negate difference rather than accept it. This movement advances the argument that LGBTQ individuals should have the same access to core institutions in society as heterosexuals, because they seek the same ideals of family and intimate life. The package of rights and responsibilities may include pension benefits, parental rights, inheritance recognition, joint income benefits, and the most recent achievement of the movement is the growing recognition of the right to marriage. In different ways, these efforts to integrate gays and lesbians into society arguably reinforce existing gender and sexual values as the preferred way of life.

Emma, a lesbian woman, who is a partner in a large firm, found a way to both come out and bond with male colleagues and clients who, like her, have a wife at home:

We will be in a meeting and say, 'I got to get home or else my wife's going to kill me.' And I'll say, 'Oh, me too.' And suddenly we have this really weird kind of connection where you're telling wife stories and they really get it, and they suddenly really get you.

Since her spouse is the one who carried their children and was the primary caregiver, Emma was able to assume the role expected of a successful lawyer in the firm -- that of the heterosexual male, who is relatively unburdened with familial obligations. In one situation, Emma recalled, a client was 'greatly relieved' to learn that while she is expecting a child, she is not the one carrying the baby and through this, he understood that there will be no 'interruption' in the work on his file. In these ways, Emma feels she has an advantage over women who find it more challenging to 'connect' with male colleagues. If she were straight, her male colleagues and clients would have assumed that her family obligations come first ("Oh no, I shouldn't keep you at this meeting because your husband's going to be angry!"). These oppressive gender expectations, in turn, could have real consequences for women in terms of work allocations and ultimately, advancement in the firm.

Emma's story may be viewed as an example for the ways in which the presumption of heterosexuality in law firms is being successfully challenged and undermined by lesbian and gay lawyers. These acts of coming out and

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115 R2, p 4.
117 R8, p 31.
118 For a review of critiques see Diane Richardson, "Locating Sexualities: From Here to Normality" (2004) 7:4 Sexualities 391.
119 R9, p 14.
120 R9, p 14.
121 R9, pp 14-15.
'connecting' with straight men on the basis of familial expectations seem to subvert gender roles while working within the terms of heteronormativity: Every time Emma comes out to colleagues or clients, she challenges their assumption that she is a straight woman, as well as the assumption that as a woman, her commitment to the firm has real limitations because of family obligations (childbearing, child rearing) which render her less 'valuable' to the firm and to its clients. As others have noted, however, such acts of subversion may shore up heteronormativity as much as they are likely to challenge it. 122 And in our example, while Emma and many other LGBTQ lawyers who formed families may question heterosexual assumptions about gender roles, the underlying norms continue to prevail, resulting in little progress.

The stories of gay lawyers we encountered earlier demonstrated the challenges of sexual minorities in a hyper-masculine work environment: their experience has taught them that you are more likely to succeed in the firm if you act as a 'guys' guy' or a 'bro.' Their comments reflected concerns about the mismatch between the characteristics associated with 'flaming' gay men and the heterosexual masculinity associated with professional success. Calibrating 'gayness' was seen as crucial, even in seemingly gay-friendly firms, in order to survive and thrive. Emma’s story suggests that in a similar fashion, lesbian lawyers navigate through the heteronormative workplace by performing their identity in a manner that distances them from stereotypes associated with women. 123 One such stereotype is the belief that women are not sufficiently committed to the firm, because they are likely to work fewer hours, and could not bill the same number of hours as their male counterparts. This stereotype has real consequences for advancement prospects. It may lead rational decision makers within the firm to systematically prefer male associates to female lawyers. And the stereotypes tend to be a self-fulfilling prophecy. Because of the stereotype, male associates will likely receive better assignments, superior mentorship, and advanced training. Over time, male associates will have more and superior opportunities to become better lawyers, rationalizing the biased decisions against women attorneys. 124

The impact of such gender stereotypes is particularly pronounced given the prevailing professional ideology in large law firms. The growing commercialization of legal services and the fierce competition between firms, in combination with the economic downturn of the late 2000s, has led firms to adopt an 'around-the-clock' service mentality to clients and this resulted in an expectation from both partners and associates to demonstrate complete loyalty and devotion to the firm. 125 This mentality, Eli Wald argues, became part of the definition of excellence in hiring and promotion practices, and it now forms a part of what is a 'hypercompetitive meritocracy' governing large law firms. 126

C. The Limits of Diversity Programs: Hiring Practices, Committees, and Affinity Groups

Large firms responded to the challenges facing equity-seeking groups in at least three important ways. First, by taking measures to ensure that the summer/articling classes become increasingly diverse. Second, they have set up diversity committees and affinity groups that aim to foster an inclusive work environment. And third, they established formal mentorship programs for junior lawyers. As our conversations with the [*61] participants revealed, while these efforts have had some clear achievements, their impact has been limited to the lower ranks of firms.

122 See Chambers’ discussion of Judith Butler’s example of drag performances as subversive acts. Supra note 112 at 671-76.
126 Wald, "Glass Ceilings", supra note 124 at 128-29.
The majority of participants (ten of the fifteen) described their personal experience at the firm as positive. There was also a general acknowledgement, however, of the role unconscious bias may play in hiring and promotion practices. Participants who have done well for themselves attributed their success to luck or good fortune in overcoming these potential obstacles. While some cited a 'pipeline problem' (i.e. not enough LGBTQ lawyers apply to big firms, perhaps given their natural gravitation toward more creative career paths), or a growing interest in a better work-life balance that millennials expect and that law firms are unable to provide, the majority described the hiring process of law students as fairly subjective and therefore more likely to reproduce homogeneity. Surprisingly, our participants often defended prevailing practices around the hiring process. While appreciating the risks in a subjective assessment of candidates, they explained that due to the nature of the legal practice, which requires a strong personality or 'people skills', there is no way to find a 'good fit' other than through conversational interviews with candidates. They did not seem to know what hiring practices could achieve this purpose while avoiding the collateral damage of implicit bias other than diversity and unconscious bias training.

The initial screening of student applications to law firms is based on academic achievements, and only the top performing students are interviewed. The On-Campus Interview [OCI] process and the in-firm interviews are based on casual conversations, where recruiters are mostly looking for the best 'fit':

...[P]eople want to work with like individuals. You spend so much time in a law firm it becomes a bit of a second family. I think that becomes a bit of the obstacle in that you're always promoting the same people, the same fit, a certain profile, a certain mold.  

Sam, who we met earlier, interviewed with over a dozen law firms in the city and was not able to secure an articling position in any of them. The firm where he got hired (in a different city) was the only one that used a panel interview format for hiring students, with a set of pre-determined questions that each candidate was asked. The student intake at that firm, he recalls, was particularly diverse as a result. Only when asked directly, a few participants agreed that a more standardized hiring process, perhaps with a scripted questionnaire and set metrics, could address the potential bias in selecting the best candidates. One participant noted that his firm's leadership team put in place more 'objective' measures, by including checklists that recruiters must fill out, asking them to assess the skills and aptitudes required. While this is a move in the right direction, he maintained, the decisions continue to be largely subjective.

Sam's experience (who started his career over 15 years ago) may not be representative of the impact of the OCI hiring process on law firm diversity today. Over the past few years, large Canadian law firms have consciously diversified the student intake and the incoming cohorts are much more representative of graduating law school classes than before. This is done partly through ensuring, for example, that the lawyers assigned to interview the candidates come from diverse backgrounds, which arguably makes these [“62] casual interviews less awkward than they otherwise would be. The hire-back ratios, in turn, are fairly high and as a result, the associate rank in

127 R2, p 19; R4, p 10; R5, p 10; R6, pp 6-7; R7, pp 11-12; R8, pp 15-16; R10, p 18; R11, p 6; R12, pp 5, 12.
128 R11, p 10-11; R13, p 22.
129 R1, pp 11, 14; R3, p 10; R5, pp 5, 7; R6, p 7; R10, p 23; R11, pp 9, 11; R13, p 9; R15, pp 14-15.
130 R3, p 16; R4, p 10; R5, pp 9-10; R10, pp 16-18; R13, pp 6-7.
131 R5, pp 9-10; R7, pp 11-12; R8, p 14; R9, pp 6-7; R10, pp 16-17; R12, p 12; R13, p 7; R14, p 12.
132 R14, p 17, and similarly stated in R2, pp 3-4; R3, p 16; R4, pp 8, 10; R5, pp 9-10; R8, pp 14-15; R9, pp 6-7; R10, p 18; R11, p 6; R12, p 12; R13, p 7; R15, p 10.
133 R2, p 18; R7, pp 11-12; R9, p 21; R11, p 6; R12, p 13, R13, p 8.
134 R11, at p 6-7.
135 R3, p 16; R4, pp 9-10; R8, pp 15-16; R9, pp 5-6, 23; R10, pp 8, 16; R11, pp 6-7.
many of the firms is not as homogeneous as it used to be. The challenge with respect to all minority categories remains in retention and promotion.  

Michael is the most junior lawyer we spoke with. He is in his first year as an associate at a large Toronto law firm. His path may be representative of the current openness and acceptance experienced by gay and lesbian lawyers entering the profession. Michael attended an LGBTQ professional networking conference in his first year of law school, and made connections that he later leveraged when applying for summer and articling positions at various firms. Soon after joining the firm he started an LGBTQ affinity group with the firm's blessing and support. He thought it was a great opportunity to promote an inclusive work environment and that strategically, it could benefit him personally ("It would be foolhardy of them to make someone the lead of… Pride Network and not hire them back!").

As the affinity group lead, Michael makes efforts to bring together LGBTQ lawyers from across the firm, who participate in socializing events, Pride Week celebrations and professional development activities targeting LGBTQ lawyers and allies. He is often called upon to meet prospective summer/articling students who make their sexual orientation evident when applying to work at the firm. His message to candidates is that the firm is very LGBTQ-friendly and that as a gay lawyer, he is very comfortable being out in the firm. He is therefore an active contributor to the firm's efforts to appeal to diverse talent and to signal to prospective employees that being openly gay at the firm is not just tolerated; it is supported and celebrated.

Michael's story so far illustrates what Eli Wald has termed "implicit capital exchange" in law firms. Wald suggests that diversity in firms can only be enhanced through an understanding of the role capital plays in the hiring and promotion of lawyers within firms. He argues that firms and lawyers constantly engage in complex transactions where they exchange economic, social, cultural and identity capital. The firm typically provides incoming associates with short-term economic capital (in the form of lucrative pay) as well as opportunities to enhance their social and cultural capital (through training, mentoring, and access to valuable relationships that may help them develop their own book of business). Ultimately, the firm also offers them a shot at long-term economic capital in the form of partnership rank.

The lack of transparency around the nature of this labour-capital exchange, Wald argues, results in the underrepresentation of women and racialized lawyers in big law firms. The focus on equal treatment of all through an objective assessment of junior lawyers confuses merit with capital. Associates who come into the firm endowed with substantial social, cultural and identity capital (typically white males) have greater success at the firm because their capital is often misrecognized as merit. Women and racialized minorities are negatively impacted because they tend to have lower capital endowments (due to prevailing stereotypes), and while firms often attempt

136 R2, p 16; R5, p 9; R12, pp 11-12; R13, pp 4, 7; R14, p 2.
137 R3, p 4.
138 Eli Wald, "BigLaw Identity Capital: Pink and Blue, Black and White" (2015) 83 Fordham L Rev 2509 [Wald, "BigLaw"]. Michael seems to be relatively mindful of the exchange (describing the valuable work he did for the firm and his expectation that it would be rewarded). Others realized they are the diversity 'poster-child' for the firm (as R4 defined himself, p 21), but did not express a similar perspective on reciprocity. Another participant told us he was always sent to meet gay and lesbian candidates at the interview stage, even though there was never a conversation with him about this practice and its purpose (R10, p 4), which again speaks to the implicit ways firms extract lawyers' identity capital.

139 Social capital is defined as an individual's membership in networks that extend to its members benefits by virtue of membership. Cultural capital includes communication skills, cultural awareness, knowledge of institutions and credentials that provide access to socioeconomic mobility. Identity capital refers to value derived from different facts of one's identity: race, gender, class, or sexual orientation, which triggers positive reactions and perceptions or stereotypes (Wald, "BigLaw", supra note 138 at 2519-29).

140 Ibid at 2529-32.
to extract identity capital from diverse lawyers (in order to appear more diverse), they fail to properly reciprocate in a way that positions all lawyers on equal footing.  

These insights can be applied to the relationship gay and lesbian lawyers may have with large law firms. In fact, Michael's professional journey so far, as an example, reads like a fair (if implicit) exchange with the firm: he was offered an opportunity to develop economic capital, cultivate connections that would improve his social and cultural capital, and he is reciprocating by enhancing the identity capital of the firm (i.e. appearing progressive and diverse). Interestingly, however, when considering his future in the firm, Michael does not think that his work on LGBTQ initiatives and his contribution to the diverse image of the firm will play a meaningful role in his promotion, other than signal loyalty to the firm. He believes he will be evaluated based on his skills and performance, as reflected in his ability to meet the billable hour targets and capacity for client development. Non-billable contributions to the firm (of all kinds) are an expectation but in his view, they are not 'deal breakers.' In other words, the implicit capital exchange only goes so far. It may help lawyers who choose to leverage their identity capital in their early tenure in the firm (and the firm benefits from the value that it brings), but it may not be useful beyond the associate rank.

In some ways, the firms' support for the establishment of diversity committees and affinity groups makes a positive contribution to the development of social capital among diverse lawyers. Diversity committees were initially created within firms to address the gender gap, and later broadened their mandate to consider other underrepresented groups. Most large Canadian firms have such committees, and their mandates are typically stated on their website. Their initiatives may include organizing diversity training for lawyers and recruiters, participation in awareness-raising campaigns, employee engagement surveys, and representing the firm in various inter-firm initiatives such as the LFDIN discussed earlier. Affinity groups tend to be less formal and structured, although some firms have developed policies for setting up such groups. The LGBTQ affinity groups (often labelled "Pride Network") have only sprung up in firms over the past few years. This loose association of employees at the firm (both lawyers and staff) organize social activities, plan firm Pride parties, support various campaigns such as Pink Shirt Day and National Coming Out Day, hold information sessions and panel discussions on LGBTQ family issues (parenting, wills and estates) and in rare cases engage in advocacy by urging the firm to consider revising its benefits policies (e.g. on maternity and paternal leave).

Participants' views on the benefits of affinity groups in helping diverse lawyers advance ranged from celebratory to cynical. Michael, for one, believes that the opportunity to socialize with other LGBTQ lawyers within the firm, who are at different stages in their careers, provides the emotional support that may help overcome low points in the

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141 Ibid at 2536-39.

142 As Wald convincingly argues, institutions can possess capital as well. For example, "the rise of large WASP law firms to prominence in the late nineteenth through the mid-twentieth centuries very much depended on their ability to translate their elite ethno-religious and class identity as WASP and white-shoe institutions into elite professional identity" (ibid at 2526-27). Today, diversity is a value that firms increasingly embrace as part of their identity. See David B Wilkins, "From 'Separate is Inherently Unequal' to 'Diversity is Good for Business': The Rise of Market-Based Diversity Arguments and the Fate of the Black Corporate Bar" (2004) 117 Harvard L Rev 1548.

143 R3, pp 9-10.

144 How effective these initiatives are in closing the gender gap is still under debate. It is often argued that while diversity committees assist in initial recruitment, they have very little impact on partnership decisions. See e.g. a recent NAWL study, indicating that despite being hired in nearly equal numbers as men at the associate level, only 19% of all equity partners in the U.S. are women, reflecting a very small upward change from 16% in 2007. National Association of Women Lawyers, Annual Survey Report 2017: The Promotion and Retention of Women in Law Firms (2017), online:<http://www.nawl.org/p/cm/ld/fid=1163>.

145 R4, p 6; R11, p 13. For a typology of such groups see Rod P Githens & Steven R Aragon, "LGBTQ Employee Groups: Who are They Good for? How are They Organised?" (2007) Adult Education Research Conference Proceedings 2007, online: <http://newprairiepress.org/cgi/viewcontent.cgi?article=2524&context=aerc>.

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associate's journey to the partnership rank. Concern over the loss of work-life balance is an issue that makes many junior associates second-guess their career paths, and the support network that affinity groups provide may tilt the scale in favour of working through it ("It's more like a family, I don't mind working long hours because the people I work with are like friends"). In this sense, affinity groups provide a social support network that is not related directly to advancing the cause.

Aaron, on the other hand, describes the recent efforts by firms to create an inclusive workplace as 'pink washing', 'fluff' and 'window dressing.' In his view, beyond being effective marketing tools and fostering a measure of 'feel-good,' these initiatives will not resolve the structural barriers facing equity seeking groups:

The affinity group is all very well and good, but it doesn't address the core issue that your success at a firm depends on having that partner who really likes working with you and having the partner who has the consistent, reliable, dependable source of good, lucrative client work. The affinity group just doesn't help.

Aaron is alluding to the kind of social capital that may help associates reach the next level -- creating meaningful and mutually beneficial relationships with influential partners at the firm. Our participants (whether associates or partners) who are not directly involved in the promotion process in their firms knew very little about what promotion entails. Their view is that the process is not particularly transparent, and they referred to the decision-making process as a 'black box.' But they all believe that their advancement will depend (or depended, in the past) on the support from the head of their practice group, as well as others in the firm (mentors, sponsors and other partners they work for) who would vouch for them when decision time comes.

The support system that allows associates to devise ways to form such relationships varies across firms and it reflects the firm's effort to provide associates with opportunities to cultivate their social and cultural capital. Most participants told us that their firms have a formal mentorship program, but they also knew that participation of partners in this program is non-billable and for this reason, the level of their time commitment varies greatly. The most effective and meaningful connections are often organically formed with partners who can personally relate to the associate and act as their mentor or sponsor.

As we saw above, the lawyers who had the most difficult time receiving support from partners in the firm were both gay and racialized. Robert, for example, said:

[*65] I would want to attach myself to someone who would bring in a lot of work and I can learn a lot from; who would most likely be a white male partner, but I have nothing in common with that white male partner. Even if I wanted to do -- have that connection... I have [tried]; but I'm just not their person of choice.

It is often argued that the challenge in making law firm partners devote time to helping diverse lawyers advance is that unlike corporations, partnerships are more difficult to manage because they are more like a collection of sole practitioners than a hierarchical organization. Yet, several participants disagreed with this view. With the creation of tiered partnership tracks in law firms, power has become more concentrated and decisions regarding criteria for compensation, for example, are being made by a small group of senior partners. This small group,

146 R3, p 13.

147 R5, p 9; R8, p 13 ("We say we're diverse, we say -- we advertise ourselves as a gay-friendly firm, so that's what makes it diverse but that's not actual substantive diversity.")

148 R5, p 6; R8, p 11; R9, pp 11-12; R10, pp 9-11; R13, p 13; R14, p 7; R15, pp 19-20. Quite often, the extent of information shared with associates is that the criteria for partnership is whether the associate is "making a sustainable contribution to the firm" (R11, p 12).

149 R2, p 3; R7, pp 7-8; R8, pp 8-9; R10, pp 11-13; R11, p 9; R12, pp 9-10; R13, pp 9-10; R14, p 7; R15, pp 4-5. Similar to what Pearce et al argue in the U.S. (supra note 62 at 2418-19).

150 R2, pp 13-14; R4, pp 12-13; R8, pp 8-9, 26.

151 R8, p 26.

152 R5, pp 2-4; R6, p 17; R8, p 10; R11, p 15; R13, p 25; R14, pp 8, 12.

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often in the form of an executive committee, could decide to include diversity considerations in the compensation scheme:

*If an executive committee at a law firm said, 'Right now our compensation is based on how much you work in a year, how much work you give to other people,' so how hard are the associates under you working, 'Did you bring in clients?' There’s a whole matrix of factors... What if part of it was, 'What did you do to advance [the] diversity of your group? ... Did you mentor somebody? Did you make it a point to give some work?' Think about it, that's the only motivating factor in a law firm -- compensation.*

One large law firm we heard about from a participant is the outlier: rather than basing its compensation scheme on origination credits (by asking who brought the file/client into the firm), compensation decisions are made on the basis of both billable and non-billable work hours, and these are considered regardless of who brought the file into the firm. This approach, initiated by the founders of the firm, fosters collegiality and most importantly, it allows them to sidestep the often-contentious question "Who originated the file?" and instead considers each partner's actual contribution to the firm, using both billable hours and other factors (i.e. mentoring of junior lawyers). This approach reportedly drives the firm culture and works in favour of both partners and associates who do excellent work but may not have access to the networks that others can leverage to drive business development:

'[Y]ou feel like clients are clients of the firm and not your personal clients. Then people don't build fiefdoms; we're very proud to have strong stable corporate clients that we've had for many years and they're not attributable to any particular person. I think it probably was easier for someone like me to succeed in an environment like that.*

Structural obstacles, then, have a real impact on the organizational culture of the firm and its ability to address the diversity gap in a meaningful way. The majority of law firms do not recognize non-billable [*66] contributions to the firm in the same way that they reward billable hours and as a result, senior partners often lack the incentive to dedicate time and effort to helping associates with limited social and cultural capital to develop to their full potential.

**VI. CLOSING THE DIVERSITY GAP: WHAT WORKS AND WHAT DOES NOT**

Kalev *et al* conducted a study of hundreds of U.S. mid-sized companies comparing the effectiveness of three different approaches to the advancement of diversity. First is the organizational approach, where companies use various forms of affirmative action, oversight and advocacy through diversity committees and staff appointments to monitor diversity. The second approach focuses on reducing social insulation by establishing mentoring and network programs to change employee relationships. Finally, a behavioural approach uses diversity training and performance feedback in efforts to reduce managerial bias. The authors found that companies that advanced an organizational approach were able to increase diversity in the most significant way.

In Section IV, we reviewed the initiatives implemented by big law firms in response to the mounting pressure to diversify their ranks. These efforts can be placed across all categories in the typology Kalev and her colleagues

\[^{153}\] Indeed, several participants stressed that a meaningful change is possible if only senior management was more interested in and championed diversity (R2, pp 10-12; R10, pp 21-22; R11, p 18; R13, p 15; R14, p 14).

\[^{154}\] R11, p 15. Also: R4, p 19; R7, p 13-14; R13, pp 23-24; R14, p 14; R15, pp 16-17.

\[^{155}\] R15, p 17. Whether this compensation structure resulted in a more diverse leadership in this firm remains unclear, given that the demographic information is not publically available. It also cannot be confirmed whether other firms followed suit given that compensation and promotion schemes are not made public either.

\[^{156}\] Alexandra Kalev, Frank Dobbin & Erin Kelly, "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies" (2006) 71 American Sociological Rev 589. See also Frank Dobbin & Alexandra Kalev, "Origins and Effects of Corporate Diversity Programs" in Quinetta Roberson, ed., *Oxford Handbook of Diversity and Work* (New York: Oxford University Press, 2013) 253 (diversity initiatives, which focus on eliminating managerial biases through e.g. training, have been much less effective than initiatives, which focus on workforce integration, through mentoring programs, and diversity task forces).
propose: prompting behavioural change by mandating diversity training, reducing social insulation through mentorship programs for junior lawyers and support for affinity groups, but also intentional recruitment efforts of diverse talent and the establishment of diversity committees. Some firms have also implemented employee surveys that provide them with quantitative and qualitative data on the demographic composition of the workforce and the level of inclusiveness of the firm. In this Section, we consider the effectiveness of these diversity programs in light of the interview findings as well as the available research on workplace diversity.

A. Measurement and Transparency

Within firms, there is broad agreement that data collection and tracking are crucial for the development of efforts to address the diversity gap. In fact, some Canadian firms are already collecting information on their demographic composition, but they do not make it public and the measures they use may not be consistent. As a result, the only information available is provided by the LSUC in aggregate form. This is about to change in Ontario, where the LSUC will start reporting information it collects by legal workplaces with 25 licensees or more. The intention is to publish an inclusion index by firm, which includes a breakdown to associate and partnership levels, starting in 2019 and update the index every four years.

Similar voluntary efforts south of the border to publish demographic information on the composition of firms have had limited success in increasing the representation of equity-seeking groups in leadership positions. But this use of data as a ‘shaming’ tool may work more effectively in the Canadian context, where a relatively small number of big firms dominate the legal services market. The diversity index could operate as a mechanism for social accountability, and provide useful information for prospective employees as well as clients, who may choose to take their business to firms that stand out as diverse and inclusive. The in-house counsel initiatives we discussed earlier indicate that some of the big firm's largest clients have an interest in advancing this cause and may indeed use this information when seeking legal services.

A consistent and reliable measurement across all firms could reveal which of the big firms deliver on their commitment to diversity and inclusion by showing the representation of equity-seeking groups at all levels in the firm. It could highlight the challenges that these firms may have in retaining diverse talent. For example, even when significant progress is shown in the number of gay and lesbian lawyers entering the firm over the years, it would be important to track their representation in the leadership ranks. As we noted in Section V, the general sense expressed by interview participants was that law firms have been making notable efforts to attract diverse talent but often fail to support them along the track toward partnership. A diversity index could substantiate this claim and pressure firms into finding ways to address the gap.

B. Diversity Training

Diversity training programs have become an essential part of the inclusive workplace toolkit. They are used widely in an attempt to remove bias in hiring and promotion decisions in the corporate sector, and almost all of the participants we spoke with noted that unconscious bias training was made mandatory for all employees at their firm or at least for those on hiring committees. This conventional wisdom -- that training helps people (managers in particular) shed their biases is rarely based on empirical evidence. Pride at Work's guide for best practices, for example, includes a recommendation for organization-wide training which covers a review of discrimination and

157 For a discussion see Lyon & Sossin, supra note 45.
158 See LSUC Committee, Report 2016, supra note 11 at 91.
159 See Canada's large firms in Lexpert Directory, supra note 57. The size and number of large firms in the U.S. is substantially different.
160 Most participants found training helpful but not enough as they felt unconscious bias was not an easy issue to tackle (R4, p 10; R7, pp 14-16; R8, pp 14-15; R9, pp 20-21; R11, p 6; R12, p 15; R13, p 13). A few questioned its effectiveness or usefulness (R2, p 14; R6, pp 8-9, 11; R10, p 20).
harassment policies, education on respectful communication, and the organization's policies that support victims of discrimination and harassment. Additionally, when discussing unconscious bias and hiring practices, the guide states: "Recruiters and hiring managers should be trained on the many forms of unconscious bias that play out in the hiring process to ensure they are selecting the best person for the job, regardless of differences."  

Research suggests, however, that heavy reliance on training programs to overcome bias in management may be ill-advised. In the U.S., nearly all Fortune 500 companies as well as nearly half of midsize companies use training programs, but their effectiveness is being increasingly questioned. In fact, in a study of more than 800 companies, it was found that mandatory training has a surprisingly negative effect. In companies that mandated training, there was no improvement in the proportion of white women, black men, and Hispanics in management five years into the implementation of the programs. The share of black women and Asian-American men and women actually decreased. One explanation offered by the authors is that compulsory training evokes anger and resistance. The resentment may be derived from the perception that managers are being singled out because they require these remedial measures. On the other hand, when managers feel that the choice to attend training is theirs, they tend to be more receptive to change their practices. More crucially, however, reliance on training is problematic because "[i]t turns out that while people are easily taught to respond correctly to a questionnaire about bias, they soon forget the right answers. The positive effects of diversity training rarely last beyond a day or two."  

Another study, which reviewed the literature on diversity training programs on campuses and in the workplace, critically examined the short and long term outcomes of diversity training. It found that that an integrated approach to diversity training (where "training is conducted as part of a systematic and planned organizational development effort") is more effective but less popular than a stand-alone approach and other diversity programs, which focus on specific groups or on one method of instruction. It also concluded that the integrated training approach requires "increased commitment of top management."  

Meaningful engagement of managers in diversity programs, Dobbin & Kalev suggest, is a more effective strategy and it has proven successful in companies that rather than focusing on control, try to include managers in attempts to address the diversity gap (e.g. in targeted recruitments and mentoring programs), expose them to people from different identity groups, and encourage social accountability for change (e.g. through diversity task forces). Some of the tactics they recommend are relevant to the law firm context and we will address them here in turn: management practices focusing on targeted recruitment and mentoring programs, and the establishment of diversity task forces.  

C. Management Practices: Targeted Recruitment and Mentoring Programs  

Law firms recruit prospective employees as early as second year of law school, as we saw above. While the initial screening is based on a seemingly objective measure (top grades), the following stages of the recruitment cycle are inherently subjective. In the search for the best 'fit,' recruiters inevitably reproduce homogeneity when selecting candidates. The hiring practices in big firms have not changed over the years, and they continue to be based on assessments that may exclude members of different identity groups. We heard of two exceptions to this general  

163 Ibid. See also Peter Bergman, "Diversity Training Doesn't Work" (March 2012) Harvard Business Rev.  
164 Katerina Bezrukova, Karen A Jehn & Chester S Spell, "Reviewing Diversity Training: Where we have been and where we should go" (2012) 11:2 Academy of Management Learning & Education 207 at 220-21.  
165 Ibid at 221-222.  
166 Ibid at 222. See also the studies referenced in supra note 80.
practice. One was of a midsize firm that introduced standardized interview questions for all candidates (which reportedly resulted in very diverse cohorts entering the firm). Another was an attempt to provide guidance to recruiters by giving them forms to fill out, where the desired aptitudes and skills are identified and measured.

While the hiring process remains largely subjective, we also heard from participants that some law firms are making efforts to attract gay and lesbian talent by engaging gay and lesbian associates and partners in the recruitment efforts of students. Associates involved in the hiring process, we argued above, appear to be trading their identity capital by taking part in the firm’s effort to project an inclusive and diverse image. The lack of transparency of this exchange, however, suggests that the rewards for gay and lesbian lawyers may not necessarily help them advance very far in the firm.

Dobbin & Kalev, in their large-scale study, considered the success of college recruitment programs that target underrepresented groups. Studies suggest that engaging managers in these efforts converts the ‘wishy-washy’ managers and brings them to think of themselves as diversity champions. Once they get involved in the recruitment of employees from underrepresented groups, they also become convinced that their protégés merit advancement opportunities and as a result, the representation of equity-seeking groups in management positions improves dramatically. In our context, however, this practice can only go so far given that the gay and lesbian lawyers sent to recruit diverse talent are the hiring managers for the purpose of recruiting students, but they are typically not the ones involved in promotion decisions down the road. As a result, the changes we see in big firms in addressing the diversity gap do not extend to their upper echelons.

Mentoring programs are another demonstrated way to diversify the workplace as they help engage managers and “chip away at their biases.” It gives these senior members of the organization a stake in the cause and they become champions for their protégés. Formal mentoring programs tend to benefit junior employees from underrepresented groups, who are less likely to develop such relationships on their own. In the 829 midsize and large companies studied by the authors, mentoring programs improved the representation of racialized employees in management by 9% to 24% within five years.

Most big law firms in Canada have established mentoring programs and the lawyers we spoke with confirmed that such formal relationships exist. Just like racialized lawyers reported in the LSUC study, however, our participants made an important distinction between mentorship and sponsorship. In most cases, mentoring is not a billable contribution to the firm and for this reason, the level of time commitment and energy invested by mentors varies. Meaningful relationships tend to develop informally, typically within the same area of practice (and therefore involve assignment of work on important files). As observed by our participants, such helpful sponsorships are more likely to occur within the same identity groups.

D. The Establishment of Diversity Task Forces

Diversity task forces, Dobbin & Kalev suggest, are an effective way to promote social accountability within the organization. Their role is typically to review the diversity numbers in the organization and devise solutions:

Task forces are the trifecta of diversity programs. In addition to promoting accountability, they engage members who might have previously been cool to diversity projects and increase contact with among women, minorities, and white men who participate. They pay off, too: On average, companies that put in diversity task forces see 9% to 30% increase in the representation of white women and of each minority group in management over the next five years.

167 Dobbin & Kalev, supra note 162.
168 Ibid.
169 Ibid. While the authors’ focus is the advancement of women and racialized employees, the same would apply to sexual minorities as another underrepresented group.

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Large Canadian law firms have established diversity committees and from the public statements made by the firms, these committees seem to have a broad mandate to impact both culture and strategy in the firm. In terms of workplace policies, their main focus has been the improvement of employee benefits and programs such as same-sex health benefits, parental leave and access to child and parental care. These committees may have access to diversity numbers but they typically do not make them available within the firm or to the public. They also do not have stated targets for improving the number of underrepresented groups, although some firms have partial data or targets with respect to the representation of women. The new reporting rules adopted by the LSUC could have significant impact on the work of these committees. A diversity index where the diversity numbers of each firm are made public would increase the accountability of such committees both within the firm and more broadly in the legal services market.

E. Organizational Changes

The literature on diversity programs suggests, then, that isolated initiatives or remedial measures are not likely to make the workplace more diverse or inclusive. What this scholarship offers as effective strategies to addressing the diversity gap, in turn, are based on findings that are more relevant to the corporate context than to the unique structure of law firms as limited liability partnerships.

Our interview findings help illuminate the day-to-day realities of large law firms given their unique structure. First, the subjectivities of the hiring process can work to exclude members of certain identity groups. While firms have introduced some version of deliberate recruitment targeting underrepresented groups by pairing gay candidates with gay interviewers, lawyers who may choose not to highlight this aspect of their identity on paper could be negatively impacted. Their entry into the firm would depend on how well they connect with the interviewers assigned to assess them, on a personal level. Their success would depend on the biased evaluation of their ‘fit.’

Second, and most relevant to the uniqueness of law firms’ organizational structure, is the compounding effect of intersectionality on the ‘otherness’ experience of lawyers. It suggests that often, the diversity gap may be more about race and class than sexual identity. White gay males are more likely to connect with influential figures in the firm, develop meaningful mentoring relationships, and receive important work assignments that help them along the track to partnership. The social capital they already possess upon entering the firm is often more substantial than that of racialized lawyers. We agree with Wald, who argues that the commodification of lawyers’ identity capital ought to be reciprocated by law firms by making the capital exchange more explicit and transparent. This could be achieved by measuring associates’ success relative to their capital endowments, and making efforts to ensure that they have an equal opportunity to advance in the firm as their male, white, heterosexual counterparts.

Wald’s proposal could be the first step toward leveling the playing field, but it requires a significant departure from the way most big firms are run today. In our interviews, we heard of one example of a firm where the ‘origination credits’ rule as a basis for compensation was abandoned in favour of a more substantive assessment of lawyers’ contribution to the firm. This business model has the potential to address the diversity gap by rewarding excellent work rather than favouring lawyers who happen to be endowed with more social capital than others. In an

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171 For example, Osler’s data on the representation of women in the firm was made available in their Diversity at Osler: 2016 Year in Review (2016) at 17, online: <https://www.osler.com/osler/media/Osler/reports/corporate-governance/Diversity-in-the-workplace-Osler-2016.pdf>. See also Norton Rose Fullbright’s commitment to reach 30% representation of women in partnership (currently 24%) by 2020, online: <http://www.nortonrosefulbright.com/ca/en/about-us/diversity-and-inclusion>. Other firms make more obscure statements on women, see e.g. Stikeman Elliott, online: <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/12249.htm> (“Our percentage of women equity partners remains well above average among other national law firms”).

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organization where what you know matters more than who you know, the advancement opportunities for underrepresented groups in the firm could be significantly improved.

The third insight our interviews revealed qualifies the second by considering the impact of organizational structure on the firm's culture. Sexual identity may be a 'non-issue' for lawyers of any racial background as long as they conform to the imperatives of the heteronormative culture of the firm. [71] In other words, when it comes to sexual identity, you may be allowed to be different in the firm, but you may not be allowed to act different. The inclusive workplace that many law firms claim to be, therefore, is a place where you must pass into 'normality' by toning down behaviour that does not conform to hyper-masculine standards, having a life partner, and assuming the heteronormative roles of men at the firm by working long hours and being available to the firm and its clients around the clock.

The heteronormative culture of the firm and its organizational structure feed off each other, of course, and their impact on women has been studied and documented. In their longitudinal study of Ontario lawyers, Kay, Alarie and Adjei found that women leave practice at higher rates than men and that "[t]hese departures appear to be largely the consequence of organizational structure and a practice culture that remain resistant to flexible schedules, time gaps between jobs and other leaves." 172 It was previously assumed that women choose to leave practice because they prefer to focus on family responsibilities and stay home with their children. This view, the authors rightly argue, places the blame on women and overlooks the fact that individual choices are often bound by the workplace’s structure and culture. 173 Their study showed that workplaces offering flexible schedules, for example, significantly improve retention of lawyers. 174 Gay and lesbian lawyers, we heard from participants in our study, may paradoxically stand to gain in such a culture, as long as they assume the heteronormative male role in their family and submit to the 'around the clock' service mentality plaguing law firms today.

To conclude this part, big law firms have been addressing the diversity gap in several ways, including targeted recruitment efforts, mandating diversity training, establishing diversity committees with a broad mandate but a narrow focus on socialization, and advancement of changes to workplace benefit policies. These initiatives, we argue, are not likely to significantly shift the needle unless they are part of an integrated effort to re-examine the underlying organizational structures that constrain the progress of underrepresented groups. Targeted recruitment that operates in a largely subjective hiring process will continue to result in biased selection. Mentoring obligations that are not transparently and substantially rewarded may result in superficial relationships that make little difference to a junior lawyer's career. And while diversity committees and affinity groups fill an important role in creating an inclusive work environment, they will not have a real impact on the diversity gap unless they are charged with setting clear, measurable objectives with support from the top.

VII. CONCLUSION: FROM INSTRUMENTAL TO SUBSTANTIVE DIVERSITY

We suggested in the introduction that the approach to address the diversity gap taken by big law firms so far may be termed the 'instrumentalization of diversity,' in the sense that it is a means to another end. The social and legal landscape in Canada and the growing pressure from institutional clients has driven firms to engage in efforts and initiatives that aim to appease their relevant audiences. They have done so at a relatively small cost and without revisiting the organizational structures that arguably produce inequities within the firm. A private practice that is founded on an ethos of excellence but confuses merit with social capital will likely continue to place emphasis on


173 Kay, Alarie & Adjei, supra note 172 at 7-10.

174 Ibid at 34.

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client 'ownership,' on billable hours as the ultimate bottom line, and on workplace policies that favour white, able-bodied heterosexual males.

[*72] What could accelerate the required shift from instrumental to substantive diversity? What would bring big law firms to consider meaningful organizational changes that address diversity issues? Participants in our study were convinced that only market imperatives and increased pressure from big clients will make a difference. 175 The in-house counsel initiative Legal Leaders for Diversity [LLD] we discussed above has the potential to drive this change. The network they formed is focused on their commitment to promote diversity within their own organizations, but also ‘encourage’ law firms to follow their lead. 176 The approach they take is markedly different from its American counterpart, originally named “Call to Action” and its Canadian equivalent “Call to Action Canada.” 177 The latter group of Canadian in-house counsel is a smaller one and following the American example, the language it employs is far more assertive, placing the conditioning of legal procurement on demonstrated diversification front and centre. 178 It has received less traction among in-house counsel and it currently includes 11 signatories, 179 while LLD includes 98.

The soft approach taken by these 98 companies through their legal counsel may change, however, once a law firm diversity index is available. If the data it will provide shows the demographic composition of each firm, including the representation of different identity groups in its leadership ranks, clients would be able to rely on them when deciding where to direct their business. The qualitative reporting big firms share today selectively highlights their initiatives to enhance diversity, without any measures of success. This approach will only go so far in demonstrating their commitment to diversity under the new regulatory regime. Transparency activates social accountability, not only within the firm but also more broadly in the legal services market and the public at large.

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175 R1, pp 4-5; R2, p 16; R3, p 15; R4, pp 17-18; R5, p 11; R6, pp 14, 16-17; R9, p 18; R11, pp 4-5; R14, pp 9, 14.

176 Supra note 59.

177 For a discussion of the genesis of both see Chow, supra note 1.

178 See A Call to Action Canada: Diversity in the Legal Profession, online: <http://www.acalltoactioncanada.com/>.

179 See online: <http://www.acalltoactioncanada.com/signatories/>.

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**ARTICLE: Perceiving Discrimination: Race, Gender, and Sexual Orientation in the Legal Workplace**

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**Author:** Robert L. Nelson, Ioana Sendroiu, Ronit Dinovitzer and Meghan Dawe

Robert L. Nelson is the MacCrate Research Chair in the Legal Profession at the American Bar Foundation and Professor of Sociology and Law at Northwestern University. He may be contacted at the American Bar Foundation, 750 N. Lake Shore Dr.-4th floor; Chicago, IL 60611; 312-988-6532; rnelson@abfn.org.

Ioana Sendroiu is a Ph.D. Candidate in Sociology at the University of Toronto.

Ronit Dinovitzer is Professor of Sociology at the University of Toronto and Faculty Fellow at the American Bar Foundation.

Meghan Dawe is a post-doctoral Research Social Scientist at the American Bar Foundation.

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**Highlight**

Using quantitative and qualitative data from a large national sample of lawyers, we examine self-reports of perceived discrimination in the legal workplace. Across three waves of surveys, we find that persons of color, white women, and LGBTQ attorneys are far more likely to perceive they have been a target of discrimination than white men. These differences hold in multivariate models that control for social background, status in the profession and the work organization, and characteristics of the work organization. Qualitative comments describing these experiences reveal that lawyers of different races, genders, and sexual orientations are exposed to distinctive types of bias, that supervisors and clients are the most frequent sources of discriminatory treatment, and the often-overt character of perceived discrimination. These self-reports suggest that bias in the legal workplace is widespread and rooted in the same hierarchies of race, gender, and sexual orientation that pervade society.

**Text**

[*1051] INTRODUCTION
Despite widespread expressions of support for diversity and inclusion by leading law firms and corporate law departments (Wilkins and Kim 2016) and new rules of professional conduct defining sexual harassment and discrimination as ethical violations (Geraghty 2016; American Bar Association 2018), we possess little systematic data on the prevalence and character of workplace discrimination in the U.S. legal profession (but see Collins et al. 2017). While this is surprising given the considerable body of research on race and gender inequality among lawyers (Rhode and Ricca 2015), it reflects the general tendency in research on inequality to analyze unequal outcomes rather than the mechanisms that produce and maintain workplace hierarchies of race, gender, and sexual orientation (Roscigno 2007).

In this Article we analyze self-reports of discrimination from a large national sample of lawyers and qualitative comments about the type and source of bias they have encountered. Using these data, we map the contours of perceived discrimination by race, gender, and sexual orientation in the contemporary legal profession and analyze the social correlates of these patterns. Our analysis draws from and advances theories of workplace discrimination. Quantitative results demonstrate the resilience of ascriptive hierarchies across practice contexts and career stages. The qualitative data complement and qualify the quantitative findings as they reveal that perceptions of discrimination are connected to the identities of disadvantaged groups and the particular types of bias they experience in the workplace and other professional contexts. Contrary to the common assertion that most discrimination today entails implicit bias and subtle forms of unequal treatment (Green 2007; Wax 1999), respondents’ accounts show that workplace bias is often explicit. Both overt workplace interactions and implicit bias appear to reinforce the very hierarchies of race, gender, and sexual orientation decried by leaders of the legal profession. These findings extend our theoretical understanding of discrimination and have important implications for equal opportunity within the legal profession and the prospects for equal justice under the law.

THEORIZING SELF-REPORTS OF DISCRIMINATION

Hierarchies of Race, Gender, and Sexuality among U.S. Lawyers

In this Article we examine whether lawyers perceive that they have been the target of workplace discrimination. We consider self-reports of discrimination not as forming the basis for a formal legal claim, but as a measure of workplace inequality. As Hirsh and Lyons note, whether traditionally disadvantaged groups perceive that they are treated unfairly at work due to their ascriptive status comes prior to whether an individual or group files a legal claim (2010). Perceptions of discrimination by marginalized groups are significant in their own right as a matter of workplace equality, but will also likely affect their health and well-being (Pavalko et al. 2003), their level of job satisfaction (Collins et al. 2017), and their willingness to continue working for a given employer (Payne-Pikus et al. 2010). Perceptions of discrimination in part reflect the amount and character of discrimination in society. A considerable body of social science research finds that women, persons of color, and LGBTQ persons continue to face discrimination in the labor market and employing organizations (see, e.g., Fryer et al. 2013; Hull 2005; Quillian et al. 2017; Tilcsik 2011). Social psychological research suggests that these recurring processes are produced by status belief systems. When a certain group controls more resources in a given situation, people tend to equate greater power with greater competence (Ridgeway et al. 2009). In the contemporary United States, these status construction processes favor certain groups—whites, men, the middle or upper class (Cuddy et al. 2007; Fiske 2011). Once these status hierarchies are in place, they become the basis for continued competition as groups develop strategies to enhance their social position through the pursuit of elite credentials and other markers of social superiority (Bourdieu 1984; Lamont 2012).

Another mechanism that sustains workplace hierarchies is stereotyping based on ascriptive characteristics. Gender and racial stereotypes afford individual members of privileged gender or ethno-racial groups the presumption of competence while women and racial minorities are held to a higher standard than their white male counterparts (Rhode 2015; Ridgeway and England 2007; Cuddy et al. 2004). For example, African Americans and Latinos are assumed to be less capable and qualified, and women are assumed to be less committed. Moreover, men's achievements are often attributed to their abilities while women's achievements are attributed to external factors, and women are perceived as ineffective at self-promotion and cultivating clients (Rhode 2015; Cruz and Molina 2010; Thomas 2001; Swim and Sanna 1996).
Against the backdrop of social science research on discrimination in American society and the legacy of racism, sexism, and religious discrimination in the American legal profession (Ladinsky 1963; Smigel 1969; Auerbach 1976; Epstein 1981; Heinz and Laumann 1982; Abel 1989), it would be surprising if we did not find evidence of ascriptive or status-based differences in contemporary legal workplaces. Yet there have been significant transformations in the demographic makeup of the profession. Women now make up more than 30 percent of all lawyers and almost half of lawyers under age forty (Carson and Park 2012; ABA 2017a). About one-quarter of law school graduates are persons of color, divided roughly equally between Asian Americans, African Americans, and Latinos (Snyder et al. 2016; Chung et al. 2017). These demographic shifts have been coupled with at least the symbolic embrace of equal opportunity by leaders of the organized bar, the judiciary, corporate law departments, and major law firms (Wilkins and Kim 2016).

Despite these shifts, dramatic gender and racial inequalities persist in the legal profession. Women and persons of color have gained entry-level positions in corporate law firms at historically high levels but continue to be underrepresented among partnership positions (Noonan et al. 2008; Payne-Pikus et al. 2010; Kay and Gorman 2008, 2016; ABA 2017b; NALP 2017). Female attorneys on average earn 80 percent as much as their male counterparts, a disparity not explained by productivity-based performance differences (Dinovitzer et al. 2009; Dinovitzer et al. 2014). And female lawyers must contend with a long-hours culture that rewards total commitment while balancing their greater share of familial responsibilities (Sommerlad 2016; Rhode and Ricca 2015; Epstein and Seron 2001; Hagan and Kay 1995). In addition to being underrepresented among law firms, research indicates that women and racial and ethnic minorities are also underrepresented among tenured law professors, law school deans, and general counsel in Fortune 500 companies (Rhode 2017; Rhode and Ricca 2015; Neumann 2000), and are more likely than white men to begin their careers in the public sector (Dinovitzer et al. 2004). The number of LGBTQ lawyers has risen since the National Association of Law Placement (NALP) began collecting data on this group in 2002, but they are concentrated primarily within associate positions (NALP 2017).

These inequalities appear rooted in stereotypes about gender, race, and lawyering. Pierce asserted that the dominant cultural script in many fields of law practice was that of a highly assertive male (1995). Women were left to mimic that style or choose areas of practice where they could cultivate an alternative, "more caring" approach. Critical race scholars have illustrated the tensions that attorneys of color face as they make choices about whether and how to "act white" and thus meet expectations within predominantly white law firms and law schools (Carbado and Gulati 2013; see Williams 1991; Wilkins and Gulati 1996; Barnes and Mertz 2012).

Women of color face particular challenges because they are outsiders on the boundaries of both race and gender from the dominant group in the legal workplace (Crenshaw 1989). Qualitative research suggests that African-American women (Reeves 2001), Asian-American women (Chung et al. 2017), and Latinas (García-López 2008) experience discrimination in the workplace in different ways from men of the same race and ethnicity, and sometimes experience sexism from men of their own race. LGBTQ status also cuts across race and gender. While LGBTQ attorneys may "cover" their sexual orientation (Yoshino 2006), they too may feel the sting of discrimination in the workplace.

**Theories of Workplace Discrimination: Implications for Lawyers**

In an important article, Hirsh and Lyons examined the relative influence of ascriptive status, personal characteristics, and workplace context in explaining whether a sample of workers "reported being discriminated against at work because of their race or ethnicity in the previous year . . ." (2010, 280). They found that race and gender were associated with perceptions of discrimination, controlling for the characteristics of the job and the work organization. But workers who the authors characterized as more "entitled" because they were better educated, in a union, or held positions of authority were more likely to perceive discrimination, while workers employed at firms that signaled fair treatment through formalized personnel policies were less likely to perceive discrimination. Thus, it was a combination of ascriptive traits and workplace context that best explained perceptions of discrimination.

Drawing on Hirsh and Lyons and other research on workplace discrimination, we sought to examine the relative importance of ascriptive status versus other variables to perceptions of discrimination by lawyers. In addition to ascription, the literature points to the potential importance of career stage, marital and family status, social
background, professional status, status in the work organization, and characteristics of the organization in which an
attorney works. These other variables may explain away the effects of ascription or may interact with ascriptive
status to increase or decrease perceptions of discrimination.

**Ascription, Attribution, and Intersectionality**

Members of traditionally marginalized groups are more likely to perceive discrimination in the workplace, both as
a matter of objective experience (see Quillian et al. 2017 and other sources cited above) and the result of greater
sensitivity or vigilance to discriminatory treatment, what is referred to as attribution (see Ruggiero and Major 1998).
Self-reports about personal experience with discrimination are subject to two kinds of errors: failing to see
discrimination that objectively exists and seeing discrimination when it does not exist (Major and Kaiser 2005).
Personal and situational factors shape the accuracy of such judgments (Major and Sawyer 2009). If members of
disadvantaged groups have experienced discrimination in the past, they may be more sensitive to cues about unfair
treatment and more likely to attribute a negative outcome to bias than members of traditionally advantaged groups
(Feldman Barrett and Swim 1998; Cohen et al. 1999; Steele et al. 2002). High stigma consciousness makes African
Americans, Asian Americans, Latinos, and women more likely to perceive personal and group discrimination (Major
and Sawyer 2009). The research suggests a gradient among racial and ethnic groups, with African Americans the most likely to report experiencing discrimination, whites the least likely, and Latinos and Asian Americans in between (Smith 2002).

The scholarship on intersectionality suggests that women of color may be especially subject to discrimination and
to reporting perceived discrimination (see Collins 2009). The survey of North Carolina lawyers by Collins et al.
(2017) found such an intersectional pattern, with African-American women reporting the highest levels of
discrimination by race, sex, and age.

**Career Stage**

Studies that include longitudinal measures or a variable for age offer mixed results about whether workers will
perceive more or less discrimination over the course of their careers (McLaughlin et al. 2012, Hirsh and Lyons
2010, Collins et al. 2017). Intuitively, we expect the rate of self-reports will decline over time as respondents who
encountered perceived discrimination would likely leave discriminatory environments for less-biased environments
over the course of their career. Yet, as we discuss below, women may experience more discrimination as their
careers progress if they encounter penalties for having children or suffer a backlash as they assume more authority
at work.

**Marital and Family Status**

Given the findings of discrimination based on parental status (Correll et al. 2007; Cuddy et al. 2004), we expect
that women with children will be more likely to perceive workplace discrimination than other women and men,
including men who have children (Kay and Wallace 2009). Moreover, research suggests that single women may be
more frequent targets of sexual harassment than married women because they are seen as being more sexually
available and less protected, and as threatening traditional gender roles (De Coster et al. 1999).

**Social Background and Professional Status**

Social background and its connection to elite educational credentials continues to play a role in shaping the career
opportunities of lawyers in the Anglo-American legal professions (Rivera and Tilcsik 2016; Rivera 2016; Ashley and
Empson 2016; Webley et al. 2016). It may be that lawyers from less privileged backgrounds and from lower status
law schools may be more likely to perceive they are discriminated against. However, following Hirsh and Lyons
(2010), it may be that lawyers from more privileged backgrounds or with law degrees from more selective
institutions may feel more entitled and, therefore, more likely to perceive unfair treatment.

**Status in the Work Organization**
Both formal and informal status in the work organization may shape perceptions of discrimination. In their examination of sexual harassment in the workplace, [McLaughlin et al. (2012)] tested two competing conceptions of the role of power: a vulnerable-victim approach and a power-threat approach. The former conception argues that less powerful, more vulnerable people are more likely to report being sexually harassed at work; the latter suggests, paradoxically, that women with more power are more likely to be harassed because they threaten the male workplace hierarchy. The authors' findings strongly support the power-threat approach and suggest it might have broader application beyond sex discrimination: members of traditionally marginalized racial groups might also report more discrimination as they rise in organizational authority. Other research suggests that if women and persons of color are not integrated into social networks in law firms, and thus are socially isolated, they will be less committed to staying at the firm and more likely to perceive discrimination (Payne-Pikus et al. 2010).

**Characteristics of Work Organization**

A considerable body of organizational research examines the relationship between organizational characteristics and levels of inequality and discrimination (see, e.g., Baron et al. 1991; Hirsh and Kornrich 2008; Kalev et al. 2006; Reskin and McBrier 2000). More formalized personnel structures and policies, usually associated with organization size, are likely to reduce levels of perceived discrimination, either because such structures actually reduce discrimination or because they present a symbolic commitment to nondiscrimination that can shape workers' perceptions (Hirsh and Lyons 2010; Edelman 2016; Bisom-Rapp 1999). Yet in the legal profession, large law firms are up-or-out hierarchies in which women and persons of color have much higher rates of attrition than white men (Henderson and Galanter 2008). We expect, therefore, that respondents will report higher levels of perceived discrimination in large firms.

Research suggests that public sector employers are friendlier to minorities and women than private sector firms (Roscigno 2007, 12; Wilson and McBrier 2005). In the legal profession, women and minorities have been overrepresented in public sector employment (Dixon and Seron 1995; Lempert et al. 2001). Thus, we expect to see lower levels of perceived discrimination in public sector organizations. The racial and gender composition of the workplace also is likely to shape perceptions of discrimination by disadvantaged groups. In their study of Alberta lawyers, Kay and Wallace (2009) find that in law firms with more than a token number of women lawyers, women receive higher levels of emotional and informational support. We may surmise that such a context would produce lower levels of perceived discrimination.

**Explicit or Implicit Forms of Bias**

A central issue in theoretical and policy debates about discrimination in the legal profession and more broadly, is whether most discrimination today arises from implicit or unconscious bias rather than more explicit biases against protected groups. A substantial body of research suggests that implicit bias in workplace decisions affects protected groups (Banaji and Greenwald 2013; Greenwald and Krieger 2006; Kang and Banaji 2006; Krieger and Fisk 2006; but see Mitchell and Tetlock 2006). Decision-makers discriminate without conscious intent based on pervasive and uncontrollable biases against disadvantaged groups. Some scholars suggest that "unintentional or 'unconscious' discrimination has become the most pervasive and important form of bias operating in society" (Wax 1999, 1130; see also Green 2007). Yet other scholars continue to show that a significant portion of discrimination claims involve overt acts (Sperino and Thomas 2017; Berrey et al. 2017; Selmi 2017). The survey data from After the JD (AJD) are not well-suited to addressing this debate, but the comments from respondents about the nature of the discrimination they experienced provide insights into the relative prevalence of overt and implicit forms of bias in legal workplaces.

**MEASURING SELF-REPORTS OF DISCRIMINATION**

Our empirical analysis focuses on respondents' self-reports about being the target of discrimination in the workplace. While self-reports are subjective, lawyers' perceptions of discrimination are significant in themselves. If we find that particular groups of lawyers are more likely to perceive being targets of discrimination, it would have important implications for equality and opportunity in the legal profession. We follow a tradition of other researchers...
who have used survey methods to collect self-reports of discrimination as measures of inequality (Bobo and Suh 2000; Smith 2002).

AJD is based on a nationally representative sample of lawyers who were admitted to the bar in 2000. The survey is composed of three waves, conducted in 2002-2003, 2007-2008, and 2012-2013. Across three waves of data collection, we received responses from 5,399 different attorneys, or 65.6 percent of the eligible sample group of 8,225. The numbers we report here are unweighted, without adjustment for whether a respondent was part of a minority oversample or according to patterns of nonresponse by sampling unit.

Self-Reports of Discrimination by Race/Ethnicity, Gender, and Sexual Orientation Across Three Waves of Surveys

The dependent variable for the analyses below is a composite measure of questions referring to specific types of discrimination experiences. Respondents were asked: "During the last two years, has any of the following ever happened to you in your place of work by virtue of your race, religion, ethnicity, gender, disability, or sexual orientation?" Their answer options in waves 2 and 3 were: "experienced demeaning comments or other types of harassment"; "missed out on a desirable assignment"; "had a client request someone other than you to handle a matter"; "had a colleague or supervisor request someone other than you to handle a matter"; or had "experienced one or more other forms of discrimination" with a "please specify" answer field. The wave 1 questionnaire did not include the item on supervisors or colleagues requesting someone else on a matter. The composite discrimination variable for each wave is binary and equals one if a respondent answered in the affirmative to any of the four or five answer options.

We rely on a composite measure of perceptions of discrimination to capture the full range of experiences in the legal workplace. To avoid the difficulty of subjective definitions of discrimination, we asked about specific negative experiences based on ascriptive characteristics. This is a purposefully broad approach. As we discuss below, we also conducted analyses of individual items used in the composite measure. With the one exception of client requests, we found no differences in results between the composite measure and the individual items.

Table 1 presents the breakdown of self-reports of discrimination by detailed race and gender categories and LGBTQ status. Contrary to our expectation that perceived discrimination would decline over career stage, we

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1 Details about response rates and representativeness across three waves of the study are available at Dinovitzer et al. (2014). In each of three waves, a response rate above 50 percent was achieved for those contacted. In wave 3, only respondents who had responded to at least one previous wave were included in the target sample. Nonresponse analyses of wave 3 data based on internet searches did not find significant differences on bar status and employment as lawyers. In wave 3, respondents and nonrespondents did not differ on urban or rural location, law school rank, or practice setting. Michelson (2017) found that the demographic profile of AJD respondents in terms of age, sex, race, and ethnicity was similar to a parallel cohort of JD graduates sampled by the National Survey of College Graduates.

2 While waves 2 and 3 explicitly provide a timeframe of the "last two years," the wave 1 question did not include this prompt. However since the wave 1 survey was administered two years into the respondent's career we were asking about a similar two-year time period.

3 We did not include "class" or socioeconomic background in the questions about negative treatment. Respondents could have mentioned class bias in the "specify other" field, just as they mentioned other forms of bias described in Table 4 below.

4 Researchers have used different survey approaches to elicit data on perceptions of discrimination. Hirsh and Lyons (2010, 280) asked about "being discriminated against at work." Collins et al. (2017, 1648) asked attorneys "if they felt they had been treated unfairly in negotiations with another attorney because of their race, gender, or age." For each basis of unfairness the attorney could reply "no, yes rarely, yes occasionally, or yes often." McLaughlin et al. (2012), who focused on self-reports of sexual harassment, used an elaborate battery of questions. They asked whether respondents perceived that they were sexually harassed (a subjective measure), but then also asked about whether they had experienced specific types of behaviors (more objective measures).

5 While the AJD surveys used the term "LGBT," we use "LGBTQ" herein to reflect current commonly accepted terminology.
find remarkable continuity across waves, varying between 25 percent and 26 percent. But consistent with our expectations, we see striking differences across race, gender, and LGBTQ status, as well as at their intersection. In terms of race, African Americans report the most discrimination, followed by Latinos, Asian Americans, Native Americans, Other (mostly multiracial respondents), and whites. In every racial and ethnic group, women report higher levels of experiencing discrimination than their male counterparts. By far the highest level of reports come from African-American women. For LGBTQ respondents, men and women report similar levels of discrimination. LGBTQ women and non-LGBTQ women report similar levels of discrimination, suggesting that gender bias is equally pervasive as sexual orientation bias for women. However, LGBTQ men report almost twice as much discrimination as do non-LGBTQ men. Compared to other surveys of self-reported workplace discrimination, that vary between 18 percent and 33 percent for African Americans and Latinos (Berrey et al. 2017, 46-47), the rates of self-reported discrimination by attorneys of color and white women are strikingly high.

**Multivariate Models**

We now turn to logistic regression models predicting self-reported discrimination, both the composite measure we have previously discussed (see also Table 1), and a measure indicating whether a client had requested another lawyer to handle a matter.

| TABLE 1. Self-Reported Discrimination by Race, Gender, and Sexual Orientation across Waves |
|---------------------------------|---------------------------------|---------------------------------|---------------------------------|
| **Status Group**                | **Gender**                      | **AJD 1**                       | **AJD 2**                       | **AJD 3**                       |
| Race                            |                                 | % (n)                           | % (n)                           | % (n)                           |
| African American                | Female                          | 48.3 (232)                      | 40 (197)                        | 50.3 (173)                      |
|                                 | Male                            | 34.0 (159)                      | 34.7 (144)                      | 42.4 (92)                       |
|                                 | Total                           | 42.5 (391)                      | 37.5 (341)                      | 47.6 (265)                      |
| Latino                          | Female                          | 37.5 (176)                      | 34.3 (166)                      | 44.7 (141)                      |
|                                 | Male                            | 25.8 (209)                      | 17.6 (176)                      | 18.8 (138)                      |
|                                 | Total                           | 31.2 (385)                      | 25.7 (342)                      | 31.9 (279)                      |
| Native American                 | Female                          | 34.5 (29)                       | 46.2 (26)                       | 40.9 (22)                       |
|                                 | Male                            | 21.9 (32)                       | 28.6 (28)                       | 26.1 (23)                       |
|                                 | Total                           | 27.9 (61)                       | 37.0 (54)                       | 33.3 (45)                       |
| Asian American                  | Female                          | 36.4 (206)                      | 26.7 (180)                      | 29.4 (170)                      |
|                                 | Male                            | 24.5 (188)                      | 19.3 (166)                      | 19.4 (129)                      |
|                                 | Total                           | 30.7 (394)                      | 23.1 (346)                      | 25.1 (299)                      |
| White                           | Female                          | 34.6 (1170)                     | 32.5 (1023)                     | 29.8 (936)                      |
|                                 | Male                            | 13.3 (1629)                     | 14.3 (1347)                     | 12.9 (1045)                     |
|                                 | Total                           | 22.2 (2799)                     | 22.2 (2370)                     | 20.9 (1881)                     |
| Other                           | Female                          | 38.9 (18)                       | 37.5 (8)                        | 42.9 (14)                       |
|                                 | Male                            | 21.7 (23)                       | 22.2 (18)                       | 15.4 (13)                       |
|                                 | Total                           | 29.3 (41)                       | 26.9 (26)                       | 29.6 (27)                       |
| Total                           | Female                          | 36.9 (1831)                     | 33.1 (1600)                     | 31.5 (1453)                     |
|                                 | Male                            | 17.1 (2240)                     | 16.9 (1879)                     | 16.2 (1440)                     |
|                                 | Total                           | 26.0 (4071)                     | 24.4 (3479)                     | 23.9 (2893)                     |
| LGBTQ Status                   |                                 |                                 |                                 |                                 |
| LGBTQ                           | Female                          | 35.7 (56)                       | 32.1 (53)                       | 32.0 (50)                       |
|                                 | Male                            | 38.5 (65)                       | 28.1 (57)                       | 29.4 (51)                       |

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Presenting separate models for each wave of data allows us to consider the different patternings of results in each wave while taking full advantage of the number of responses at each wave. We used multiple imputation to account for missing data. Analyses were performed using the *mi estimate: logit* command in Stata, version fourteen.

**Independent Variables**

We detail below the range of measures that correspond to our theoretical expectations about the social correlates of perceived discrimination. In Appendix Table 1 we provide means and standard deviations for the variables we employ.

[*1060] **Ascriptive Status**

We include the status-based variables of central interest in this analysis: race/ethnicity and gender and LGBTQ status. Given relatively small numbers in some of the cells presented in Table 1, and our interest in analyzing the combined effects of race and gender, we created a four-category variable for race and gender: women of color, white women, men of color, and white men (with the latter as the reference category). We also included a variable for whether respondents identified as LGBTQ.

**Marital and Family Status**

We include variables for marital status and parental status at each wave.

**Social Background**

We measure the effect of social background by entering a binary variable for father’s education (with fathers with graduate or professional schooling compared to all others). An extensive body of research identifies father’s education as a measure of parental status (Dinovitzer 2011; Hauser and Warren 1997; DiMaggio and Mohr 1985). Father’s education has been found to be strongly correlated with mother’s education and to have fewer missing or difficult-to-interpret cases (Jaeger and Holm 2003).

**Professional Status**

We include two measures of professional status: the selectivity of the law school respondent attended (with a binary variable representing respondents who attended the least selective tier three or four law schools compared to all others) and a measure for whether the respondent reported that they were practicing law at the time of their survey response. An exit from law practice does not necessarily entail a decline in occupational status, yet it is a common reference point for professional success (see, e.g., NALP 2016).

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6 The AJD survey asked respondents to self-report their race/ethnicity. Since respondents were able to select more than one racial/ethnic category, we priority coded these data in the following order: African American, Asian American, Native American, Latino, white. To create the race/gender variables, we classified respondents as “white” if that was the only category they selected. We included all others as men or women of color.

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**Status in Work Organization**

We include several measures of status in the work organization: the interaction of being female with whether the respondent supervises other employees; number of hours worked, which we employ as a measure of relative position in work production, but which can also be seen as a measure of the work intensity of the organization; number of years in organization; and whether the respondent spends recreational time with partners and managers, a variable that has proven useful in measuring social isolation in professional firms (Payne-Pikus et al. 2010).

**Characteristics of Work Organization**

We include measures for whether the employing organization is in the private sector or public sector, with the business sector as the reference category; organization size as measured by number of total employees; and gender and race composition of the employer as measured by whether the percentage of women or persons of color (as estimated by the respondent) exceeds the proportion for the entire sample.

**Composite Measure of Self-Reported Discrimination**

We began by investigating the main effects of the status-based variables of race, gender, and LGBTQ identity with no controls. In models not shown, we confirmed the pattern we saw in Table 1, finding statistically significant effects for race and gender in all three waves and LGBTQ status in waves 1 and 2. Table 2 shows the results for models that include the remainder of the independent variables. In all three waves, the race and gender variables remain statistically significant. Women of color have odds of perceiving discrimination that are between 3.3 and 4.4 times greater than those of white men, followed by white women whose odds of perceiving discrimination are between 2.5 and 3.3 times greater than white men, followed closely by men of color, whose odds are between 1.8 and 2.4 times greater than white men. We thus see very consistent results arrayed by race and gender even after controlling for several variables that might be plausibly linked to self-reports of discrimination.

The effect of LGBTQ status is also significant, yet the effect size is smaller. At wave 1, LGBTQ respondents have odds of perceiving discrimination that are 1.8 times higher compared to non-LGBTQ respondents, a 1.7 odds ratio in wave 2, and a 1.4 odds ratio in wave 3, which is non-significant. The lack of statistical significance at wave 3 may well reflect the somewhat smaller number of LGBTQ cases available at wave 3, but otherwise we could not develop a good explanation from either the survey or comments data. This is a topic that should be pursued in future research.

The effects of other independent variables, with a few exceptions, are not statistically significant and therefore tend to reject many of the expectations based on theories of workplace discrimination. These include null effects for marital or family status and having a highly educated father; attending a less selective law school increases the odds of perceiving discrimination but only in wave 1. The characteristics of the work organization also largely do not affect rates of perceiving discrimination. Surprisingly, private sector lawyers report higher discrimination only in wave 2. Status in the work organization does have significant effects, but some only emerge at wave 3. Our results support McLaughlin et al.’s (2012) suggestion that women supervisors are more likely to experience discrimination than other women. By wave 3, being a female supervisor becomes a significant predictor of discrimination, and this is in the context of wave 3 having the highest proportion of female supervisors, growing from approximately 8 percent of respondents in wave 1 to 21 percent in wave 2 and 22 percent in wave 3. Hours worked becomes statistically significant in waves 2 and 3, supporting the notion that attorneys who work in high demand positions are more likely to perceive discrimination. It may be that by wave 2, those working long hours are

---

7 The female supervisor variable varies between wave 1 and waves 2 and 3. In wave 1, this variable equals one if a respondent is female and reports that over the total life of legal matters she worked on, she was “assigning and/or supervising the work of others.” In the next two waves, the female supervisor variable equals one if a respondent was female and answered “yes” to a question asking whether she supervises anyone on her job. We did not have this more comprehensive question in wave 1, but we tested the first variable formulation in our wave 2 and 3 models and there was no change between the two female supervisor variables.
more keenly aware of the competition for senior positions and, therefore, are likely to perceive bias in how they are treated. Somewhat surprisingly, whether a respondent spends recreational time with partners and managers has no significant relationship to perceptions of discrimination.

**TABLE 2. Logistic Regressions Predicting Discrimination for Each AJD Wave**

<table>
<thead>
<tr>
<th>Variables</th>
<th>AJD1 (N=4,236)</th>
<th>AJD2 (N=3,513)</th>
<th>AJD3 (N=2,946)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Odds Ratio</td>
<td>Std. Error</td>
<td>Odds Ratio</td>
</tr>
<tr>
<td>Constant</td>
<td>0.06***</td>
<td>0.02***</td>
<td>0.08***</td>
</tr>
<tr>
<td>Ascriptive Status</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women of Color</td>
<td>4.41***</td>
<td>0.55</td>
<td>3.34***</td>
</tr>
<tr>
<td>Men of Color</td>
<td>2.35***</td>
<td>0.29</td>
<td>1.84***</td>
</tr>
<tr>
<td>White Women</td>
<td>3.32***</td>
<td>0.37</td>
<td>3.03***</td>
</tr>
<tr>
<td>LGBTQ</td>
<td>1.83**</td>
<td>0.36</td>
<td>1.70*</td>
</tr>
<tr>
<td>Family Status</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Married</td>
<td>0.92</td>
<td>0.08</td>
<td>0.95</td>
</tr>
<tr>
<td>Parent</td>
<td>1.09</td>
<td>0.10</td>
<td>1.12</td>
</tr>
<tr>
<td>Social Background</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Father Graduate/Professional</td>
<td>1.03</td>
<td>0.08</td>
<td>1.16</td>
</tr>
<tr>
<td>School</td>
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<tr>
<td>Professional Status</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Tier 3 or 4 Law School</td>
<td>1.24**</td>
<td>0.10</td>
<td>1.09</td>
</tr>
<tr>
<td>Practicing Lawyer</td>
<td>1.45</td>
<td>0.29</td>
<td>0.99</td>
</tr>
<tr>
<td>Status in Work Organization</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female Supervisor</td>
<td>1.09</td>
<td>0.13</td>
<td>0.88</td>
</tr>
<tr>
<td>Hours Worked</td>
<td>1.00</td>
<td>0.00</td>
<td>1.29**</td>
</tr>
<tr>
<td>Number of Years in Organization</td>
<td>1.05**</td>
<td>0.02</td>
<td>1.17</td>
</tr>
<tr>
<td>Recreational Time with</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Partners/Managers</td>
<td>0.90</td>
<td>0.10</td>
<td>1.00</td>
</tr>
<tr>
<td>Characteristics of Work</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Organization</td>
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<tr>
<td>Private Sector</td>
<td>1.17</td>
<td>0.19</td>
<td>1.12*</td>
</tr>
<tr>
<td>Public Sector</td>
<td>1.24</td>
<td>0.20</td>
<td>1.02</td>
</tr>
<tr>
<td>Organization Size</td>
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<td>0.01</td>
<td>0.08</td>
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<tr>
<td>Organization High Percent Male</td>
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<td>0.12</td>
<td>0.97</td>
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<tr>
<td>Organization High Percent</td>
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<td></td>
</tr>
<tr>
<td>Minorities</td>
<td>1.02</td>
<td>0.11</td>
<td>1.09</td>
</tr>
</tbody>
</table>

*p≤0.05, **p≤0.01, ***p≤0.001

Note: We tested interaction effects for female*parent and female*married, but neither was statistically significant at conventional significance levels.

[**1063**] FIGURE 1. Predicted Probability of Self-Reporting Discrimination across Waves Note: Predicted probabilities were calculated with all other variables set to their means.
The multivariate results drive home the salience of ascriptive characteristics for explaining perceptions of discrimination. In Figure 1 we present the predicted probabilities of perceiving discrimination at each wave by race/gender and LGBTQ status based on the models in Table 2. The probability of white men perceiving discrimination is between 13 percent and 14 percent across the three waves, which is substantially lower than for the other race/gender groups. Women of color have the highest probability of perceiving discrimination in all three waves, ranging from 35 percent to 41 percent, and have odds of perceiving discrimination that are about 3 to 4.5 times greater than white men. Although white women and LGBTQ respondents have consistently higher probabilities than white men and non-LGBTQ respondents, the probability of self-reporting discrimination decreases for both groups across waves, from 35 percent to 28 percent and from 37 percent to 29 percent, respectively. For non-LGBTQ respondents, the probability of perceiving discrimination remains remarkably stable across waves, varying only between 22 percent and 25 percent.

**Clients Requesting Another Attorney**

We tested the same multivariate models on the specific types of discrimination from which we constructed the composite measure. For all but one of the five specific measures we found virtually identical results as for the composite discrimination variable. The one exception was the question about whether a client had requested another attorney due to the respondent's ascribed status. The models in Table 3 reveal interesting similarities and differences from the results for the composite measure of discrimination.

**TABLE 3. Logistic Regressions Predicting Clients Requesting New Attorney for Each AJD Wave**

<table>
<thead>
<tr>
<th>Variables</th>
<th>AJD1 (N=4,192)</th>
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<th></th>
<th></th>
<th></th>
<th></th>
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<tbody>
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<td></td>
<td>Odds</td>
<td>Std.</td>
<td>Odds</td>
<td>Std.</td>
<td>Odds</td>
<td>Std.</td>
<td>Odds</td>
<td>Std.</td>
<td>Odds</td>
</tr>
<tr>
<td>---------------------------------------</td>
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<td>------</td>
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<tr>
<td>Constant</td>
<td>0.02***</td>
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<td>0.00</td>
<td>0.00***</td>
<td>0.00</td>
<td>0.00***</td>
</tr>
<tr>
<td>Ascriptive Status</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Women of Color</td>
<td>1.97***</td>
<td>0.36</td>
<td>2.09***</td>
<td>0.48</td>
<td>2.80***</td>
<td>0.77</td>
<td>2.80***</td>
<td>0.77</td>
<td>2.80***</td>
</tr>
<tr>
<td>Men of Color</td>
<td>1.25</td>
<td>0.24</td>
<td>1.59*</td>
<td>0.33</td>
<td>1.31</td>
<td>0.34</td>
<td>1.31</td>
<td>0.34</td>
<td>1.31</td>
</tr>
<tr>
<td>White Women</td>
<td>2.02***</td>
<td>0.33</td>
<td>1.71**</td>
<td>0.34</td>
<td>2.31***</td>
<td>0.59</td>
<td>2.31***</td>
<td>0.59</td>
<td>2.31***</td>
</tr>
<tr>
<td>LGBTQ</td>
<td>0.90</td>
<td>0.31</td>
<td>1.37</td>
<td>0.47</td>
<td>0.58</td>
<td>0.30</td>
<td>0.58</td>
<td>0.30</td>
<td>0.58</td>
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<tr>
<td>Family Status</td>
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<tr>
<td>Married</td>
<td>1.11</td>
<td>0.14</td>
<td>0.98</td>
<td>0.17</td>
<td>0.85</td>
<td>0.17</td>
<td>0.85</td>
<td>0.17</td>
<td>0.85</td>
</tr>
<tr>
<td>Parent</td>
<td>1.11</td>
<td>0.15</td>
<td>1.13</td>
<td>0.17</td>
<td>0.99</td>
<td>0.17</td>
<td>0.99</td>
<td>0.17</td>
<td>0.99</td>
</tr>
<tr>
<td>Social Background</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Father Graduate/Professional School</td>
<td>0.82</td>
<td>0.10</td>
<td>1.27</td>
<td>0.18</td>
<td>1.27</td>
<td>0.20</td>
<td>1.27</td>
<td>0.20</td>
<td>1.27</td>
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<tr>
<td>Professional Status</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Tier 3 or 4 Law School</td>
<td>1.37**</td>
<td>0.16</td>
<td>1.24</td>
<td>0.17</td>
<td>1.01</td>
<td>0.16</td>
<td>1.01</td>
<td>0.16</td>
<td>1.01</td>
</tr>
<tr>
<td>Practicing Lawyer</td>
<td>1.10</td>
<td>0.30</td>
<td>2.23**</td>
<td>0.66</td>
<td>2.17*</td>
<td>0.74</td>
<td>2.17*</td>
<td>0.74</td>
<td>2.17*</td>
</tr>
<tr>
<td>Status in Work Organization</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female Supervisor</td>
<td>1.07</td>
<td>0.21</td>
<td>1.01</td>
<td>0.20</td>
<td>1.03</td>
<td>0.22</td>
<td>1.03</td>
<td>0.22</td>
<td>1.03</td>
</tr>
<tr>
<td>Hours Worked</td>
<td>1.01*</td>
<td>0.00</td>
<td>1.01*</td>
<td>0.00</td>
<td>1.01*</td>
<td>0.01</td>
<td>1.01*</td>
<td>0.01</td>
<td>1.01*</td>
</tr>
<tr>
<td>Number of Years in</td>
<td>1.05</td>
<td>0.03</td>
<td>0.99</td>
<td>0.02</td>
<td>1.05*</td>
<td>0.02</td>
<td>1.05*</td>
<td>0.02</td>
<td>1.05*</td>
</tr>
</tbody>
</table>

8 The predicted probabilities were calculated using the results from the regression model predicting our composite measure of discrimination, with all other variables held at their means.

9 We conducted several analyses to test the robustness of our results. We ran separate models by sector. Although we found a few differences from the overall model, no notable differences emerged. We also ran models that did not include the race-gender variables. We obtained results for the other independent variables that were similar to those we see in the overall model.
In all three waves, women of color and white women were significantly more likely than white men to report that a client had requested a different attorney. It is notable that in wave 3 women of color have odds of perceiving discrimination that are 2.8 times greater than are white men and white women's odds are 2.3 times greater than white men. Men of color are only statistically significantly different from white men in wave 2, suggesting that gender may be more of an impediment to client representation than race.

Working in the private sector is a statistically significant predictor of this type of perceived discrimination across all waves, supporting our expectation about sectoral differences in perceived discrimination. Yet, somewhat contrary to that expectation, working in the public sector is a significant predictor in waves 1 and 2. We also find some support for our expectation that larger organizations would contain fewer self-reports of discrimination. In wave 1 only, we find that organization size has a statistically significant negative effect on having had a client request a different attorney. This may in part reflect the relative absence of client contact in large organizations at early career stages. Reports of client requests for other attorneys also are significantly associated with being a practicing lawyer in waves 2 and 3 and working longer hours (in all three waves). Attorneys who no longer practice may not have clients in a conventional sense, and so may be less exposed to this possibility. The effect of hours worked is more difficult to explain, but may reflect greater deference to clients’ preferences in more intense work environments as indicated by hours worked. In sum, the models for clients requesting other attorneys show the effects of race and gender, but also reflect more contextual effects than for the composite measure.

The quantitative data demonstrate striking differences in perceptions of discrimination across race, gender, and sexual orientation that are not explained away by other factors. But to understand the experiences that underlie these numbers, it is necessary to examine our qualitative data.

**QUALITATIVE RESULTS: ACCOUNTS OF PERCEIVED DISCRIMINATION**

While our survey data are powerful for systematically analyzing the prevalence and social correlates of self-reports of discrimination, qualitative data offer uniquely valuable information. It can reveal "how inequality is created and maintained, rather than merely its extent" (Roscigno 2007, 8). Open-ended accounts state in the respondents' own words how they see their position in the workplace, the kinds of interactions they perceive as enacting discrimination, whether the discriminatory conduct they observe is explicit or subtle, and who are the actors in the workplace or in professional contexts who engage in discriminatory conduct (e.g. Feagin 1991; Feagin and McKinney 2003).
Our survey form provided respondents with the opportunity to provide comments about their experiences with discrimination. While this approach has the benefit of allowing broad coverage of the range of perceived discrimination, the accounts are necessarily short—limited to the space in a comments field in the survey instrument. Below we first present simple counts about the nature and source of perceived discrimination. We then analyze the content of the comments.

**Positionality and Perceived Discrimination: Counts of the Nature and Source of Discrimination by Race, Gender, and Sexual Orientation**

Across all waves, we received a total of 1,472 comments about perceived experiences of discrimination at work. Between 44 percent and 48 percent of respondents in each wave who reported that they experienced some kind of discrimination offered a written comment. Within the subsample of respondents who reported experiencing discrimination, chi-square tests indicate that there are no consistent differences between the ascriptive characteristics or practice settings of respondents who wrote a comment and those who did not. Thus, those providing comments appear to be representative of the larger group of respondents who reported an experience with discrimination.

**TABLE 4. Summary Table of Type and Source of Bias Reported in Comments by Status Group, All Three Waves**

<table>
<thead>
<tr>
<th>Code</th>
<th>Women of White Color</th>
<th>Women of White %</th>
<th>Men of Color</th>
<th>%</th>
<th>N</th>
</tr>
</thead>
<tbody>
<tr>
<td>Type of Bias</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Group Animus</td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Female Gender Bias</td>
<td>198</td>
<td>35.3</td>
<td>356</td>
<td>51.7</td>
<td>1.7</td>
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<td>Racial Bias</td>
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<td>30.1</td>
<td>12</td>
<td>1.7</td>
<td>103</td>
</tr>
<tr>
<td>LGBTQ Discrimination</td>
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<td>0.2</td>
<td>9</td>
<td>1.3</td>
<td>7</td>
</tr>
<tr>
<td>Reverse Discrimination</td>
<td>0</td>
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| Source of Bias        |                      |                  |              |       |       |
| Clients               | 78                   | 27.2             | 124          | 31.5  | 40    | 35.1  |
| Supervisors           | 108                  | 37.6             | 162          | 41.1  | 42    | 36.8  |
| Colleagues            | 37                   | 12.9             | 42           | 10.7  | 20    | 17.5  |
| Lawyers               | 26                   | 9.1              | 32           | 8.1   | 3     | 2.6   |
| Judges                | 16                   | 5.6              | 20           | 5.1   | 5     | 4.4   |
| Opposing Counsel      | 20                   | 7.0              | 10           | 2.5   | 4     | 3.5   |
| Defendants            | 2                    | 0.7              | 4            | 1.0   | 0     | 0.0   |
| Total (Source of Bias)| 287                  | 100.0            | 394          | 100.0 | 114   | 100.0 |

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The patterns in Table 4 suggest the significance of positionality in these accounts, as different race-gender and sexuality groups report distinctive types of bias relating to their group membership. This reflects broader research on perceptions of discrimination, which finds that women are significantly more likely to perceive gender-based mistreatment than men, and that racial minorities are significantly more likely to perceive race-based mistreatment than whites (McCord et al. 2018). Perhaps somewhat surprisingly, women of color were most likely to describe experiences related to female gender bias, followed by racial bias, age discrimination, and sexual harassment. White women were most likely to report female gender bias, followed by sexual harassment, part-time/motherhood penalty, and age discrimination. It is striking that white women were far more likely than women of color to comment on sexual harassment and the motherhood penalty, possibly reflecting the complexities of how women of color experience sexual harassment as a combination of sexual and racial harassment (Welsh et al. 2006).

Note: The totals refer to the number of types or sources of discrimination mentioned in the comments, not the number of respondents or comments.

**NEC/Other** includes comments that fall under categories that are not elsewhere classified, and comments referring to bias related to political affiliation and illness/disability as these were relatively small categories.

The patterns in Table 4 suggest the significance of positionality in these accounts, as different race-gender and sexuality groups report distinctive types of bias relating to their group membership. This reflects broader research on perceptions of discrimination, which finds that women are significantly more likely to perceive gender-based mistreatment than men, and that racial minorities are significantly more likely to perceive race-based mistreatment than whites (McCord et al. 2018). Perhaps somewhat surprisingly, women of color were most likely to describe experiences related to female gender bias, followed by racial bias, age discrimination, and sexual harassment. White women were most likely to report female gender bias, followed by sexual harassment, part-time/motherhood penalty, and age discrimination. It is striking that white women were far more likely than women of color to comment on sexual harassment and the motherhood penalty, possibly reflecting the complexities of how women of color experience sexual harassment as a combination of sexual and racial harassment (Welsh et al. 2006).
Men of color were most likely to report racial bias, followed by unspecified hostility, and religious discrimination. White men were most likely to report reverse gender discrimination, followed by religious discrimination, reverse race discrimination, and age discrimination (most comments concerning age discrimination were, in contrast to the legal definition of protected age groups, about being treated as "too young"). LGBTQ respondents were most likely to report LGBTQ bias, followed by gender and racial bias.

The sources of discrimination are varied, from supervisors, to colleagues, judges, and clients. Across all minority groups except LGBTQ and in all three waves, supervisors are the most commonly cited source of discrimination (comprising about one-third of all reports), followed by clients and then colleagues. One exception to this pattern is white men, who are most likely to report clients as the source of reverse discrimination by gender or race.

Analyzing the Content of Comments

Based on our analysis of the full set of respondent comments, we identified a set of prominent themes and selected quotes to illustrate them. For each quote we indicate the race, gender, and practice setting of respondents, and the wave of the survey. In addition to the major themes, the quotes reveal three important dimensions of how respondents perceive discrimination that are of theoretical interest: (1) how frequently respondents report explicit, interactional types of discrimination or offer observations about the effects of implicit or unconscious bias; (2) who respondents see as the perpetrators of discrimination; and (3) the contexts in which respondents report discrimination.

Comments Reflecting Group Animus

Across all three waves, the most common type of discrimination mentioned in the comments section is discrimination based on one's group membership. These experiences cover a broad range of interactions. For example, women are singled out in a negative way because of their gender. Some of the comments relate to judgements of women's appearance, such as the following two experiences:

"Senior (male) HR person told me I needed to make my hair more attractive, wear more make-up and perfume. Seriously." (White woman, business inside counsel, wave 3)

"I also regularly receive comments about my appearance. No one comments on the appearance of my male colleagues. Essentially, I am forever being assessed verbally with respect to things unrelated to my job and this does not happen to my male colleagues." (White woman, business inside counsel, wave 3)

Women also express that their voices are not heard and they are not taken seriously by others, simply because of their gender:

"Women generally are not treated equally as their counterparts in the legal field --comments are ignored or put down. When a man in the room makes the same comment, it is brilliant." (White woman, business inside counsel, wave 3)

"As a young female lawyer of color I am treated differently--sometimes by clients or by officers of court, lawyers, judges, etc., demeaning comments like, 'girl,' 'hysterical,' or 'bitchy.' (Asian-American woman, public interest organization, wave 1)

"Comments from a male partner about how I, as a blonde woman, would not be an appropriate choice to send to a board of directors' conference, and not getting brought to client pitches or generally into networking circles." (White woman, law firm of 251+, wave 3)

For members of minority groups, negative experiences are often racialized. Minority women report racial bias as the second most common form of discrimination, and minority men as the most common form of discrimination. These interactions signal to minority lawyers that they are considered outsiders, and lesser lawyers, because of their ethnic or racial status.

"I have had situations where attorneys assumed I didn't know as much because I wasn't white, spoke down to me as though I were a fool. If you're in an environment where people are not sensitive, it's demeaning. I
complained about a manner and attitude that an attorney had and I was just told he didn't have social skills. I experienced a lot of it and that's why I started my own firm." (African-American woman, solo practice, wave 2)

Many of these experiences are rooted in stereotypes that are based on the race, gender, or both of our respondents:

[*1069] "Being mistaken for an interpreter or clerk at court because I'm Latina and look Latina." (Latina woman, solo practice, wave 1)

"At my former job, I believe I was passed up for partnership. I was told I had more obstacles than another employee because I was female, Mexican, I was gentle natured. I was there the longest of any employee. Other comments were made, not about my ethnicity, but about minorities. My questions about partnership were ignored. I was told that I was not assertive enough, that I was too nice. Before I left, they promoted an associate who was a white male to partnership and he had been with the firm less time::: . I thought I was more competent." (Latina woman, law firm of 2-20, wave 2)

"Client made racist comments to me (without understanding my racial background) regarding intellectual inferiority of Blacks when I was defending him at a deposition." (African-American man, law firm of 251+, wave 2)

For LGBTQ lawyers, the most common form of discriminatory experience is derogatory references to their sexual orientation:

"Heard the use of the word 'faggy' or 'fags' by colleagues before they knew I am gay." (LGBTQ man, law firm of 251+, wave 3)

"Someone made a really derogatory comment about my sexual orientation while on assignment." (LGBTQ woman, business nonlegal position, wave 3)

White men who were not LGBTQ report a different orientation to status-based discrimination. Their most common comment refers to reverse gender or race discrimination, sometimes by clients, sometimes by supervisors in their work organization.

"People sometimes perceive women as more desirable to handle divorce matters so I've actually been fired by a couple of clients who wanted a woman to handle their case in order to 'soften' their image." (White man, law firm of 2-20, wave 3)

"Many minority in-house counsel are engaged in a form of reverse discrimination, requiring that only minority attorneys work on various projects. I have had many projects taken away from me as a white male." (White man, law firm of 251+, wave 2)

Religious discrimination was the next most common type of discrimination white men reported.

"Boss expressed anger at request not to work on Saturday due to Sabbath. Said he thought request was bullshit. I'm the only Jew in the office and feel he is discriminating against me in terms of work and advancement." (White man, law firm of 2-20, wave 1)

[*1070] "I live in Utah. The legal community is mostly Mormon and I am not." (White man, business inside counsel, wave 1)

One of the ways in which group animus manifests is through exclusion from social activities. Workplace interactions with both peers and superiors are key to the development of a lawyer's career, and exclusion from these networks—which are both social and which might also lead to mentoring, training, and career advancement opportunities—contribute to the social isolation of women and minorities in the workplace (Payne-Pikus et al. 2010). A man of color described "not being invited or included in socializing opportunities with colleagues, race ethnicity related" (Asian-American male, law firm of 2-20, wave 1), while a woman noted: "Female attorneys are not

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included in social activities by male partners. Most partners are male and therefore women miss social interaction with superiors" (white woman, firm of 101-250, wave 1).

Another recurring theme relating to exclusion is that members of minority groups experience their place at work as one of an outsider, and as a token:

"No formal discrimination but there is definitely a boys club & the relationships the male bosses have with their white male subordinates is much different than the relationships they have with the female subordinates." (Asian-American woman, nonprofit, wave 1)

"I believe the white male culture norm defines what is a good associate with regard to interpersonal skill. Others [from different backgrounds] are seen perhaps subconsciously as different or not as capable." (Asian-American male, law firm of 251+, wave 1)

"I believe there is subconscious racial discrimination at my agency that impacts my overall ability to be considered for the most senior level positions in the agency. While I have advanced to what is considered a senior position, the most senior positions remain somewhat elusive. A combination of too few Black attorneys being hired and a lack of familiarity or comfort with such attorneys may contribute to the subconscious discrimination that results in the exclusion of candidates from the candidate pool considered for the most senior positions." (African-American woman, federal government, wave 3)

These comments describe how social exclusion works along gender and racial lines without overt discrimination.

**Sexual Harassment**

Women attorneys provided accounts of the sexual harassment they faced at work. "As a female I experience sexual harassment on a weekly basis from judges, male attorneys, and clients" (white woman, solo practice, wave 3). Another recounts that:

"[1071]"My male co-workers repeatedly referred to me as "honey," "sugar," and other inappropriate names, as well as rude inappropriate sexually charged comments in my presence. I am the only female attorney in my office. The male attorneys fraternize with each other and share the more interesting and important assignments with each other." (White woman, state government, wave 2)

A number of women recount that sex is often used as a weapon or quid pro quo for assignments: "Supervisor withheld assignments based on refusal to provide sex favors" (white woman, education, wave 3); and "Boss made pass at me--I believe I missed desirable assignment because I turned him down" (white woman, business inside counsel, wave 2). Sex is used as a weapon in other dynamics as well, with one woman of color reporting that "when client was making sexual advancements, I rejected them and he reported to the bar association that I wasn't doing my job" (African-American woman, solo practice, wave 2).

**Motherhood/Part-Time Penalty**

Although our quantitative results did not find a significant effect of being a parent or having children on the odds of reporting discrimination, the comments reveal that motherhood is a status that is used against some women. Mothers experience this form of discrimination when their familial obligations are assumed to interfere with their work role. Thus, while 5 percent of comments by women of color and 11 percent of comments by white women concerned bias against mothers, no men of color and only one white male comments on bias against being a parent.

The following comment demonstrates the ways in which motherhood acts as a status that is packaged with a set of assumptions about women's commitment to their work:

"I was told that as a new mother I would not be considered for an assignment that was very prestigious due to travel requirements, although I was never asked if that would be an issue." (White woman, federal government, wave 3)
Women also report negative work outcomes as a result of their transition to motherhood, with some noting penalties as a result of their maternity leave and others commenting that simply the status as parent is enough for them to lose significant professional authority and career advancement.

"Had twins and now demonstrable drop in trust and treated like a first-year associate. Managing Partner with whom I have worked for years now keeps me behind the scenes and won't let me re-establish client relations I had before I left for maternity leave." (White woman, law firm of 2-20, wave 2)

[1072] “When I learned I was pregnant and advised the managing partner, a woman, she told me that I had ensured that I was off of the partnership track for at least two years as a result of my choice to take maternity leave.” (White woman, law firm of 21-100, wave 2)

“I have been passed over for opportunities for certain work because I am a single mother, and the perception was that a man with a wife at home to attend to family obligations would be more available for the project(s).” (White woman, law firm of 21-100, wave 3)

Intersection of Gender and Supervisory Status: A Largely Unarticulated Form of Bias

While the quantitative and qualitative findings both point to the main effects of ascriptive status on perceptions of discrimination, the quantitative findings suggest that supervisory status is an additional mechanism that appears to exacerbate the negative experience of women at work. The quantitative data show that in wave 3, women in supervisory positions are significantly more likely to perceive discriminatory experiences. As noted above, the results are entirely consistent with power-threat theory as developed concerning sexual harassment by McLaughlin et al. (2012). That is, as women gain more power in the workplace--such as assuming supervisory roles--they provoke sexist reactions from male workers. But it could also be that having ascended to a supervisory position, these women are more aware of discrimination.

In the comments of women attorneys in supervisory positions we found an interesting disjuncture: it is rare to find an example of a woman who explicitly noted that her negative experiences stemmed from her supervisory status. The following comments, both made by African-American women, were unusual for their reference to their position: "I am a young, black attorney, so it's not always easy to get support staff who I supervise to follow my direction" (State government, wave 2). And:

"Certain of my colleagues not affording me the same respect or treating me in the same way as other white males who have held my position or similar positions." (African-American woman, education, wave 3)

Our interpretation is that women who are supervisors experience more discrimination than other women, but they do not articulate their experience as a product of being targeted because they are a woman in a position of authority. Typical of the quotes we see from women who were in supervisory positions at wave 3 are those which focus on gender. For example:

“Forceful opinions from a woman are not tolerated nor treated equally as they would be coming from a man. Lower pay offered than to a man in a similar or lesser position.” (Latino woman, state government, wave 3)

[1073] Uggen and Blackstone (2004, 83), who also find that female supervisors experience more discrimination, comment that "a woman’s authority does not immunize her from sexual harassment, at least within a cultural context in which males hold greater power and authority." Yet that women do not explicitly note that their position of authority exacerbates their workplace experiences points to the fact that while it is their gender that is targeted, additional mechanisms of workplace power are in play. The targets of workplace discrimination may not recognize the intersectional character of the discrimination they face. Just as women of color are somewhat more likely to report experiencing gender bias rather than racial bias, women in supervisory positions are more likely to interpret their experience in terms of gender. Thus, to gain better traction on our understanding of workplace discrimination, it is critical for researchers to pay attention to the intersectional experiences of individuals--such as race and gender, or gender and authority--and to investigate how (and whether) individuals perceive their intersectional status.
Clients Requesting Other Attorneys

The quantitative data suggested that for lawyers working in the private sector, having clients request another attorney on a discriminatory basis is a common experience. While the quantitative data emphasized the occurrence of this form of discrimination in the private sector, the comments highlighted that lawyers in the public sector had similar experiences, and we provide examples of both below.

"VP requested a male attorney handle matters in his area (whereas I had specific expertise in that area and male attorney did not)." (Asian-American woman, legal services, wave 3)

"Male clients often get angry and call me names or request a male attorney. Sometimes they do the opposite & try to flirt with me or ask me out." (African-American woman, public defender, wave 3)

"Derogatory comment relating to race and request of no African-American counsel." (African-American man, law firm of 2-20, wave 3)

"Clients prefer American (white) people as their lawyers and are willing to pay more for their services::: ." (Latina woman, solo practice, wave 3)

The comments of these respondents exemplify how men and women of color and white women perceive bias by clients. In some instances the bias is explicit, but perhaps more often respondents draw the inference of bias, as when respondents see clients ask for particular men to work on their matters even though they are not as expert as the respondent.

The comments demonstrate how respondents saw hierarchies of race, gender, and sexuality operate in the legal workplace. Together with our quantitative analyses of self-reports of discrimination, the comments indicate that women and persons of color often are the targets of what they perceive as discriminatory treatment. These groups experience anti-group animus, sexual harassment, penalties for motherhood and part-time status, sexist reactions to women achieving supervisory status, and discrimination by [*1074] clients. The comments thus describe the various processes that enact discrimination for young attorneys, processes that are not otherwise captured in our survey results. Whereas prominent scholars of discrimination argue that overt acts of discrimination are now largely a thing of past, replaced by more subtle, implicit forms of bias, many of the comments of these early career attorneys describe very explicit forms of discriminatory behavior. Our results tend to confirm the arguments of Sperino and Thomas (2017) and Berrey et al. (2017) that overt forms of discriminatory behavior persist in American workplaces. Moreover, the comments illustrated why we did not see sectoral differences in the composite measure of reported levels of discrimination: discriminatory processes operate in private law firms, government employment, educational and nonprofit institutions, and in business.

What comes through in many of these comments by traditionally disadvantaged groups is the continuing dominance of the traditionally advantaged group in the legal profession, white (presumably heterosexual) men. In many of the quotes above, men are depicted as the perpetrators of discrimination as they comment on women's appearance, fail to take women's comments seriously, exclude women and minorities from important meetings and social events, and perpetuate a white male "boys club." In other comments, the traditionally disadvantaged experience discrimination because the white heterosexual man is held out as the model of the superior lawyer, who has a wife at home to take care of family responsibilities; who is seen as a better courtroom performer in contrast to an Asian-American or Latino attorney, who are seen as too passive; who clients seek out as more presentable to a corporate board or able to stand up to aggressive opposing counsel; who commands respect as a supervisor when women and persons of color do not; and whose heterosexuality fits in perfectly with the aggression and dominance that LGBTQ men are assumed not to embody. Many of the quotes refer to a white male as a comparator, a person not in a protected group who receives unwarranted benefits in comparison to a person in a protected group. It is the white man who gets the promotion, gets the higher pay, and gets the client rather than the respondent, whose qualifications and seniority are overlooked.

DISCUSSION: THE PREVALENT, PERSISTENT, YET VARIABLE CHARACTER OF ASCRIPITIVE HIERARCHIES

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The quantitative analysis of self-reports of discrimination demonstrates that perceived discrimination is prevalent and persistent. Women, and especially women of color, men of color, and LGBTQ attorneys are substantially more likely to perceive that they have been the target of biased treatment than their white male counterparts. This pattern holds through all three waves corresponding to different stages of the respondents' careers. And it holds across employment contexts: in the public sector as well as in private practice; and in large organizations and small ones. And it holds despite controlling for a full range of other independent variables that might affect these perceptions.

When we turn to the qualitative comments of respondents about the nature of the negative experience they reported, we find that members of different ascriptive groups experience negative treatment that reflects how distinct hierarchies operate across various work settings. Women and persons of color describe the bias they experience from supervisors, clients, and other actors. These experiences are always described as a burden. Sometimes these experiences are described as limiting concrete career opportunities. For women, especially white women, the comments reveal gender bias, sexual harassment, or a motherhood penalty. For women of color and LGBTQ women, race or sexual orientation bias is often mixed with gender bias.

Interestingly, the qualitative comments sometimes are not consistent with the quantitative results. In our multivariate models we found no significant main effects for having children or interaction effects for women who have children reporting higher levels of perceived discrimination. Yet in the comments, several women spoke about the motherhood or part-time penalty. We found the opposite relationship between comments and numbers for female supervisors. While we found a significant effect for the interaction of supervisory status and female—a confirmation of power-threat theory—women, with a few exceptions, did not comment on the link between gender bias and supervisory status.

We do not view the differences between the quantitative and qualitative findings as problematic as these data are measuring distinct but related phenomena. Not enough women who are parents report they are a target of negative treatment to register in our statistical models, but some women do describe a motherhood penalty. And while female supervisors are significantly more likely to report negative treatment than other respondents, they very seldom report it as the combined effect of their status and their gender.

More broadly, the quantitative and qualitative results are complementary. The qualitative comments speak of relationships and of identity in context. They thus support a relational and contextual framework for understanding perceived workplace discrimination as suggested by Roscigno (2007) and Hirsh and coauthors (Hirsh and Lyons 2010; Hirsh and Kornrich 2008). But they also support scholars who give priority to ascriptive hierarchies, such as Feagin (1991, 2000) and Bonilla-Silva (2012) who assert that racial hierarchies are reinforced through everyday interactions in multiple contexts. The qualitative comments reveal theoretically important variation in the nature of the bias respondents perceive. Many comments suggest discrimination that is overt, indicated by the words of managing partners and clients or a dramatic change in treatment after getting pregnant or having a child. In other comments respondents reflect on more subtle, systemic biases they see operating in their organization, which are more consistent with theories of structural or implicit bias in the workplace. Taken as a whole, these data provide a valuable corrective to scholarship that argues that implicit bias is now the dominant form that discrimination takes, but they also indicate there is substantial variation in the discriminatory treatment respondents observe and experience.

**CONCLUSION**

In this Article we have presented data from a national sample of lawyers about their perceptions of whether they have been the target of discrimination in the legal workplace. While these are self-reports and therefore subject to attribution error, we find striking differences in levels of perceived discrimination along the lines of race, gender, and sexual orientation. In the most recent wave of the survey (conducted in 2012-2013) over one-half of African-American women reported being the target of discrimination in their workplace in the last two years, as did 43 percent of African-American men, between 29 percent and 45 percent of women in other racial and ethnic groups, and 30 percent of LGBTQ attorneys. Multivariate analyses that controlled for several other variables did not explain away these ascriptive patterns. Qualitative comments describing these discriminatory experiences largely supported the quantitative results, gave content to the nature of bias that disadvantaged groups perceive, but also
identified some disjunctures between quantitative results and individual perceptions. Interestingly, the comments also suggest that much of the bias in the workplace is overt in character, which contradicts a common narrative that most contemporary discrimination operates through unconscious or implicit bias.

It is important to recognize some of the limitations of this research. First, it is based on self-reports, which necessarily involve subjective judgments. The literature on attribution bias documents perceptual differences across race and gender groups, and these no doubt contribute to the patterns we observe. But research on employment discrimination claims suggests that there is often subjectivity in defining workplace events as discrimination. Even in instances where formal claims have been filed, there are conflicting, contested constructions of what is fair treatment in the workplace (Berrey et al. 2017). To the extent we have captured perceptions of discrimination, the race, gender, and sexuality differences we report should be taken seriously. Second, one of the great strengths of our method is also a weakness: we posed standardized questions about negative treatment, which allowed us to estimate rates of perceiving discrimination, and we asked for short descriptions of those experiences, which allowed us to gather large numbers of accounts of these experiences. But we could only scratch the surface of respondents' experiences. In-depth interviewing is necessary to examine their perceptions of workplace bias more fully. Third, while possessing data from three waves of surveys allows a unique perspective on when bias occurs in lawyers' careers, we only have data on one cohort of lawyers, those passing the bar in 2000. Given dramatic changes in the market for legal services following the financial collapse of 2008 and its effects on the job prospects of more recent law graduates, it is fair to ask whether our results generalize to other cohorts. Yet nothing in our results suggests our findings are unique to one cohort.

With these limitations in mind, our results pose a serious challenge to the legal profession. In the perceptions of lawyers, we have found evidence of entrenched hierarchies of race, gender, and sexual orientation. Given the breadth of perceived discrimination, how do leaders of the organized bar, law firms, corporate law departments, and government agencies address this problem? Perhaps the first step is to recognize the scope and character of the problem. Rather than accept the narrative that all discrimination is subtle and unintended, it is important to see that there are identifiable actors engaging in identifiable misbehavior. It is necessary to design systems of accountability in the workplace to detect and correct this misbehavior.

Second, the #metoo movement suggests the importance of grassroots action in the workplace by targeted groups to raise awareness about and take action against discriminatory behavior. Other kinds of efforts to address these problems, while laudable and increasingly popular, have not been demonstrated to be effective. The most common response has been to mandate training about sexual harassment and workplace bias. Yet training programs appear not to have advanced diversity goals in organizations, and in fact may be counterproductive in some circumstances (Kalev et al. 2006; Edelman 2016). Other efforts focus on moving women and minorities into positions of power in organizations (Dhir 2015). Experiments are currently underway to test the effects of requiring a minimum number of women on the compensation and promotion committees of law firms (Flores 2017; Weiss 2017). While research suggests that greater representation of women on the corporate boards and in the corporate law departments of clients increases the chances for women to be promoted to partner (Phillips 2005), Wallace and Kay found that having women in positions of leadership in law firms did not enhance the informational and emotional support women received in those firms (2012).

In this Article we have begun to develop a more comprehensive understanding of perceived discrimination by race, gender, and sexuality in the American legal profession. Further systematic work is needed to examine the effects of perceived discrimination on the career trajectories of lawyers. Do those lawyers who perceive that they are the targets of bias leave their employer or even leave the legal profession all together? Do they express lower levels of satisfaction with their decision to become a lawyer? Does the health and workplace performance of these lawyers suffer as a result of discrimination? These are questions best addressed with longitudinal data. The answers to these questions are of concern not just for the legal profession but for society more broadly. To the extent that lawyers of different races, genders, and sexual orientations are exposed to discrimination that limits their career development, it will erode the capacity of the legal profession to provide equal representation to all groups in society. Research suggests that communities served by a more racially and ethnically diverse legal profession...
experience smaller racial disparities in sentencing outcomes (King, Johnson, and McGeever 2010). The fate of equal justice may be tied to the fate of equal opportunity in lawyer careers.

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I. INTRODUCTION

What do black women, Latino gay men and transgender bisexuals all have in common? These minority subclasses, along with many others, are protected by current employment discrimination laws to a limited extent. Discrimination against individuals who belong to multiple minority groups is known as intersectional discrimination. Intersectional discrimination is often overlooked in antidiscrimination law, despite the increasing prevalence of this

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1 For purposes of this paper, a "minority subclass" refers to a group that is composed of two or more minorities. Thus, Black women, who are both racial and gender minorities, Latino homosexuals, who are both racial and sexual orientation minorities, and bisexual transgender people, who are both gender identity and sexual orientation minorities, all constitute minority subclasses. There are innumerable minority subclasses, particularly when considering a broad range of minority categories such as age, disability, religion, national origin, etc.

2 According to the EEOC, intersectional discrimination "occurs when someone is discriminated against because of the combination of two or more protected bases (e.g. national origin and race)." EEOC, EEOC Enforcement Guidance on National Origin Discrimination, Notice 915.005 (Nov. 18, 2016), available at https://www.eeoc.gov/laws/guidance/national-origin-guidance.cfm#. Toc451518804. More generally, "intersectionality theory posits that individuals have multiple identities that are not addressed by legal doctrines based solely on a single identity or status." Dianne Avery, et al., Employment Discrimination Law: Cases and Materials on Equality in the Workplace 47 (8th ed. 2010).
form of discrimination. The absence of intersectionality as a consideration in employment discrimination statutes specifically, and from civil rights discourse more broadly, is known as intersectional invisibility.

A current shortcoming of employment discrimination jurisprudence from a remedial perspective is that courts are generally unresponsive to claims made by discrete minority subclasses. Rather, most courts effectively require that distinct minority subclasses frame employment discrimination claims as a member of one protected class or another, but not as a member of two or more protected groups. For reasons that will be explained below, a black woman, for example, is essentially required to frame a discrimination claim as a racial minority or as a gender minority, but not through a combination in many jurisdictions. As a result, individuals who are members of multiple protected classes often lack a complete remedy in the employment discrimination context. In effect, this is judicially propagated intersectional invisibility.

Compounding this problem for lesbian, gay, bisexual and transgender ("LGBT") plaintiffs is the fact that LGBT plaintiffs do not have independently protected status under federal employment discrimination statutes, along with many other areas of antidiscrimination law. The LGBT grouping is composed of both sexual orientation minorities, including gays, lesbians, and bisexuals, as well as gender minorities, encompassing transgender individuals. Twenty-three states include gays and lesbians as protected classes under employment


4 See, e.g., Devon W. Carbado, Colorblind Intersectionality, 38 Signs 811, 813-14 (2013) (discussing the concept of intersectional invisibility and compiling academic commentary on the subject).


6 LGBT individuals are not explicitly covered by Title VII, the primary federal employment discrimination statute, for example. See infra Section III.A. Similarly, LGBT individuals are not a uniformly protected class at the federal level for purposes of housing discrimination. See, e.g., Ending Housing Discrimination Against Lesbian, Gay, Bisexual and Transgender Individuals and Their Families, HUD, https://portal.hud.gov/hudportal/HUD?src=~/program_offices/fair_housing_equal_opp/LGBT_Housing_Discrimination (last visited April 18, 2017) ("the Fair Housing Act does not specifically include sexual orientation and gender identity as prohibited bases [for discrimination]. However, discrimination against a lesbian, gay, bisexual, or transgender (LGBT) person may be covered by the Fair Housing Act if it is based on non-conformity with gender stereotypes").

7 Although lesbian, gay, bisexual, and transgender identities are subsumed into the "LGBT" grouping, it is important to note that "transgenderism...is distinct from homosexuality (attraction to members of one's own biological sex) and transvestitism or cross-dressing (dressing in clothes usually worn by those of the opposite biological sex)." Edward J. Reeves & Lainie D. Decker, Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law, 20 Law & Sexuality 61, 74 (2011).

8 While this paper will include bisexuals in discussions about LGBT discrimination, this paper does not delve as deeply into issues affecting bisexuals, as is common in the academic literature. For an in-depth exploration of this phenomenon, see Kenji Yoshino, The Epistemic Contract of Bisexual Erasure, 52 Stan. L. Rev. 353 (2000).

9 Gender Identity is defined as "a person's innate, deeply felt psychological identification as male or female, which may or may not correspond to the person's body or designated sex at birth (meaning what sex was originally listed on a person's birth certificate)." Reeves and Decker, supra note 7, at 74 (quoting Sexual Orientation and Gender Identity Terminology and Definitions, Human Rights Campaign, http://www.hrc.org/issues/workplace/equal-opportunity/gender-identity-termsdefinitions.asp).

10 Transgender individuals identify emotionally and psychologically with the opposite biological sex and usually live in the gender role opposite the one they were biologically born into or assigned. Transgender individuals do not always use surgery or
discrimination statutes, and approximately one-third of states provide coextensive protections for transgender individuals. Yet, efforts to include these groups as protected classes in federal employment discrimination statutes have failed to pass Congress since 1977. While the Employment Nondiscrimination Act ("ENDA"), which would prohibit employment discrimination against all members of the LGBT community, has gained traction in Congress in recent years, the enactment of this statute would not remediate the issue of intersectional discrimination, either in the intra-LGBT context or for intersectional plaintiffs more generally.

Because neither sexual orientation nor gender identity are expressly protected classes in federal employment discrimination statutes, intersectional LGBT plaintiffs can actually lose the ability to bring a successful claim based on other protected characteristics. For example, a Latino homosexual employee in a state with no employment discrimination statute covering sexual orientation could lawfully be discriminated against for his sexual orientation. Even if the employee attempted to bring a race-discrimination claim, the employer could be absolved of liability by arguing that the discrimination was instead primarily predicated on sexual orientation rather than race. Sexual orientation discrimination would serve as a legally sanctioned sword, in this case permitting an employer to avoid a claim of race discrimination by conceding blatant sexual orientation discrimination.

The employment discrimination landscape is arguably bleakest for a transgender bisexual plaintiff, however, who lacks uniform coverage under federal employment discrimination law for both sexual orientation and gender identity. This paper delves into the issue of intra-LGBT intersectional invisibility in the employment discrimination context and critiques ENDA for its potential to reinforce, rather than remediate, intersectional invisibility in employment discrimination law.

Discrimination against subclasses of protected groups is an increasingly common occurrence in the modern workplace, yet employment discrimination law fails to provide meaningful redress for plaintiffs who experience discrimination on the basis of more than one trait. This paper argues that as the demography of the workplace becomes increasingly intersectional, and as the LGBT subgroups attain protected class status in the

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employment discrimination context at the federal level, employment discrimination jurisprudence must evolve to embrace claims by plaintiffs who belong to more than one protected category to achieve the underlying goals of antidiscrimination law. Given the prevalence of intersectionality in the LGBT community, the existence of intra-LGBT intersectionality, and the current momentum for expanding employment discrimination through legislative efforts, it is necessary to consider intersectionality as an integral part of any effort to remediate LGBT discrimination in particular, and to address gaps in the law for marginalized plaintiffs in employment discrimination law more generally.

This article first discusses the legal origins of intersectional invisibility, and the role that courts have played in affirming the single-axis framework in employment discrimination jurisprudence. The following section addresses the phenomenon of LGBT intersectionality and raises the issue of intra-LGBT intersectionality, arguing that current efforts to prohibit LGBT discrimination in the workplace would leave both LGBT intersectionality and intra-LGBT intersectionality unaccounted for. This article next addresses the scant options for intersectional plaintiffs under the current single-axis framework, demonstrating the limits of this analytical approach to providing meaningful recompense for intersectional employees. The article next articulates judicial and legislative reform options, which would incorporate intersectionality into the mainstream of employment discrimination jurisprudence. The final section briefly concludes.

II. INTERSECTIONALITY THEORY AND THE ROOTS OF INTERSECTIONAL INVISIBILITY

A. The Single-Axis Framework in Employment Discrimination Law

Over the past half-century, American antidiscrimination law has made meaningful strides towards remediating many forms of overt discrimination, particularly in the employment context. The most prominent federal employment discrimination statute is Title VII of the Civil Rights Act, which prohibits employment discrimination "because of... race, color, religion, sex, or national origin." The Americans with Disabilities Act ("ADA") and Age Discrimination in Employment Act ("ADEA") add to Title VII's canon of protections for employees by outlawing discrimination on the basis of disability and age respectively. Additionally, Congress enacted the Pregnancy Discrimination Act ("PDA"), which prohibits discrimination against women on the basis of pregnancy or family status. Currently, Congress is considering the Employment Nondiscrimination Act ("ENDA"), which would

16 See, e.g., Nancy Levit, Changing Workforce Demographics and the Future of the Protected Class Approach, 16 Lewis & Clark L. Rev. 463 (2012).

17 The policy rationale behind [employment discrimination legislation] was fairly simple: employers should focus only on characteristics relevant to employment when making employment decisions, and the enumerated traits listed in Title VII will almost never have any bearing on whether someone can perform a certain job." Cody Perkins, Sex and Sexual Orientation: Title VII After Macy v. Holder, 65 Admin. L. Rev. 427, 428 (2013).

18 42 U.S.C. § 2000e-2 (2006). While Title VII has been successful in eradicating certain overt discriminatory practices in the workplace, Title VII is also limited in its efficacy. For one, Title VII only covers five protected classes: race, color, sex, national origin and religion. This leaves many groups unprotected. Additionally, not all employers are subject to the requirements of Title VII. Researchers have estimated that up to nineteen percent of the American labor force is not covered by Title VII. Levit, supra note 16, at 470. "While laws prohibiting discrimination were first developed following the Civil War, they failed to have the impact that they were designed to create." Jourdan Day, Note, Closing the Loophole - Why Intersectional Claims are Needed to Address Discrimination Against Older Women, 75 Ohio St. L. J. 447, 449 (2014).


broaden the scope of employment discrimination law by making discrimination on the basis of both sexual orientation and gender identity illegal. 22

Despite legislation that prohibits workplace discrimination, many employees continue to face on-the-job discrimination. 23 Title VII, the ADA, the ADEA, the PDA, and, if it passes, ENDA, create a patchwork of employment discrimination protections. However, workplace discrimination persists in numerous significant, albeit less overt forms, and current employment discrimination laws are ill equipped to handle these new iterations of workplace discrimination. 24 For example, a landmark study conducted by prominent labor economics researchers [*113] demonstrated that job applicants with “ethnic-sounding” names received substantially fewer interview invitations relative to those with “race-neutral” names, regardless of industry or occupation level. 25 To research this phenomenon, economists sent numerous employers resumes from fake candidates, all of whom were substantively equivalent, except for the fact that some resumes used race-neutral names, such as Sarah and David, while others had “ethnic-sounding” names like Lakesha and Jamal. 26 The difference in responses to candidates based on name was not negligible: prospective employees with “ethnic-sounding” names were twice as unlikely to receive a call back for a job interview. 27 Further, the unemployment gap between blacks and whites was the same in 2014 as it was in 1964, when Title VII of the Civil Rights Act was enacted. 28

22 The Employment Non-Discrimination Act of 2011 (ENDA) proposes to essentially extend Title VII protections to Americans who are gay, lesbian, or bisexual, making it illegal for employers to hire, fire, refuse to promote, or treat in a hostile manner persons based on their sexual orientation” and gender identity. Zoe Robinson, Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion, 20 Wm. & Mary Bill Rts. J. 133, 170 (2011) (internal citations omitted). “As proposed, ENDA would define "sexual orientation" as meaning "homosexuality, heterosexuality, or bisexuality," and "gender identity" as "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.” Reeves & Decker, supra note 7, at 78 (internal citations omitted). According to many scholars and political commentators, it is likely that ENDA, or a functional equivalent thereof, will pass congress within the next few years. See, e.g., Hendricks, supra note 13. Although ENDA failed to pass in the House of Representatives, the bill passed the Senate with bipartisan support, which itself is an historic event. See, e.g., Michael Memoli, Senate Votes to Ban Discrimination Against LGBT Workers, The Los Angeles Times, Nov. 7, 2013, http://www.latimes.com/nation/la-na-senate-gays-20131108, 0,1055292.story#axzz2kOnkUMEjr. As this paper discusses, however, ENDA is limited in scope relative to Title VII. For example, plaintiffs under ENDA would not be able to raise disparate impact claims. See, e.g., Employment Nondiscrimination Act, HUMAN Rights Campaign, http://www.hrc.org/resources/entry/employment-non-discrimination-act.

23 Title VII has failed to eradicate discrimination from the workplace, as evidenced by the 93,277 bias discrimination complaints filed against employers in 2009 alone. Title VII has made great strides in improving workplace opportunities and mitigating workplace discrimination since its enactment, but change is necessary in order to foster increased successes and to achieve its broad remedial policy goals. Title VII does not protect all workers against wrongful employment discrimination, and it does not adequately or consistently protect the workers that it was supposed to cover, either.” Anastasia Niedrich, Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections, 18 Mich. J. Gender & L. 25, 28 (2011) (internal citations omitted).

24 As times changed, so too did the nature of discrimination. What was once blatant became more subtle. Discussions that were once dominated by a Black-White paradigm were challenged by peoples of varying shades of brown. Gender, class, language, accent, color, and national origin began to complicate the analysis and served to differentially situate racialized groups and individuals within those groups. Unfortunately, legal analysis and doctrinal frameworks failed to keep up with the times. Today, these frameworks and outmoded ways of thinking about discrimination present considerable challenges for plaintiffs.” Jones, supra note 3, at 679-80 (internal citations omitted).


26 Id.

27 Id.
discrimination on the basis of race, along with Title VII’s other enumerated categories, may be formally illegal, not all forms of discrimination are captured by such prohibitions, and inequality and marginalization persist as a consequence of this gap in the law. 29

Intersectional discrimination is one form of discrimination that has eluded most efforts at reform. 30 As scholars have noted, “intersectionality is a conceptual blind spot for antidiscrimination law.” 31 Intersectional discrimination is unaccounted for in the employment discrimination context because the vast majority of courts adhere to a single-axis framework for analyzing discrimination claims. 32 The single-axis framework refers to an unwritten expectation that a plaintiff frames a claim of discrimination as being based on one protected trait or another, but not as a result of the confluence of two or more traits. 33 Consequently, most courts fail to recognize that individuals who identify as members of multiple marginalized groups may experience discrimination differently than individuals who are members of only one protected class. 34 Few courts recognize actionable [114] claims based on intersectionality, despite the increasing prevalence of discrimination faced by subclasses of protected groups. 35 The reasons for this will be explored more fully in part II.B, infra.

The paradigmatic example of intersectional discrimination is black women. 36 Kimberle Crenshaw, the pioneering scholar behind intersectionality theory, articulated the constraints imposed by the single-axis approach to employment discrimination jurisprudence in particular, and antidiscrimination law more broadly:

With Black women as the starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis. I want to suggest further that this single-axis framework erases Black women in the conceptualization, identification and remediation of race and sex discrimination by limiting inquiry to the experiences of otherwise-privileged members of the group. In other words, in race discrimination cases, discrimination tends to be viewed in terms of sex-or class-privileged blacks; in sex discrimination cases, the focus is on race-and class-privileged women. 37

29 See, e.g., Niedrich, supra note 23, at 28-29.
30 Intersectionality theory posits that individuals may be subject to adverse treatment as a result of the convergence, or intersection, of two or more protected classifications.” Jones, supra note 3, at 668; See also Crenshaw, supra note 15.
32 See, e.g., Crenshaw, supra note 15. Crenshaw’s article first articulated the idea of the single-axis framework, which refers to the legal presumption of single-trait discrimination. Id. Thus, discrimination claims are adjudicated on the basis of one claim or another, often failing to recognize the unique experiences of subclasses of protected groups. Id.
33 Id.
34 Crenshaw’s analysis demonstrates that antidiscrimination doctrine imagines the quintessential race plaintiffs as men of color and the model sex discrimination plaintiffs as white women. The claims of women of color are viewed as presenting an unprotected "sub-category’ or ‘special class’ and as placing civil rights doctrine on a dangerous slippery slope.” Hutchinson, supra note 5, at 302 (internal citations omitted).
35 See, e.g., Kramer, supra note 31, at 932 (“The problem, of course, is that modern discrimination is a messy enterprise that defies neat categorization. In its attempt to impose order on something disorderly, employment discrimination law neglects the needs of employees who face discrimination aimed at multiple parts of their identity.”).
36 Although black women remain the paradigmatic example of intersectional discrimination, as the focal point of intersectional scholarship and as a group that has successfully asserted claims of intersectional discrimination, other groups, such as Asian women, have also successfully raised intersectional discrimination claims and been addressed in the scholarly literature. See, e.g., Jones, supra note 3, at 668-69.
37 Crenshaw, supra note 15, at 140. See also Melissa Harris-Perry, Sister Citizen 91 (Yale 2011).
Under Crenshaw’s articulation of the single-axis framework, comparing the experiences of black women to black men or white women is inapt. 38 Unlike black men, who benefit from male privilege, and white women, who benefit from white privilege, black women are unable to claim privilege through either axis. As a result, black women experience a unique type of discrimination and have a set of life experiences that differ from both black males and white women, 39 yet the experiences of these dissimilar groups will be used to assess the veracity of a race or sex discrimination claim. 40 This problem arises for many other intersectional plaintiffs. 41 Courts have recognized claims by very few minority subclasses, including black women and Asian women, 42 underscoring a need to broaden antidiscrimination jurisprudence beyond the single-axis approach.

Intersectional invisibility is problematic for both minority workers in general and LGBT employees in particular. The demography of the US workforce is changing, which will likely increase the necessity for judicial recognition of intersectional claims, particularly for groups who may not have previously been considered intersectional. As some have noted, “by 2042, a generation from now, racial and ethnic minorities will become a majority of the U.S. population and whites will be a racial minority. In roughly that same timespan, the number of multiracial individuals in the United States will triple.” 43 Further, with women comprising a larger proportion of the workforce, and LGBT workers coming out of the closet in higher numbers, the frequency of intersectional discrimination claims will inevitably increase, warranting expanding current employment discrimination jurisprudence to recognize the viability of these claims.

B. Judicial Responses to Intersectional Claims

Despite the prevalence of intersectional discrimination in the employment context, there has not been widespread judicial acceptance of intersectional theory. "Rather than appreciate the multidimensional nature of discrimination and the dynamic interaction of various identity traits, courts generally demand a specific injury linked to discrimination based on a specific trait." 44 Some courts have allowed black women, along with a few other distinct minority subclasses, to bring intersectional claims, recognizing the unique historic social positions of marginalization experienced by these sub-groups. 45 For example, in Jefferies v. Harris Community Action Association, the Fifth Circuit “implicitly recognized that black women throughout American history have worked in subservient roles and have been subjected to adverse conditions that have not been imposed upon either black men or white women.” 46

38 See, e.g., id. (discussing unique experiences of black women in the workplace: “the workplace is a particularly fraught terrain for black women who try both to earn professional respect and to guard against the expectation that they are irrationally angry”).

39 A black woman’s experience cannot be compared to the experience of either a black man or a white woman. Neither of these latter examples captures the full range of stereotypes and prejudices that attach uniquely to a black woman’s experience.” Kramer, supra note 31, at 932-33.

40 In Degrafenreid v. General Motors, five African American women brought suit against General Motors, alleging that the employer’s seniority system perpetuated the effects of past discrimination against black women. The Eighth Circuit held that there was no sex discrimination because although General Motors did not hire black women prior to 1964, it did hire white women.” Alina Hoffman & Margarita Varona, Sexual Discrimination Claims Under Title VII of the Civil Rights Act, 13 Geo. J. Gender & L. 523, 553 (2012).

41 The complexities of joint racial and gender classification are not limited to black female plaintiffs. Black men have also faced specific and unique discrimination in employment settings.” Id. at 554.

42 Thus, an Asian woman may allege that she was discriminated against not because she is a woman, or Asian, but because she is an Asian woman.” Jones, supra note 3, at 668-69.

43 Levit, supra note 16, at 464.


45 See, e.g., Avery et al., supra note 2, at 47.

46 Id. at 48.
Although the Jefferies Court allowed the plaintiffs in that case to bring an intersectional discrimination claim, this holding has been extended in only a handful of subsequent cases. \(^{47}\) The holding of Jefferies is limited by its own terms, moreover, because the case recognized the unique experiences of black women in finding that the intersectional claim was viable. \(^{48}\) This is quite different from articulating a universal cause of action for plaintiffs based on intersectional discrimination.

In addition to black women, Asian women are one of the few other intersectional subclasses that courts have allowed to bring intersectional claims. \(^{49}\) Courts have recognized that Asian women face discrimination that does not impact Asian men or white women. \(^{50}\) Scholars have argued for the recognition of numerous additional protected subclasses, including older women, \(^{51}\) black Muslims, \(^{52}\) and LGBT people of color. \(^{53}\) Given that neither the Supreme Court nor Congress have formally addressed intersectionality, claims of intersectional discrimination remain legally precarious.

Many courts have been skeptical of intersectional claims, to put it mildly. The most unequivocal and vehement rejection of intersectionality theory was articulated in DeGraffenreid v. General Motors Assembly Division. \(^{54}\) In DeGraffenreid, the Eighth Circuit rejected a black woman's claim of intersectional discrimination. \(^{55}\) The court characterized allowing a judicial cause of action for intersectionality as providing a "super remedy" for minorities subjected to discrimination on intersectional bases. \(^{56}\) The Degraffenreid Court held that the "lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both." \(^{57}\)

It is important to challenge the Eighth Circuit's characterization of intersectionality as providing a "super remedy" because plaintiffs in intersectional discrimination claims do not seek any extra remedy. Rather, intersectional plaintiffs seek only recognition of unique discrimination that results from the confluence of membership in multiple marginalized groups. Intersectional plaintiffs are not seeking any extra remedy or correspondingly higher damages based on multiple forms of discrimination. Providing equal opportunity for intersectional plaintiffs to bring a discrimination claim is in no way tantamount to a "super remedy," but is instead a step toward substantive equality for intersectional individuals.

\[^{47}\] See Jefferies v. Harris Cty. Cmty. Action Ass'n, 615 F.2d 1025 (5th Cir. 1980); see also Hicks v. Gates Rubber Co., 853 F.2d 1406 (10th Cir. 1987).

\[^{48}\] See Jeffries, 615 F.2d at 1032.

\[^{49}\] Jones, supra note 3, at 668-69.

\[^{50}\] Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994); see also Jones, supra note 3, at 668-69.

\[^{51}\] Day, supra note 18, at 453, 457.


\[^{55}\] Id.

\[^{56}\] Id.

\[^{57}\] Id. at 483 (emphasis added).
While the EEOC recently incorporated a statement in its compliance manual interpreting Title VII to allow a cause of action for intersectional discrimination, courts have not cited this provision in published opinions. Moreover, the EEOC's recognition of intersectional discrimination perpetuates a problematic feature of intersectional discrimination thus far, which is the recognition of only certain intersectional classes, rather than an understanding of the myriad manifestations of intersectionality in the workplace.

There are at least three distinct reasons why intersectional claims have failed to become accepted in mainstream discrimination jurisprudence. The first can be traced to Title VII's language, which uses a disjunctive "or" in describing the discrete minorities that are protected under the statute. Courts rejecting an intersectional approach have indicated that the language of Title VII implies a plaintiff may belong to one category, but not multiple. The text of the statute does not explicitly provide a cause of action based on intersectional discrimination, though this may be an amendment worth considering, which will be discussed in greater depth in section V, infra.

The second factor that reinforces judicial reliance on the single-axis framework is the four-step burden-shifting framework from McDonnell Douglas Corp. v. Green, through which a plaintiff can establish a claim of discrimination. There are two ways in which this four-step burden-shifting framework reemphasizes the law's entrenched dependence on the single-axis framework.

Under the first step of McDonnell Douglas, a plaintiff must make a prima facie case of discrimination. This requires that a plaintiff demonstrate that "(1) he or she belongs to a minority group; (2) he or she applied for and was qualified for the position at issue; (3) despite his or her qualifications, he or she was not hired; and (4) after his or her rejection, the position remained open and the employer continued to seek applications from other individuals." The first prong of McDonnell Douglas implicitly buttresses the single-axis framework by requiring a plaintiff allege a claim as a member of a protected class, not one or more. A protected class is generally understood as a member of a singular minority group, thus formalizing the requirement that a discrimination claim be framed as an either-or claim.

If a plaintiff sufficiently articulates a prima facie case of discrimination, the burden shifts to the defendant to rebut the inference of discrimination raised by the plaintiff's prima facie case. This raises the second problem

59 See id. The EEOC Compliance manual regarding intersectionality reads: "Title VII prohibits discrimination not just because of one protected trait (e.g., race), but also because of the intersection of two or more protected bases (e.g., race and sex). For example, Title VII prohibits discrimination against African American women even if the employer does not discriminate against White women or African American men. Likewise, Title VII protects Asian American women from discrimination based on stereotypes and assumptions about them "even in the absence of discrimination against Asian American men or White women." Id.
60 Much of the confusion for intersectionality centers around Congress's use of the word "or" in the text of Title VII, which protects against discrimination based on race, color, religion, sex, or national origin." Bradley Allen Areheart, Intersectionality and Identity: Revisiting a Wrinkle in Title VII, 17 Geo. Mason U. Civ. Rts. L. J. 199, 208 (2006).
61 See, e.g., DeGraffenreid v. General Motors Assembly Division 413 F. Supp. 142, 143 (E.D. Mo. 1976), aff'd in part, rev'd in part on other grounds, 558 F.2d 480 (8th Cir. 1977).
63 Angela Onwuachi-Willig & Mario Barnes, By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply Even If Lakesha and Jamal are White, 2005 Wis. L. Rev. 1283, 1290-92 (2005).
64 See, e.g., Areheart, supra note 60, at 208.
for intersectional plaintiffs making a case of intersectional discrimination, which is the use of statistics. 66 An oft invoked method used by defendants to rebut the inference of discrimination raised by the plaintiff's prima facie case of discrimination is through statistical evidence, which demonstrate that other "similarly situated' employees at the workplace have not been treated discriminatorily, undermining the reliability of the discrimination claim. 67

The use of statistics in this context are problematic for at least two reasons. First, statistics used to establish discrimination, can fail to account for the unique experiences of subclasses of protected groups. As Crenshaw describes, there is an apparent hierarchy among marginalized groups, with those marginalized along only one axis, such as white women or black men, being nearer to the top. 68 The experiences of those "at the top" of the hierarchy will nevertheless be used to measure the legitimacy of an intersectional discrimination claim. Thus, if a black woman is alleging race-sex intersectional discrimination, an employer might use statistics that show that he has eight black employees, and ten female employees. These statistics fail to reveal that seven of the black employees are men and nine of the female employees are white. There is only one black woman, and her claim can therefore be undermined. Use of statistics is thus problematic in this context. 69

The second problem with the use of statistics in intersectional discrimination cases is the lack of available comparator groups for intersectional plaintiffs. 70 For example, in Moore v. Hughes Helicopter Inc, the Ninth Circuit failed to recognize the [*119] challenge of proffering adequate statistical evidence for subclasses of protected groups, dismissing the claim as a result: 71

Presumably on the basis of Moore claiming discrimination as a black woman, the court left her to support her claim with statistical evidence of discrimination against black women. The court found Moore to be the only qualified black woman employee in her particular unit, thereby leaving her with no statistically significant evidence to prove a claim of discrimination against black women. 72

65 McDonnell Douglas, 411 U.S. at 802.

66 For a detailed discussion of the problematic aspects of using statistics in discrimination cases, see Suzanne B. Goldberg, Discrimination by Comparison, 120 Yale L.J. 728 (2011).

67 There are two different ways courts use "similarly situated comparators' to evaluate discrimination claims: "Although not mentioned by the Court in McDonnell Douglas, many circuit courts have added another element to the prima facie case. These courts require plaintiffs to demonstrate "that a similarly situated person outside the protected class was treated better. Other courts have held that a similarly situated comparator is one of the ways in which plaintiffs may prove discrimination." Day, supra note 18, at 453. Whether the court frames the similarly situated comparator requirement as part of the prima facie case, or merely as an evidentiary advantage for plaintiffs, using a similarly situated comparator is the most common way plaintiffs prove a claim of discrimination. Id. It is often difficult, if not impossible, to find similarly situated comparators for an intersectional plaintiff, making it even more difficult to prevail on a discrimination claim under the current framework. See Goldberg, supra note 66.

68 Crenshaw depicts this point visually with her metaphor of a basement that contains all people who are discriminated against on the basis of race, sex, class, sexual preference, age and/or physical ability...Those at the bottom of the basement are individuals fully disadvantaged by the broad array of factors, while those at the top (near the ceiling) are disadvantaged by only a single factor. She notes that this ceiling is also a floor, above which all those who are not disadvantaged by any factor reside." Areheart, supra note 60, at 211.

69 See, e.g., Goldberg, supra note 66.

70 See, e.g., id. at 736 (intersectional plaintiffs "[struggle] under a comparator regime in part because it can be difficult to decide who is the proper comparator - is it someone who shares neither of the individual's traits or shares one but not the other? In addition, because intersectional plaintiffs are often few in number relative to all others in a workplace, decision makers tend to be skeptical of the comparison's probative value and are typically unwilling to conclude that comparatively worse treatment is attributable to discriminatory intent rather than to the plaintiff's idiosyncratic quirks").

71 708 F.2d 475 (9th Cir. 1983).

72 Areheart, supra note 60, at 210 (emphasis added).
A similar problem with the use of statistics arises in the disparate impact realm. Disparate impact discrimination occurs when an employer promulgates a facially neutral policy, which has a disproportionate impact on certain protected classes. 73

In establishing a prima facie case of disparate impact, a plaintiff first must identify a specific employment practice to be challenged, and then, through relevant statistical analysis, must prove that the challenged practice has an adverse impact on a protected group. In making these comparisons, a plaintiff must demonstrate disparate impact with respect to the pool of qualified persons in the relevant labor market for the given position. 74

Given that it can be difficult to find similarly situated comparators, raising a successful disparate impact claim can be exceedingly difficult for intersectional plaintiffs.

One example of a policy with a disparate impact is one that requires female employees 75 to wear their hair straight. 76 While this may seem like a race-neutral grooming policy to some in that it applies equally to everyone and does not explicitly mention race, it effectively embeds whiteness as the default racial setting. This is because this policy fails to recognize that for some women, like Black women, who have hair that naturally grows in a texture that is not straight, the employer's policy imposes an extra burden on these employees. Thus, this policy may seem facially neutral, but has a disparate impact on black employees. Under a disparate impact theory, a policy that has such a disparate impact constitutes impermissible employment discrimination. 77 However, the Eleventh [120] Circuit recently upheld an employer's policy of banning dreadlocks during the interview process, despite the racial implications of doing so. 78

Statistics are generally relied upon more heavily in this context, as employees must make the prima facie case of disparate impact discrimination through statistical evidence. Statistics in an intersectional disparate impact claim are not dispositive for the same two reasons mentioned above: For failing to capture the unique experiences of marginalized subclasses, and ignoring the reality that finding similarly situated comparators can be difficult, if not impossible.

A third reason that intersectional discrimination theory has not been more widely invoked in mainstream employment discrimination jurisprudence is because the term discrimination itself is undefined in employment discrimination statutes, except for the ADA. 79 The leading definition cited by many courts is a definition of discrimination promulgated by sponsors of the Civil Rights Act:

73 If discriminatory intent is the touchstone of disparate treatment, then discriminatory effect is the touchstone of disparate impact. Disparate impact captures unintentional discrimination, cases in which an employment policy is fair on its face but harms one group of employees more than another.” Kramer, supra note 31, at 903. See also Green v. Mo. Pac. R.R. Co., 523 F.2d 1290 (1975) (articulating the importance of statistics in disparate impact claims).


75 Courts allow employers to impose different grooming requirements on male and female employees who perform the same job, finding that such policies do not violate Title VII. See, e.g., Jespersen v. Harrah's Operating Co., 444 F. 3d 1104 (9th Cir. 2006) (dismissing a claim of sex discrimination brought by a female bartender at Harrah's Casino who was fired for refusing to wear makeup as required by the Casino grooming policy, even though the grooming policy imposed different grooming standards on male and female bartenders).

76 See, e.g., Onwuachi-Willig, supra note 74.

77 See also Green, 523 F.2d at 1290.


79 Day, supra note 18, at 451.
To discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by Section [703] are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin. Any other criterion or qualification for employment is not affected by this title.  

Because civil rights statutes do not specify either that intersectional discrimination is a recognized type of discrimination, or that intersectionality is actionable, courts have had the freedom to ignore intersectionality, despite the lived experience of discrimination for intersectional plaintiffs.

**III. LGBT INTERSECTIONALITY**

Although lesbian, gay, bisexual and transgender ("LGBT") individuals experience pervasive on-the-job discrimination, these groups are not protected from such discrimination at the federal level, or in the majority of states. Intersectional discrimination is particularly consequential in the LGBT context for two reasons. First, there is a high incidence of individuals who identify as LGBT and also belong to another protected category. For example, racial minorities identify as LGBT at the highest rates: 4.6% of Black Americans identify as LGBT, 4.3% of Asian Americans identify as LGBT, 4.0% of Latinos identify as LGBT. White Americans, conversely, identify as LGBT at the lowest rate, 3.2%, despite the construction of essentialized LGBT identity as predominantly white. Individuals identifying as both racial minorities and LGBT have intersectional race-sexual orientation identities, yet remain unaccounted for in the LGBT pursuit of employment discrimination protection.

Second, intra-LGBT intersectional discrimination can occur against an individual who identifies as both homosexual or bisexual and transgender, demonstrating the limits of a single-axis approach to remedying intersectional LGBT employment discrimination specifically, as well as highlighting a problem that is endemic to current employment discrimination law more broadly. This is hardly a theoretical problem: it is common for a transgender individual to identify both as homosexual or bisexual and transgender. According to one study, approximately one-third of

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80 Id. at 450-51.


82 See, e.g., id. at 425.

83 See, e.g., Burns et al., supra note 11 (cataloguing the extent to which each state protects LGBT workers). As the report by Burns et al. demonstrates, there is a great deal of variation between states in terms of whether discrimination against LGBT employees is prohibited by law, which LGBT subgroups are covered, and whether the statute applies to both public and private sectors. For example, some states only prohibit sexual orientation discrimination, thereby excluding transgender individuals from coverage. Other states only prohibit sexual orientation and/or gender identity discrimination in public sector employment, while others prohibit it in the private sector, and some prohibit discrimination in both contexts. See id.


86 Id.

87 Id.

88 See, e.g., Onwuachi-Willig & Nourafshan, supra note 84.

transgender individuals identify as bisexual, with an additional 12 to 16 percent identifying as homosexual or “queer.” 90 Transgender individuals who identify as a heterosexual, on the other hand, account for approximately 30 percent of the transgender population. 91

ENDA would not remedy this problem. Passing ENDA in its current form would only address discrimination on a singular axis. This effectively means that LGBT people of color, LGBT religious minorities, LGBT immigrants, LGBT elderly people, and numerous other groups would not be able to raise a viable claim that captured discrimination that occurred on the basis of more than one trait. This leaves a significant proportion of LGBT people without comprehensive protection from workplace discrimination.

Reforming employment discrimination law is a monumental undertaking, demonstrated by decades of unsuccessful attempts to do so. 92 Given the growing momentum for passing legislation that expands protected classes in employment discrimination to include LGBT plaintiffs, 93 and the import of intersectionality for LGBT plaintiffs directly, now is the appropriate occasion for considering legislating intersectionality as part of employment discrimination reform.

A. LGBT Workplace Discrimination

There is pervasive discrimination against LGBT employees in the workplace resulting in a number of consequences, including lower incomes and on-the-job harassment for LGBT employees, 94 despite widespread acknowledgment that “there is no evidence that gays and lesbians do not function as effectively in the workplace or that they contribute any less to society than do their heterosexual counterparts.” 95 In states where sexual orientation is included as a protected class in employment discrimination statutes, claims of sexual orientation are brought almost as frequently as claims of race and sex discrimination, despite the relatively small proportion of the overall workforce made up of gays and lesbians. 96 This demonstrates the dire need for extending employment discrimination protections to include LGBT people.

Discrimination against gays and lesbians appears to be endemic to the American workplace: 42 percent of gays and lesbians report experiencing harassment as a result of their sexual orientation, and 16 percent report losing a job as a result of sexual orientation. 97 Interestingly, one-third of LGBT employees are not open with any co-workers about

91 Id.
92 See, e.g., Reeves & Decker, supra note 7, at 62.
96 Out of every 10,000 gay workers, an average of four file discrimination complaints with state agencies. That number is 3.9 for workers filing discrimination complaints based on race, and 5.2 for workers filing discrimination complaints based on their gender.” Burns et al., supra note 11, at 10. There are over eight million self-identified LGBT employees in America, accounting for 6.3 percent of the total workforce, which is composed of over 129 million people. Id. at 6. Seven million LGBT employees work in the private sector, and over one million LGBT employees work in local, state and federal government. Id.
their sexual orientation or gender identity, 98 which could suggest that some of these employees who are not out to anyone in the workplace conceal their identity trait for fear of the resultant discrimination. 99 The discrimination that openly gay and lesbian employees experience has many tangible consequences, such as diminished income. 100 Studies have demonstrated [*123] that gay men earn up to 32% less than their heterosexual counterparts, for example. 101

While gays and lesbians are disadvantaged in terms of employment and income relative to heterosexuals, there are also alarming inequalities among gays and lesbians in terms of income, wealth, and employment that vary dramatically by race. 102 For example, black male same-sex couples earn $23,000 less than white male same-sex couples, and black female same-sex couples earn $21,000 less than white female same-sex couples. 103 Similarly, Latino male same-sex couples earn $27,000 less than white male same-sex couples, and Latino female same-sex couples earn $24,000 less than white female same-sex couples. 104 Further, LGBT people of color are much more likely to be employed in lower-paying government jobs and to lack private health coverage. 105

Discrimination against gays and lesbians in the workplace is unquestionably rampant, but transgender individuals report even higher levels of on-the-job discrimination, social marginalization, and economic hardship. 106 As one scholar notes:

97 Sears and Mallory, supra note 94, at 4. Notably, only twenty-five percent of survey respondents in the Williams Institute study were openly homosexual with all of their co-workers. It is possible that these discrimination figures would increase if more employees were openly homosexual. Further, one might argue that the pressure to not be openly homosexual at work constitutes a form of discrimination, known as covering. For the authoritative discussion of covering, see Kenji Yoshino, Covering, 111 Yale L. J. 769 (2002).

98 Sears & Mallory, supra note 94, at 4.

99 See Yoshino, supra note 97.

100 See Onwuachi-Willig & Nourafshan, supra note 84.

101 Badgett et al., supra note 94, at 559 ("A growing number of studies using data from the National Health and Social Life Survey ("NHLS"), the General Social Survey ("GSS"), the United States Census, and the National Health and Nutrition Examination Survey ("NHANES III") show that gay men earn 10% to 32% less than otherwise similar heterosexual men").


103 Dang & Frazer, supra note 102, at 5.

104 Id.

105 Id.; Cianciotto, supra note 102.

106 A recent national survey of almost 6,500 transgender individuals found that nearly half of respondents had experienced an adverse employment action - denial of a job, denial of a promotion, or termination of employment - as a result of their transgender status and/or gender nonconformity. Fifty percent reported harassment by someone at work, forty-five percent stated that co-workers had referred to them using incorrect gender pronouns "repeatedly and on purpose,' and fifty-seven percent confessed that they delayed their gender transition in order to avoid discriminatory actions and workplace abuse." Lee, supra note 81, at 424-25 (internal citations omitted); see also, Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2, Nat'l Ctr. for Transgender Equal. and Nat'l Gay and Lesbian Task Force, (2011), http://www.thetaskforce.org/reports_and_research/ntds.
Transsexuals are victims of discrimination in virtually every aspect of their lives. Socially, they are outcast because they do not fit into traditional notions of gender. Legally, they are subject to a variety of obstacles that the average person would never have to face. In thirty-four states, transsexuals are unable to change their birth certificate to accommodate their gender identity and expression, which, in turn, can lead to difficulty obtaining a driver's license or passport. They are unable to obtain marriage licenses, which can affect intestacy and child custody rights. They even face discrimination based on their decision to use either a "male" or "female" restroom. To date, existing anti-discrimination laws have been largely ineffective in remedying the injustices and difficulties that transsexual individuals face.

In light of this discrimination, and lack of a reliable remedy, LGBT rights activists have sought employment protections in judicial and legislative forums for decades. "Starting in the 1950s, homosexuals waged a multi-front struggle for the right to express a gay identity at work. Their activism was coterminous with similar workplace rights campaigns fought by women and racial minorities." While sex and race were granted protected-class status under Title VII, attempts to include sexual orientation as a protected class have been introduced in every session of Congress for decades, yet these efforts have not been successful.

In addition to efforts to include LGBT individuals as protected classes under federal legislation, legal advocates have pursued judicially based protections for LGBT employees as well. LGBT legal advocates have sought to expand Title VII's prohibition on sex discrimination to include gender identity and sexual orientation, which is a strategy that has yielded mixed results. The court has greatly expanded its conception of sex discrimination since the passage of Title VII, moving from a narrow conception of sex discrimination that was limited to biological sex to include discrimination based on the more expansive concept of gender. In the words of former Supreme Court Justice Antonin Scalia: "The word 'gender' has acquired the new and useful connotation of cultural attitudinal characteristics (as opposed to physical characteristics) distinctive of the sexes. That is to say,"

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107 Malloy, supra note 89, at 284 (internal citations omitted) (emphasis added). See also Niedrich, supra note 23, at 30 ("Unemployment and under-employment are huge issues for transgender people - and particularly for transsexual people who often lose their jobs during or after their gender transitions...Within the transgender community, it is not uncommon to find people dramatically underemployed regardless of their experience or background."). (internal citations omitted).


109 Current federal law generally does not prohibit workplace discrimination based on sexual orientation or gender identity. For over a decade now, advocates of the gay, lesbian, bisexual and transgender (GLBT) community have sought to change this with proposed federal legislation - the Employment Non-Discrimination Act (ENDA), which would prohibit such discrimination nationwide. Reeves & Decker, supra note 7, at 62.

110 See, e.g., Turk, supra note 108. See also Sari M. Alamuddin, Seventh Circuit Extends Title VII Protections to Sexual Orientation, The National Law Review, Apr. 7, 2017, http://www.natlawreview.com/article/seventh-circuit-extends-title-vii-protections-to-sexual-orientation ("on April 4 [2017], the US Court of Appeals for the Seventh Circuit held in Hively v. Ivy Tech Community College of Indiana that discrimination on the basis of sexual orientation is a form of sex discrimination prohibited under Title VII of the Civil Rights Act of 1964. This marks the first time a federal court of appeals has extended Title VII's protections to claims based on sexual orientation.").

111 It has become an academic norm to use the term "sex' to refer to gonadal, chromosomal, or genital anatomy and to use the term "gender' to refer to the socially expected behaviors and preferences commonly ascribed to each sex." Mark Berghausen, Intersex Employment Discrimination: Title VII and Anatomical Sex Non-Conformity, 105 Nw. U. L. Rev. 1281, 1286 (2011).

112 Each individual maintains a particularized sex and gender." Anton Marino, Transgressions of Inequality: The Struggle Finding Legal Protections Against Wrongful Employment Termination on the Basis of the Transgender Identity, 21 Am. U. J. Gender Soc. Pol'y & L. 865, 869 (2013). Sex refers to biological sex, while gender refers to the social construct that accompanies gender. "Sex is best described as the outside physical or perceived surface identity of a person." Id. at 871. On the other hand, "gender-expression is the manifestation of one's inner self and is frequently equated with socially normative, dichotomous Euro-American stereotypes of what it means to be a man or a woman." Id.
gender is to sex as feminine is to female and masculine is to male." 113 To expand Title VII's prohibition on sex discrimination to include gender, the court created the sex-stereotyping theory. 114 Sex-stereotyping theory was first articulated in the 1989 Supreme Court case Price Waterhouse v. Hopkins and holds that an employer cannot predicate an employment decision based on stereotyped notions of how men and women ought to behave. 115

A number of courts have construed sex-stereotyping theory to encompass discrimination against transgender individuals. 116 "The sex-stereotyping doctrine would seem to be a boon to the transgender community, as transgenderism is defined in significant part by nonconformity with stereotypical gender expectations." 117 This interpretation has gained traction in numerous courts, and the EEOC affirmed the inclusion of transgender individuals under Title VII's sex discrimination provision. 118 However, the Supreme Court has yet to affirm this interpretation of Title VII, and some circuit courts have explicitly rejected the extension of sex-stereotyping to include transgender plaintiffs. 119 It would be premature, therefore, to consider transgender inclusion under Title VII as settled law.

While transgender plaintiffs may have been moderately successful bringing discrimination claims under Title VII's sex discrimination provision, courts have not consistently adopted an interpretation of sex-stereotyping theory that includes gay and lesbian plaintiffs. 120 In states that do not include sexual-orientation discrimination as a protected class, which is more than half of states, an employer can lawfully terminate a gay employee that endures explicitly offensive taunts such as "fagboy" and "Tinkerbell" in the workplace, and loses his job for complaining about it. 121 In the past, the EEOC has similarly rejected an interpretation of Title VII's sex provision as including homosexual and bisexual plaintiffs. 122 While it may not be desirable for plaintiffs who experience discrimination based on sexual orientation to be deprived of a legal remedy, it is important for courts to disaggregate sex, gender

114 Perkins, supra note 17, at 428-29.
115 490 U.S. 228, 258 (1989) ("Sex Stereotyping Theory" prohibits employment discrimination on the basis of failing to conform to sex stereotypes under Title VII).
116 See, e.g., Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Schroer v. Billington, 424 F. Supp. 2d 203 (D.C. Dist., 2006); Glenn v. Brumby, 663 F. 3d 1312 (11th Cir. 2011). Conversely, some courts have rejected an interpretation of Title VII that covers transgender plaintiffs. See, e.g., Ulane v. Eastern Airlines, 742 F.2d 1081, 1082 (7th Cir. 1984) ("The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female."); Etsitty v. Utah Transit Authority, 502 F. 3d 1215 (10th Cir. 2007).
117 Lee, supra note 81, at 434.
118 Recently, courts have become much more receptive to finding that discrimination against transgender people is impermissible sex stereotyping under Title VII." Perkins, supra note 17, at 435-36 (internal citations omitted). See also Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012) (interpreting Title VII's sex discrimination provision to cover transgender discrimination claims).
119 There is now a division in the law between the jurisdictions that protect transgender plaintiffs under Title VII and those that do not." Berghausen, supra note 111, at 1306.
121 Dandan, 2000 WL 336528, at 1-4.
122 While there may be no binding precedent from the EEOC stating that sexual orientation is covered under Title VII, there is binding precedent regarding transgender people." Perkins, supra note 17, at 439.
and sexual orientation. 123 Distinguishing sex from sexual orientation is crucial for ensuring the judicial viability of intra-LGBT intersectional claims, 124 which will be discussed further in section III.B infra.

B. The Precariousness of Intersectional LGBT Claims

Although both gender identity and sexual orientation would be covered as protected classes under ENDA, 125 and the underlying aims of expanding employment discrimination protections under ENDA may be normatively desirable, this legislation fails to recognize the looming problem of intersectional discrimination, both in the intra-LGBT context, and as it applies more broadly to other intersectional LGBT plaintiffs. In a leading treatise on employment discrimination, the authors presciently pose the question, "if Congress enacts ENDA, and discrimination on the basis of sexual orientation is prohibited under federal law, should gay black males constitute a subclass that is protected on the basis that they belong to two minority groups—people of color and gay men?" 126 While the answer should be yes, according to some scholars, the structure of ENDA as a non-Title VII amendment undermines the viability of this option. 127

ENDA thus preserves intersectional invisibility, as it pertains to intersectional LGBT plaintiffs by failing to expressly embrace intersectional claims. While this article argues that ENDA is deeply flawed because of the statute’s failure to address intersectionality, it is also worth noting here that ENDA would expressly deny LGBT plaintiffs the opportunity to raise disparate impact claims. 128 As one scholar explains:

After years of failed attempts to add "sexual orientation" to Title VII of the Civil Rights Act of 1964, ENDA’s proponents decided they would have a better chance with a stand-alone bill stripped of several of Title VII’s protections: they gave up [*127] disparate impact claims and affirmative action as a remedy for proven discrimination. 129

Disparate impact claims have been an important source of redress for racial and gender minorities, yet this option would be unavailable under the terms of ENDA. If passed in its current form, it is likely that ENDA would have to be supplemented with another statute expanding employment discrimination coverage for LGBT plaintiffs to include a disparate impact cause of action.

Given that LGBT individuals are not protected under federal employment discrimination statutes, intersectionality can operate as a sword for employers. 130 Under current law, employers can avoid discrimination on another trait by blatantly admitting to engaging in sexual orientation discrimination. 131 As one scholar explains:

124 For extensive discussion on the judicial significance of disentangling sex, gender and sexual orientation, see id.
125 Reeves & Decker, supra note 7; see also Lee, supra note 81, at 425-26.
126 Avery et al., supra note 2, at 467.
127 See, e.g., Day, supra note 18, at 449.
129 Hendricks, supra note 13, at 209.
130 Hutchinson, supra note 15, at 302-03. See also Kramer, supra note 15, at 243.
131 This catch-22 for intersectional plaintiffs is apparent in a gender discrimination case: "What results is double punishment for a homosexual person: a homosexual person is more likely to be subject to gender discrimination for not fitting in, and is at the same time less likely to have a day in court." Clancy, supra note 95, at 131.
Because sexual orientation remains an unprotected category in federal statutory and constitutional civil rights law, discriminators may willingly concede sexual orientation discrimination when some evidence of discriminatory action exists, but deny racial or gender discrimination. The precarious status of sexual orientation in civil rights law, therefore, allows for the furtherance of racial subjugation and patriarchy, as defendants package their racism and sexism in homophobic terms in order to escape liability.\(^\text{132}\)

In intersectional LGBT cases, "courts do not recognize "intersecting" discrimination; they have found that evidence of sexual orientation discrimination negates any possibility that defendants also engage in racial discrimination; and they have refused to accept arguments that plaintiffs face unique discrimination as gays and lesbians of color."\(^\text{133}\) Thus, if a Latino homosexual plaintiff alleged race and sexual orientation discrimination, it would be possible for the employer to avoid liability on the race discrimination claim if he can claim that sexual orientation discrimination was instead the motivating factor.\(^\text{134}\)

ENDA's intersectionality problem is not only substantive, but also structural. If enacted as a freestanding statute, an intersectional LGBT plaintiff may not be able to combine a discrimination claim under a Title VII protected class, like race, with an intersectional claim of LGBT discrimination, because the causes of action arise from different statutes. This problem has been illustrated in intersectional \(^\text{[*128]}\) claims raised in the ADEA/Title VII context.\(^\text{135}\) A plaintiff may be able to bring two distinct claims under the two statutes, but this is different than bringing a single claim for discrimination based on multiple protected characteristics.

The advent of exploiting the unprotected status of homosexuality under federal employment discrimination laws is hardly a new phenomenon. Employers in the past have avoided liability in employment discrimination cases brought by sexual-orientation minorities, even when race and gender minorities succeed in the same case:\(^\text{136}\)

Despite facing such activist pressure, [the company] did not recognize its workers' right to enact or imply a gay identity on the job. Whereas its [parent company] had reached a landmark $38,000,000 settlement with women and minorities alleging systemic sex and race discrimination that same year, the company openly defended its policy of denying employment to workers who did not fit heterosexual norms.\(^\text{137}\)

Many intersectional LGBT individuals are already disenfranchised, both socially and economically, relative to white LGBT counterparts.\(^\text{138}\) If an intersectional LGBT plaintiff loses the ability to bring a claim under an already-protected category, this likely exacerbates the socioeconomic inequality affecting many intersectional LGBT people.

Even if LGBT employees gain protected status under ENDA, or substantively equivalent legislation, this will only partially reform the employment landscape for LGBT employees. While intersectionality would no longer strip an

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\(^{132}\) Hutchinson, supra note 15, at 302-03 (internal citations omitted); see also, Ryan Castle, The Gay Accent, Gender, and Title VII Employment Discrimination, 36 Seattle U. L. Rev. 1943, 1943-44 (2013) ("Because Title VII does not protect employees from sexual orientation-based discrimination, plaintiffs who are or are perceived to be of a sexual minority have difficulty proving a valid sex-based discrimination claim in federal court.") (internal citations omitted).

\(^{133}\) Hutchinson, supra note 5, at 302-03.

\(^{134}\) In the context of race and sexuality discrimination claims, the unprotected status of sexual orientation in civil rights jurisprudence, along with judicial essentialism, actually provides an incentive for defendants to concede homophobic intent as a way of masking and obscuring racism." Id. at 306.

\(^{135}\) See, e.g., Day, supra note 18, at 449 (discussing the impediments to filing intersectional age and sex claims because courts have held that the age claim arising from the ADEA cannot be combined with the sex-based cause of action arising from Title VII).

\(^{136}\) See, e.g., Turk, supra note 108, at 424.

\(^{137}\) Id.

\(^{138}\) See Gates, supra note 102; Dang & Frazer, supra note 102; Cianciotto, supra note 102.
intersectional plaintiff of otherwise protected status, ENDA also contains no language addressing intersectionality. Because ENDA is not an amendment to Title VII, but instead a separate statute, there is a structural impediment to raising a true intersectional claim. As has been demonstrated in the context of age-gender intersectional claims, courts do not readily allow plaintiffs to combine causes of action that arise from two different statutes. This analytic hurdle would likely exacerbate the reluctance courts have already demonstrated towards accepting intersectional claims.

ENDA would also fail to address the statistical issues facing plaintiffs. As discussed in section II.B, supra, the use of statistical evidence is problematic in intersectional claims because statistics can fail to adequately reflect the experiences of marginalized subgroups. There is an additional problem with the use of statistics of particular relevance in the LGBT context: the difficulty of finding a sufficiently large comparator group for LGBT employees, particularly for intersectional employees. For example, in order for a gay Latino male to survive a motion for summary judgment, the employee may need to demonstrate that a similarly situated white gay male employee was treated more favorably than he was. According to intersectionality theory, however, the idea that a Latino gay male and white gay male employee are or can be "similarly situated" is untenable, because the experiences of a Latino homosexual could vary tremendously from those of the white homosexual. Thus, one way of more broadly encouraging judicial adoption of intersectionality theory is to change the evidentiary burden such that employees no longer need to show "similarly situated" comparators to make a claim for discrimination.

C. Intra-LGBT Intersectional Invisibility

Intra-LGBT intersectionality is a real phenomenon, yet a relatively unexplored issue in the academic literature. Transgender individuals frequently "define" themselves as heterosexuals who are attracted to those of the same biological sex...Thus, after sex reassignment surgery (SRS), the majority of male-to-female (MTF) transsexuals pursue male partners, and the majority of female-to-male (FTM) transsexuals pursue female partners." Intersectional invisibility works as even more of a sword in the intra-LGBT context than it does for other LGBT intersectional plaintiffs because these plaintiffs lack protections from employment discrimination at the federal level and in many states. If a bisexual transgender plaintiff filed an intersectional discrimination claim on the basis of both sexual orientation and gender identity discrimination, a court would have numerous options for dismissing the claim. A very conservative court might deny all legitimacy to this allegation of discrimination, arguing that neither transgender people nor bisexuals are covered under current law, summarily dismissing the claim. Even if a court accepted the argument that a transgender individual is protected by Title VII's sex discrimination provision, the court could still find that discrimination on the basis of sexual orientation, which is currently legal at the federal level, was a permissible basis for taking an adverse employment action. Similarly, a court could dismiss a transgender homosexual plaintiff's claim by rejecting an attempt to "bootstrap" a sexual orientation claim to a gender discrimination claim. Both scenarios for the transgender bisexual plaintiff presume a court is even willing to construe Title VII to cover transgender plaintiffs. The argument that transgender individuals are protected under Title VII

139 Older women can bring a claim based on their sex or based on their age, but they cannot bring a claim on the basis of their sex and age combined." Day, supra note 18, at 449.

140 Statistical "analysis only works if the claimant has someone to compare herself to." Kramer, supra note 31, at 933.

141 See, e.g., Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam).


143 See, e.g., Gates, supra note 102; Dang and Frazer, supra note 102; Cianciotto, supra note 102.

144 Malloy, supra note 89, at 286 (internal citations omitted).
remains an unsettled and somewhat tenuous proposition, which may tip the scales in favor of dismissing a transgender bisexual plaintiff's claim.

A further challenge emerges in the intra-LGBT context because courts, and the public more generally, do not always appropriately differentiate between the [130] subgroups of the LGBT community. 145 Courts often conflate gender identity and sexual orientation, or collapse these distinct traits into one LGBT catch-all. 146 When considering intersectional discrimination in the intra-LGBT context, it is important for courts to properly distinguish the distinct subgroups of the LGBT construct. 147 “Separating sexual orientation from gender and sex, however, begs the question at issue in discrimination contexts. A homosexual person is more likely than a heterosexual person to be perceived as not fitting in with gender stereotypes. By the court attempting to separate and eventually confusing the concepts of sex, gender, and sexual orientation, however, it becomes more difficult for a homosexual plaintiff to bring an action based on gender discrimination.” 148 In the immigration context, for example, LGBT identity traits are often conflated, with problematic results:

Courts in LGBT asylum cases have reduced the sociological complexities of LGBT realities in their decisions. The courts, as institutions, operate on numerous assumptions regarding biological sex, gender, sexuality, and identity that they then deploy to configure a social order that privileges heteronormativity and marginalizes queer realities. In the asylum process, this means that LGBT refugees bear the added burden of being othered in terms of their sexuality within such a heteronormative structure. 149

Assuming that ENDA or a functionally equivalent statute is enacted, such legislation would only partially resolve the issue of intra-LGBT intersectional invisibility. While a bisexual transgender plaintiff’s employer could no longer use sexual orientation to avoid a sexual orientation or gender identity discrimination charge, as both would be protected categories, employment discrimination jurisprudence would still only recognize a single-axis approach to discrimination. The single-axis analytic approach imposes a continued constraint to redress for marginalized subclasses. Courts confronting a claim by a bisexual transgender plaintiff may very well be confounded regarding how to treat the claim. Thus, until courts or Congress are willing to explicitly recognize a wider range of subclasses of protected groups, as discussed in section V, infra, intersectional [131] invisibility will leave many employees vulnerable, and without the protections that remedial statutes like Title VII and ENDA are intended to provide. More generally, for a remedial statute protecting LGBT people to effectively address both single-axis claims of LGBT discrimination and intersectional LGBT discrimination, courts and the public need to better understand the distinctions between sex, gender identity and sexual orientation.

IV. High Risk, Low Reward: Scant Options for Intersectional Plaintiffs

145 Aaron Ponce, Shoring Up Judicial Awareness: LGBT Refugees and the Recognition of Social Categories, 18 New Eng. J. Int’l Comp. L. 185, 204 (“In addition, U.S. courts have failed to address the complexities involved in the intersection of gender and sexuality, and instead have relied on expectations and stereotypes of gender identity. In Mockeviciene v. U.S., a lesbian claiming persecution based on her sexuality was met with doubt and dismissal when the judge found that she had a child and was married. In a rather candid opinion, the immigration judge relegated Moskeviciene’s status as an LGBT individual to mere whim and uncertainty. This hesitation to believe someone who challenges both sexuality and gender norms essentially perpetuates the same sociologically uninformed attitudes that were initially responsible for the persecution.”).

146 Courts have acknowledged the interrelation between sex, gender and sexual orientation, and the near impossibility of their divisibility.” Clancy, supra note 94, at 130.

147 To properly characterize intersectional claims, the court must recognize the meaningful differences between the distinct concepts of sex, gender, gender identity and sexual orientation. See, e.g., Case, supra note 123. “To a large degree, the Court has conflated the concepts of sex and gender by using the terms interchangeably, signaling inaccurately that every person’s sex is also that person’s gender.” Marino, supra note 112, at 869-70.

148 Clancy, supra note 94, at 131 (internal citations omitted); see also Castle, supra note 132, at 1953.

149 Ponce, supra note 145, at 188.
Under current law and mainstream employment discrimination jurisprudence, there are several avenues intersectional plaintiffs can pursue to raise a discrimination claim. While each approach can provide a partial remedy for an intersectional plaintiff, each has distinct drawbacks. The incomplete remedies for intersectional plaintiffs discussed in this section underscore the need for expanding employment discrimination law, and antidiscrimination paradigms more generally, to account for intersectional discrimination. Options for doing so are discussed in section V, infra. This section will first present the option of filing a per se intersectional claim, which is a risky option given the mixed reception courts have given intersectional claims. The second option is filing separate claims based on each protected category, which raises other concerns. The third option is raising a sex-plus claim to loosely approximate an intersectional claim. This option, however, is available only when sex or gender is the intersectional category, and only if sex or gender is the primary trait on which discrimination was based. The fourth and final option is to forego multiple claims and only pursue a discrimination claim based on one trait or another, in conformity with the strictures of the single-axis framework.

A. Per Se Intersectional Claim

The first option for plaintiffs who experience intersectional discrimination is to file a per se intersectional discrimination claim. After all, some plaintiffs have successfully argued intersectional discrimination, and existing employment discrimination statutes can be interpreted to permit plaintiffs to bring an intersectional claim. Further, the EEOC's interpretation of Title VII affirms the viability of intersectional claims, as noted above. However, the viability of a per se intersectional claim is dependent on the jurisdiction in which the claim is brought, as well as the particular intersectional subclass raising the claim. Thus, a black woman in a jurisdiction recognizing intersectionality has the opportunity to bring a winnable intersectional claim. However, a different minority subclass, or a minority subclass in a different jurisdiction, may lack this option. Insofar as uniformity for plaintiffs is a goal of employment discrimination law, this type of jurisdiction-by-jurisdiction inconsistency is problematic.

To file a claim of intersectional discrimination, a plaintiff would follow the same procedure as a single-axis discrimination lawsuit, beginning with the McDonnell Douglas burden-shifting framework, discussed in section II.B supra. Courts, however, generally expect these claims to be framed as single-axis claims in conformity with the McDonnell Douglas prima facie case. Courts that have recognized intersectionality have done so for particular intersectional plaintiffs or certain intersectional groups without articulating a blanketed cause of action for intersectional discrimination.

There are significant statistical differences in success rates between single-axis claims and intersectional claims. One study demonstrated that "plaintiffs who suffer multiple disadvantages in society fare worse than do singly disadvantaged plaintiffs when they seek to assert their civil rights in court." Another study reports that single-axis claims were successful in 7 of 28, or 25% of cases, while claims brought by black women were only successful in 2 out of 12, or 17% of cases, however, this was not a statistically significant sample. Further, even if filed as an intersectional claim, a court may separate the claims, or otherwise contort a complaint of intersectional discrimination to fit the single-axis framework. This is a court-by-court difference, however.

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150 See, e.g., Degraffenreid v. General Motors Assembly Div., 413 F. Supp. 142 (E.D. Mo 1976); Moore v. Hughes Helicopter, Inc. 708 F.2d 475 (9th Cir. 1983); Payne v. Travanol Labs., Inc., 673 F.2d 798 (5th Cir. 1982).

151 Id.

152 Areheart, supra note 60, at 206.

153 See, e.g., Best et al., supra note 15.

154 Id. at 1019.

is also significant that per se intersectional claims are not a viable option for LGBT plaintiffs in the majority of states currently. As discussed in section III, supra, intersectionality can be used as a sword for employers to avoid other discrimination claims, such as race, which would only be partially remedied if ENDA were enacted.

Thus, the feasibility of raising a per se intersectional discrimination claim is largely dependent on both the jurisdiction in which the claim is brought and the intersectional identity at issue. In certain jurisdictions, such as the Fifth and Ninth Circuits, some groups, namely black and Asian women, may successfully raise intersectional claims. However, the low success rates for intersectional claims in general and the small number of jurisdictions that recognize intersectional discrimination illustrate the need to formally reform employment discrimination jurisprudence to uniformly protect subclasses of marginalized groups.

B. Separate Single-Axis Claims

A second option for intersectional plaintiffs is to file separate claims for each of the protected categories that serve as the basis for the intersectional claim. For example, a black woman would deconstruct an intersectional claim, and file separate race and gender discrimination claims. While this approach may not appear problematic, filing separate claims has disadvantages, and is conceptually distinct from raising a per se intersectional claim.

In the first instance, alleging that discrimination occurred because of two separate traits is not the same as saying that the discrimination resulted from the combination thereof. The two distinct identity traits may in fact be inextricably linked. Discrimination on the basis of one trait may be indistinguishable from discrimination on the combination of the two. Legally, this approach limits the direct relevance of the claim to the discrimination experience. Personally, this approach further marginalizes the experience of subclasses of minorities.

Second, discrimination claims in general tend to be unsuccessful in court. Studies have demonstrated that skepticism can be magnified when multiple claims of discrimination are alleged simultaneously. Filing multiple separate counts of discrimination could suggest that an aggrieved employee is filing a discrimination claim as a last-ditch effort to save a job or earn some money, necessarily undermining the legitimacy of a discrimination claim. Taking a "kitchen sink" approach to discrimination claims is thus an ill-conceived tactic for effectively remediating intersectional discrimination, because the claim of multiple counts of discrimination may cancel each other out, and strip a plaintiff of any redress.

C. Sex-Plus Claim

To loosely approximate an intersectional claim that involves sex or gender discrimination, a plaintiff could bring a sex-plus case. "Sex-plus' doctrine, which originated in the early 1970s, enables plaintiffs to demonstrate that they have been discriminated against on the basis of sex by showing that they have been treated differently than members of the opposite sex with whom they share a particular, ostensibly non-sex-related characteristic."


157 Some courts aggregate evidence of racial hostility with evidence of sexual hostility, while others deal with an adverse employment action based on two or more grounds separately." Hoffman & Varona, supra note 40, at 553-54.

158 See supra section III.

159 See, e.g., Oppenheimer, supra note 155, at 516 (finding that while discrimination claims were generally unsuccessful relative to other types of claims, "success rates varied considerably by case category, with the lowest success rates in employment discrimination cases (excepting sexual harassment cases) filed by women and minorities. Success rates were lowest at the intersection of race and gender and the intersection of gender and age (over forty")).

160 See, e.g., Minna J. Kotkin, Diversity and Discrimination: A Look at Complex Bias, Wm. & Mary L. Rev. 1439, 1443 (2009) ("Empirical evidence demonstrates that multiple claims [of discrimination] are all but impossible to win.").
Sex-plus theory can help some intersectional plaintiffs; however, sex-discrimination claim must be the crux of the claim. "A "sex-plus' protection for black men was adopted in Johnson v. Memphis Police Department, which found that a policy against facial hair discriminated against many black men who, unlike white men, suffer from a skin condition that makes it unhealthy to shave every day." 162

Like the option of filing separate claims discussed above in the previous section, a sex-plus claim is not the same as a per se intersectional claim because the weight of the discrimination is placed on the gender discrimination claim. This type of claim does not lend itself to consideration of the unique experiences of intersectional plaintiffs, and is limited to certain intersectional subclasses. 163 While some have called for the creation of an analogous race-plus theory, 164 this has not come to fruition, and, for the same reasons as sex-plus theory, would fall short of providing effective redress for intersectional discrimination per se. Like filing per se intersectional claims, the viability of sex-plus claims is jurisdiction dependent.

Sex-plus categories are relatively narrow, and the ones that have been recognized by the courts include women with school-age children, "minority women, married women, and married women who keep their surnames." 165 "In Phillips v. Martin Marietta Corp., the employer would hire women, but not women with pre-school-age children. The Supreme Court reversed the grant of summary judgment to the employer because the policy resulted in "one hiring policy for women and another for men--each having pre-school-age children.'" 166 While sex-plus doctrine may provide some intersectional plaintiffs with a cause of action in a limited number of jurisdictions, this approach falls far short of remedying intersectional discrimination for all minority subclasses.

D. Single-Axis Claim

The last option for an intersectional plaintiff seeking to bring an employment discrimination claim would be to bring one single-axis claim, foregoing the second basis on which discrimination would otherwise be alleged. This is a strategic option for a plaintiff living in a jurisdiction that has already rejected intersectional claims, yet also raises a number of obvious problems. Most fundamentally, a claim based on one trait alone would fail to capture the full experience an employee has had with discrimination. Bringing only one claim simplistically collapses the unique experience of a distinct majority into a more palatable, judicially cognizable form of discrimination. It also may be impossible to disaggregate discrimination on the basis of one characteristic from discrimination based on another trait.

In the LGBT context, this tactic may not work. Even if an intersectional LGBT plaintiff, such as a Latino homosexual, frames a claim purely as a race discrimination claim, an employer can rebut a claim of discrimination by alleging that the discrimination was based primarily on sexual orientation-related grounds, provided sexual orientation is not a protected trait in that state. 167 Thus, an employer can effectively raise sexual orientation as an affirmative defense to an allegation of discrimination based on a protected trait. Merely bringing one claim while foregoing another claim, then, may not be an effective approach for intersectional LGBT plaintiffs.

[*135]
**NEW APPROACHES FOR PROTECTING INTERSECTIONAL LGBT PLAINTIFFS**

Given the manifest deficiencies of Title VII, the underinclusiveness of ENDA, and the problems with fragmented recognition of intersectionality in employment discrimination law, it is necessary to reform employment discrimination law to recognize the prevalent albeit subtle forms of discrimination at issue today. While such sweeping changes will be difficult to effectuate, such changes are necessary for employment discrimination statutes to effectively provide judicial redress for immutable trait-based discrimination. Although public opinion has solidified in favor of extending protection to LGBT employees in the workplace, stakeholders have not coalesced around one piece of legislation to the point of its passage. Thus, it is still possible, and normatively desirable, that an intersectional cause of action could be included for all intersectional plaintiffs as part-and-parcel of extending employment discrimination protections to cover all LGBT plaintiffs.

There are a number of possible approaches that could address intersectional invisibility in employment discrimination law. There is another set of likely possible outcomes, however, which do not closely track the ideal approaches for formally addressing intersectionality in employment discrimination law. These approaches, and the likelihood of success, will be discussed more fully below, first delving into judicial solutions to intersectionality, which are more likely, followed by a discussion of legislative reforms, which are more desirable.

A. Judicial

Because LGBT issues are highly contentious, and issues involving discrimination and civil rights more broadly tend to be divisive in the political branches of government, a judicially based solution to intersectional invisibility is most likely to materialize. Some courts have taken the first step towards recognizing intersectionality. The courts that have done so, however, have stopped short of articulating a broad understanding of actionable claims of intersectional discrimination under Title VII, providing only a limited intersectional cause of action for certain minority subclasses.

Courts have manifested rigid interpretations of discrimination statute, and seldom recognize claims of discrimination, despite the legitimacy thereof. The low success rate for employment discrimination claims in general is a discouraging harbinger for judicially catalyzed developments in intersectional discrimination. "Only 15% of employment discrimination cases between 1999 to 2007 ended in a win for the employee." While some courts

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168 Sweeping changes to make the federal template of legal remedies address the lived realities of discrimination are unlikely in the shorter term of the next several decades. Given the incoherence of federal statutory protection for employment discrimination, scholars have argued for comprehensive changes to the architecture of Title VII and the Age Discrimination in Employment Act (ADEA). In 1996, Professor Ann McGinley made a thoughtful argument that, other than with respect to harassment and retaliation law, Congress should replace Title VII, the ADEA, and variable state employment-at-will exceptions with a federal wrongful discharge law that protects all workers from arbitrary discharge." Levit, supra note 16, at 481.

169 Gates & Newport, supra note 85.


171 Courts have been important institutions for extending protections to LGBT Americans. The rights established through the Supreme Court's decisions in Lawrence v. Texas, United States v. Windsor, and Obergefell v. Hodges are arguably the most significant legal protections LGBT individuals have received at the federal level.


173 Castle, supra note 132, at 1960.
will inevitably reject such discrimination claims, courts are less constrained by the political dimension of discrimination issues.

The first option for judicially-based reform to remedy intersectional invisibility is for courts to articulate a broad understanding of intersectional discrimination, explicitly allowing any intersectional group to bring an intersectional claim. For this analytic approach to take hold, however, the Supreme Court will have to make this ruling, instructing all courts to embrace a conception of discrimination that is broader than the single-axis approach. Alternatively, courts could begin widely, formally adopting the EEOC interpretation of Title VII as including intersectionality. It is apparent that LGBT individuals will not be able to "mix" claims with Title VII claims if they are protected under ENDA or a non-Title VII statute, thus this approach may only remediate intersectional discrimination for certain intersectional plaintiffs. This would exclude LGBT plaintiffs, the disabled, the elderly, and pregnant women, among others.

A second option that the judiciary could use to incorporate intersectional discrimination into mainstream employment discrimination jurisprudence is to amend the McDonnell Douglas burden-shifting framework to explicitly allow for intersectional claims. The first step to doing this would be to amend the prima facie case of discrimination. Rather than requiring that a plaintiff be a member of a single protected class, courts could allow plaintiffs to frame a claim as a member of multiple protected classes.

A third way that courts can include intersectional analysis in employment discrimination jurisprudence would be to limit the use of statistics and comparator groups in an employment discrimination inquiry. Courts must lessen reliance on comparators to establish discrimination claims. As noted, if a plaintiff is unable to produce similarly-situated comparators, it can be difficult to prove a claim of discrimination. As one scholar notes:

Showing that a similarly situated individual was treated differently than the plaintiff is the most common way of establishing discrimination. However, when a comparator cannot be found, or when discrimination is based on two separate impermissible factors, the employee's burden of proving discrimination becomes much more onerous, or even impossible.  

[*137] The Jeffries Court, which held that black women should be a recognized subclass, presciently foreshadowed the recommendation advanced in this paper, by arguing that relying on similarly-situated comparators is misplaced. The Jeffries court recognized "the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff." Rather than using similarly situated comparators to prove discrimination, courts should rely exclusively on other direct and circumstantial evidence. Thus, courts should craft a rule that limits, contextualizes or prohibits the use of statistical comparators in proving a discrimination claim. Limiting the use of statistics would necessarily require a more individualized, nuanced assessment of an allegation of discrimination to determine whether discrimination in fact occurred, and whether the discrimination is actionable.

B. Congressional

The first option for a legislative remedy for LGBT employment discrimination is to pass a supplemental statute, such as ENDA, which would protect individuals on the basis of sexual orientation and gender identity, but which

174 For a robust discussion of possible reforms to the use of statistics and comparators in the employment discrimination context, see Goldberg, supra note 66.

175 Day, supra note 18, at 453 (emphasis added).

176 Jefferson, 615 F.2d at 1034 (emphasis added).

177 The Employment Non-Discrimination Act of 2011 (ENDA) proposes to essentially extend Title VII protections to Americans who are gay, lesbian, or bisexual, making it illegal for employers to hire, fire, refuse to promote, or treat in a hostile manner persons based on their sexual orientation. Various versions of ENDA have been introduced in both houses of Congress since 1994, but what all the versions have had in common is the inclusion of an exemption for religious organizations. In its current
may also lack some of Title VII’s structural and substantive protections. While ENDA has gained traction in Congress in recent years, and could foreseeably pass in the near future, ENDA in its current form lacks some of the protections, such as disparate impact analysis, that are embedded in Title VII. This bill also lacks an intersectional component, which inherently limits the efficacy of gay and lesbian discrimination legislation, because the unique experiences of multiply subordinated individuals will be subsumed by the experiences of the privileged gays and lesbians. 178 Adopting this approach would effectively punt the issue of intersectionality back to the courts, where little resolution has occurred to this point. While pursuing this statute may be a good step towards enshrining formal employment discrimination protection for LGBT people in law at the federal level, the deficiencies of this legislation and the political capital that will be spent passing it merit critical examination of what exactly this legislation will do, since it would be only the second federal gay rights bill passed by Congress. 179

The second option for congressional reform of employment discrimination law would be to pass an amendment to Title VII, incorporating sexual orientation and gender identity, and expressly permitting intersectional claims. Although this [*138] would be difficult to push through Congress, as evinced by the decades long effort to no avail, this would be the most desirable option in that Plaintiffs would retain all the rights afforded under Title VII. For a litany of additional reasons, other scholars have also made similar recommendations for including LGBT as a protected class through an amendment to Title VII, as opposed to a stand-alone statute, such as ENDA. 180 As noted above, a compromise necessary for garnering support for ENDA was abandoning a disparate impact cause of action. 181 However, the problem would still persist regarding intersectionality. Title VII should further be amended under this approach to a conjunctive rather than disjunctive. In other words, by changing Title VII to an "and' instead of an "or,' plaintiffs would have a stronger textual basis for arguing that the legislative intent was to allow for intersectional claims.

A third option would be to separately address LGBT discrimination and intersectionality. This approach would require one piece of legislation to prohibit discrimination against LGBT people in the employment context, and a second legislative effort to explicitly allow plaintiffs to bring intersectional claims, both under Title VII, and under other remedial statutes, such as the ADEA or ENDA. This approach would have the effect of mandating recognition of intersectional plaintiffs, while broadening the coverage of antidiscrimination jurisprudence to include LGBT people, both intersectional and non-intersectional alike. While this would achieve the desired outcome of protecting LGBT and intersectional plaintiffs, there is little evidence to suggest that Congress would pass even one, let alone two, employment discrimination statutes in the near-term.

C. Social Movement Strategies

In addition to legislative and judicial solutions to intersectional discrimination, it is necessary to incorporate intersectional issues as a priority within the LGBT rights movement. Considerations of intersectionality have been

form, ENDA does not apply to a "corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII." Robinson, supra note 22, at 170 (internal citations omitted).

178 Onwuachi-Willig & Nourafshan, supra note 84.


180 This article is not the first to recommend amending Title VII. “The proposed solution for revising Title VII is strikingly simple: Amend Title VII to include gender and sexual orientation. The amended Title VII should prohibit discrimination on the grounds of race, color, religion, sex, gender, sexual orientation or national origin. The first half of the proposal would merely reflect the law as it is interpreted today by the courts - on one hand explicitly (gender) and on the other hand implicitly (sexual orientation). The result would reinforce the existing protections on gender and remove the confusion regarding sexual orientation. No longer will courts be forced to artificially sever a "legitimate' gender-based claim from an "illegitimate' sexual orientation claim. This would also remove the significant barrier of the double punishment homosexuals face by the current construction of Title VII. Finally, the statutory language would reflect the realities of sexuality: that gender and sexual orientation are inseparably linked, and not subject to categorical classifications - something Kinsey famously stated almost 70 years ago." Clancy, supra note 94, at 134 (internal citations omitted).

181 Hendricks, supra note 13.
conspicuously absent from the mainstream LGBT rights movement thus far, 182 presenting an opportunity to advocate for reform on this issue. 183 Given the immediate impact of intersectionality on many LGBT plaintiffs, it seems natural that the LGBT rights movement would embrace intersectional discrimination as an important issue both in rhetoric and in seeking tangible legislative reforms.

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D. The Limits of Intersectionality

While intersectionality theory recognizes a major gap in employment discrimination law, there are limits to intersectionality as well. 184 Although intersectional discrimination broadens the groups that can claim meaningful protection under antidiscrimination statutes, there are limits to this approach when considering the pervasiveness of individualized discrimination. Remedying intersectional discrimination does not, for example, capture identity performance claims or other forms of intragroup discrimination. Identity performance discrimination consists of informal requirements that individuals from minority groups assimilate into white, heteronormative 185 culture by downplaying traits associated with the minority group. 186

For example, many professional black men make a special effort to wear suits or traditional, professional clothing when they are in public settings in order to minimize the discrimination that they may experience just based on appearance--their skin color, height, and other physical characteristics. After all, the black man in the Brooks Brothers suit is less likely to be followed in a department store than the black man in jeans or sweats, though both are highly likely to be viewed as suspicious despite their dress. 187

Among other examples, "blacks have masked their accent on phones, speaking in what they and others perceive to be white, standard English and with a "white" accent, even if that is not their usual tone, to avoid discrimination." 188

In addition to overlooking discrimination based on identity performance, intersectional discrimination also does not address the issue of intragroup discrimination more broadly. "The typical cross-racial framework does not fit skin color and identity performance claims because, in many of these cases, the decision maker and the plaintiff are members of the same group." 189

182 See, e.g., Onwuachi-Willig & Nourafshan, supra note 84.
183 See, e.g., Hutchinson, supra note 53, at 1368.
185 Heternormativity is defined as the predominance and privileging of a definitively heterosexual-based ideology and social structure that acts as the exclusive interpreter of itself and of all other sexualities in relation to it. Heternormativity results from social actors' investment in this ideology and the social structures that are produced by such a complete reliance on the idea of heteronormativity. This comment argues that in so initiating a process of institutionalization during the course of a legal proceeding, courts have the unique opportunity to circumscribe the acceptable boundaries of both nationality and sexuality within their social domains." Ponce, supra note 145, at 188 (internal citations omitted).
186 See e.g., Angela Onwuachi-Willing, Volunteer Discrimination, 40 U.C. Davis L. Rev. 1895 (2007).
187 Id. at 1910.
188 Id. at 1912.
189 Jones, supra note 3 (internal citations omitted).
While the recognition of intersectionality does not automatically remedy all forms of discrimination not captured under the currently employment discrimination regime, employment discrimination jurisprudence and antidiscrimination law is premised on a categorical approach to discrimination claims. That issue is fundamentally different from the problem addressed in this article.

[*140] Some argue that “the issue is not reducing individuals to simple labels; it is that new labels are needed to fit new situations.” 190 While a growing group of scholars have called for a more individualized approach to adjudicating discrimination claims to capture otherwise unaccounted for types of individualized discrimination like identity performance and intragroup preferences, it is unrealistic to expect the law to abandon a categorical approach entirely. As one scholar points out:

The population in this country is rising, aging, and becoming much more racially and ethnically diverse. Appearance norms are shifting too. More than one-third of Americans aged 18 to 29 sport at least one tattoo. Fourteen percent of all Americans have body piercings other than in their earlobes. America is also becoming increasingly economically stratified, with ever greater differences between the haves and the have-nots. This is just a sketch of the numerous ways that the composition and identity characteristics of the American workforce are changing. These changes have enormous implications for constitutional and employment discrimination law. 191

Employment discrimination law must evolve its current categorical approach to analyzing discrimination to remedy existing intersectional invisibility and anticipate changes that are imminent in the American workforce in the years to come.

VI. CONCLUSION

Americans have succumbed to the seductive fallacy that the codification of antidiscrimination laws has led to substantive equality for marginalized groups. As the issue of intersectional invisibility illustrates, however, there are gaps in current antidiscrimination law, which ENDA threatens to carry forward. If the collective response to the passage of ENDA parallels the response to Title VII, there is a real risk that the LGBT rights advocates will prematurely declare victory, reflecting an incomplete understanding of how employment discrimination law fails to provide meaningful recourse for subgroups of otherwise protected classes, given the persistence of intersectional invisibility. 192 Subtle discrimination has become a prevalent form of workplace discrimination and social marginalization, 193 requiring an evolving antidiscrimination paradigm to keep [*141] pace with societal and institutional evolution. 194 Current law fails to do so. 195

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190 Malloy, supra note 89, at 315.
191 Levit, supra note 16, at 464-65 (internal citations omitted).
192 In a review of Linda Hirshman's Victory: The Triumphant Gay Revolution, entitled Declaration Premature, Diane Hamer bemoans the perils of declaring a movement victory before equality has been achieved. Diane Hamer, Declaration Premature, The Gay & Lesbian Review, Jan. 1, 2013 at 41. Some scholars take an even more pessimistic view about the progress that has been achieved in the LGBT rights movement thus far. In Be the People, Professor Carol Swain argues that the paradigm of political correctness may make the gay rights movement seem more successful by suppressing dissenting voices through fear of being labeled as narrow-minded or bigoted. See Carol Swain, Be the People: A Call to Reclaim America's Faith and Promise (2011).
193 Discrimination relating to more subtle countercultural deviations along various dimensions of identity remains unprotected. Consider, for example, employers’ regulation of employees’ appearances.” Levit, supra note 16, at 478.
194 The transformation of the workplace in the next couple of decades - with people aging, races mixing, class-based divides increasing, and individual appearances becoming more distinct - will occur in directions that make people less different in group-based ways, but perhaps more uniquely different as individuals. These changes mean that the remedies afforded by any system of class-based protections will fail to redress systematically the real discrimination happening in workplaces.” Id. at 469.
195 See, e.g., Kramer, supra note 31, at 894 (“Sex discrimination law has not kept pace with the lived experience of discrimination. When Title VII became law, most instances of sex discrimination involved overt discrimination that differentiated between men and women, almost always to the detriment of female employees.”).
Indeed, ENDA may exacerbate rather than ameliorate the problem. While some courts have allowed intersectional claims by protected classes under Title VII, there is no indication that even these courts would allow plaintiffs to state an intersectional claim arising from two different statutes. Further, because ENDA does not recognize disparate impact claims, LGBT plaintiffs would lack an important cause of action for combating facially neutral policies with disproportionate LGBT impact. This supports inclusion of sexual orientation and gender identity as amendments to Title VII as opposed to a stand-alone statute, like ENDA.

Failure to recognize intersectional claims not only deprives intersectional plaintiffs of a legal remedy, but also serves a communicative or symbolic function: The single-axis framework defines normalcy in the law. If employment discrimination law recognizes only a single trait in a sex discrimination claim, for example, the implication is either that the plaintiff is white or that white and non-white female plaintiffs experience discrimination similarly in terms of nature and degree. Either scenario reflects a conception of discrimination that elides the meaningful differences in discrimination experienced by distinct minority subclasses. Conceptions of actionable discrimination should therefore be broadened to reflect the multiple axes along which individuals experience marginalization, which is necessary to facilitate access to justice for large proportions of the increasingly intersectional American workforce.
AUTHENTICITY AT WORK: HARMONIZING TITLE VII WITH FREE SPEECH JURISPRUDENCE TO PROTECT EMPLOYEE AUTHENTICITY IN THE WORKPLACE

ABSTRACT

Today's workers want to work in diverse environments and to express themselves authentically--or, as organizational scholars describe the phenomenon, "to bring their whole selves to work." The proliferation of diversity and inclusion initiatives demonstrates that companies are taking note. While the business world attempts to move forward, the legal landscape remains stagnant: Title VII of the 1964 Civil Rights Act bestows upon employees the right to be free from employer discrimination based on race, sex, color, national origin, and religion but creates no right to affirmatively express those class memberships--or any other identity--in the way an employee may want.

Outside of the private employment context, however, the law does not so cavalierly treat the individual in her quest to be herself. Most prominently, the Free Speech Clause of the First Amendment to the United States Constitution deems freedom of expression essential to human flourishing and to the American ethos. Although the First Amendment does not protect individuals from regulations imposed on them by non-governmental actors, the values of self-determination and authenticity that animate free speech theory and jurisprudence do not and should not disappear when someone enters the workplace.

Using the First Amendment as a lens through which to understand the law's commitment to authenticity, this article contends that federal employment law should expand beyond the group-based protections established in Title VII to protect and promote an employee's authentic self in the workplace. Although this article suggests certain doctrinal changes, its primary purpose is not to offer solutions; it is to acknowledge where we are failing and, more importantly, where we should look for inspiration.

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I. INTRODUCTION

New York Times columnist Vanessa Friedman, noting the irony of the Fashion Institute of Technology's May 2016 exhibition on uniforms, wrote: "We live in a moment in which the notion of a uniform is increasingly out of fashion, at least when it comes to the implicit codes of professional and public life. Indeed, the museum may be the only place they now make sense." As Friedman's commentary suggests, the post-war conformist ideal of "The Organization Man" and his grey suit is on its way out, if not entirely gone. Many of today's workers, particularly ascending millennial employees, want to work in diverse environments and have more freedom in the workplace; they want to express themselves authentically or, as organizational scholars describe the phenomenon, "to bring their whole selves to work."

For some, this means explicitly identifying with groups to which they belong (e.g., I am a Jewish woman). For others, it means openly embracing political causes (e.g., I place a "Make America Great Again" hat on my office bookshelf). And for still others, it means the freedom not to identify with a particular group or political cause (e.g., I do not want to join my employer's women's group, and I do not want to attend a political rally with my colleagues). Contrary to traditional and legal notions of diversity—which are predicated upon group membership such as race, gender, and national origin—today's professionals increasingly do not want to be defined by only one dimension of their identity. They want, instead, to express their ever-evolving identities on their own terms. They want the space to self-determine.

Organizational scholars have begun to study the advantages of encouraging authenticity in the workplace to both individual employees and the institutions they work for. The results so far have been impressive. Employees who feel like they can "be themselves” are more engaged in their work, experience greater job satisfaction, suffer less burnout, and report improved mental health. Studies show that this is especially true for women and racial minorities, who often perceive a devaluation of the diversity they bring to traditional work settings. Organizations also benefit when employees feel true to themselves: individuals are more likely to speak up on important organizational issues, employees express greater commitment to their employers, and diversity initiatives are more likely to succeed.

The proliferation of organizationally-sponsored diversity and inclusion initiatives demonstrates that many companies are taking note. More and more companies are marketing themselves as spaces where employees can be true to themselves—such as by donning traditional cultural garb, engaging in political speech, or expressing their gender identity in ways that do not reflect mainstream culture—without sacrificing professional success.

While the business world attempts to meet the desires of the next generation of employees, the legal landscape remains stagnant. Title VII of the 1964 Civil Rights Act, which prohibits employers from discriminating against employees on the basis of race, sex, color, national origin, and religion, is the primary legal basis for protecting diversity in the workplace. In large part, Title VII bestows upon employees the right to be free from discrimination on the basis of membership in those protected classes but creates no right to affirmatively express those class memberships or any other identity in the way an employee might want. The positive impact of existing federal anti-discrimination laws on the advancement of women and minorities in the workplace is unmistakable. But, as numerous scholars have argued, these laws have proven inadequate in addressing the varied and nuanced forms of what has been described as “second generation” discrimination that exist today.

Title VII protects an employee's ability to present her authentic self at work only if that presentation neatly coincides with a protected group characteristic. The law offers no protection for all other fundamental aspects of an employee's identity, such as her clothing choices or political beliefs, and courts deciding Title VII cases often characterize these forms of expression as trivial. Although it is true that Title VII provides more comprehensive protections in the context of religion by requiring employers to reasonably accommodate employees' religious beliefs and practices—and thus, arguably provides more room to engage in conduct expressing one's authentic self—the accommodation model, as it is known, is, nevertheless, rooted in making...
room for difference, not fostering it. 16 Under existing federal antidiscrimination schemes, an employee's inability to express her individuality is of little concern to courts unless the employee can prove that she was discriminated against because she belongs to a statutorily protected class. Even then, the onus on the employee is great and the employer's actions receive little scrutiny. 17

Outside of the private employment context, however, the law does not so cavalierly treat the individual in her quest to be herself. Most prominently, the Free Speech Clause of the First Amendment to the United States Constitution, which protects individual expression from most governmental regulation, deems freedom of expression essential to human flourishing and to the American ethos. 18 It goes so far as to protect the particular ways we express ourselves to others, often down to the precise words we utter or motions we make. 19 Far from characterizing identity concerns as trivial, free speech jurisprudence demands that the government tolerate--if not celebrate--individuality, and forbids the government from compelling us to espouse specific points of view or carry its message. 20 Moreover, *704 unlike in the employment context, the government must justify its decision to silence an individual--not the other way around. 21 In doing all of this, the Free Speech Clause and its accompanying body of case law treat the freedom to be ourselves as a fundamental right.

There are, of course, limits to what the Free Speech Clause protects, and the doctrine is complicated. Some speech is protected while other speech is not, and certain conduct is expressive enough to warrant protection while other conduct is not. 22 And perhaps most importantly for the purposes of this article, the First Amendment does not protect individuals from regulations imposed on them by non-governmental actors such as private employers.

That said, the values of self-determination and authenticity that animate free speech theory and jurisprudence do not and should not disappear when someone enters the workplace. Given how much time people spend at work and the importance of work to people's lives, those values are just as significant and worthy of protection in private settings as they are in public. For that reason, the First Amendment's free speech jurisprudence offers a powerful counterpoint to the limitations of federal employment discrimination law and specifically to Title VII.

Building on the work of numerous scholars who have demonstrated Title VII's insufficiency in protecting authenticity in the workplace, this article contends that federal employment law should--taking inspiration from free speech theory and jurisprudence--expand beyond the group-based protections established in Title VII in order to also protect and promote an employee's authentic self in the workplace. Part II of this article describes the social science research that explains the value of authenticity in the workplace, the importance of work to our identities, and recent shifts in what employees, especially Millennials, want from work. Part III then describes how Title VII fails to protect an employee's authentic self in the workplace by (1) refusing to extend protection to members of protected groups based on how they uniquely express their identities and (2) ignoring critical expressions of identity untethered to a protected class. In Part IV, the article describes various elements of free speech theory and jurisprudence that should inform how we think about and interpret Title VII. Finally, Part V offers legal suggestions for fostering authenticity in the workplace. Specifically, it argues for the adoption of a statutory scheme that requires courts to apply intermediate scrutiny to any workplace regulation that limits individual expressions of identity. By shifting the burden to the employer to justify its intrusions upon an employee's authentic self, the law would appropriately prioritize employee autonomy.

*705 A few comments on the scope of this article and its arguments are in order. First, although there are other areas of constitutional law, such as substantive due process, that shed light on the law's protection of authenticity, this paper focuses exclusively on the Free Speech Clause of the First Amendment. 23 Because this paper is concerned with the right, necessity, and value in protecting the external expressions of self that people make--their public persona as opposed to their private person--the Free Speech Clause of the First Amendment provides the most apt support. 24 Second, this article does not argue for the elimination of categorical protections for particular groups in American society whose members have faced institutional oppression. 25 Those protections have been instrumental in opening up historically homogenous workplaces to women and minorities. Instead, this article argues for an expansion of Title VII to supplement existing protections from workplace discrimination. 26 Third, it does not advocate for a doctrinal extension of the First Amendment, which requires state action, to the private *706 sphere. 27 Rather, it uses the First Amendment as a lens through which to understand the law's commitment to authenticity. Although this article suggests certain doctrinal changes, its primary purpose is not to offer solutions; it is to acknowledge where we are failing and, more importantly, where we should look for inspiration.
II. SOCIAL SCIENCE: THE PROVEN IMPACT OF AUTHENTICITY

A. Authenticity

Philosophers, sociologists, and psychologists have long grappled with what it means to be one's authentic self and why pursuing such a state is beneficial for individuals and society. 28 In the past twenty years, a growing number of organizational scholars have joined their endeavor, seeking to understand the nature and role of authenticity in the workplace. 29 This section will describe different conceptions of authenticity. It will then summarize research that demonstrates how fostering authenticity in the context of the workplace benefits employees and employers alike.

1. Background and Definition

Most theories related to authenticity begin with the “understanding, embracing, and enactment of self-defining characteristics.” 30 It is, therefore, important to explain what scholars in the field mean by “self.” The self is made up of multiple identities, which social scientists Bernardo Ferdman and Laura Morgan Roberts define as “the labels and categories that situate us in a social world through the construction of defining characteristics and relationships with other entities—as well as the associated thoughts, feelings, and intentions.” 31

These identities derive meaning from numerous sources, including:

- The groups to which we claim membership (e.g., “woman,” “Jew”);
- The social roles we inhabit (e.g., “mother,” “neighbor”);
- The reactions others have to us (e.g., “My friends describe me as genuine”);
- Social structures (e.g., “rich vs. “poor”); and
- Individuating traits and characteristics (e.g., “short,” “introverted”). 32

Our identities also include how we think and feel about the groups to which we belong. 33 As Ferdman and Roberts write, “each of us integrates our multiple identities in an individualized way and gives meaning to the intersections and relationships among the identities in the context of our particular life path and social history.” 34 Accordingly, there is both a singular and a group dimension to the self.

Authenticity, then, relates to the ways in which an individual expresses her complicated, ever-evolving self. Scholars differ on how to characterize this process. Some view authenticity as a set of character traits or a moral value that an individual possesses. 35 Others understand it as an optimal psychological state to which people should aspire. 36 In addition, some scholars construe authenticity as relational, such that it can be achieved only when two parties experience each other as engaging in a transparent exchange of strengths and limitations. 37 By contrast, others contend that another’s external reaction is irrelevant—that the nature of authenticity lies only in the extent to which a person is “true to himself or herself.” 38
Although scholars conceptualize authenticity differently, a few key themes emerge. First, authenticity involves a connection between what one experiences internally and what one expresses externally. Therefore, authenticity is experienced subjectively: how an actor feels about whether she has sufficiently communicated and acted on her genuine internal experience determines whether she has acted authentically. Second, authenticity is not a “static trait”: people slide along a spectrum of inauthenticity to authenticity depending on the circumstances. Even if some people are predisposed to being more authentic, one's environment and social role matter. Third, and relatedly, “people are active agents who, under certain conditions, will attempt to ‘become more authentic’.” That is, people want to be authentic.

*709 2. Authenticity in the Workplace

In the context of the workplace, authenticity often runs up against organizational demands to assimilate--to downplay or hide one's true self for the sake of the job. Early management theory encouraged this quite literally, suggesting that employees bring only their physical bodies to work but leave their minds, and presumably their hearts, at home. Although the tension between organizational cohesion and individuality has not disappeared, social scientists have recently found that when employees perceive themselves as being authentic at work, both they and their organizations benefit.

Organizations are created to achieve certain goals and generally require that employees work together to innovate and problem-solve to achieve those goals. Scores of social scientists have confirmed that, at the most basic level, organizational survival depends on good ideas and good relationships—among coworkers, with management, and between groups within the organization. In an effort to foster such cohesion, organizations attempt to minimize differences between employees. Employees, trying to fit in, correspondingly struggle with how much to share about themselves at work.

Prior to the 1960s, the question for many people was less about self-expression and more about getting through the door: women and minorities were either segregated into specific roles or not allowed into institutions entirely. Through a combination of market, social, and legal pressures, organizations were forced, grudgingly, to open up. Simultaneously, the world in which organizations were operating grew rapidly in terms of scope and complexity. Seeking a competitive advantage in such a world, organizations—and those who work within them—have become increasingly complex and diverse.

For organizations, the increase in diversity brings both rewards and challenges. As many have noted, diversity in background and viewpoints has the potential to lead to better organizational performance and greater innovation, which is necessary to meet diversifying consumer needs. However, diversity along those same dimensions also increases the likelihood of disagreement and conflict among employees. As previously noted, organizations struggle with how to handle differences productively, and most respond by coalescing around an organizational culture. Because of the history of segregation and patriarchy in this country, that culture typically expresses white, heterosexual, middle class, male norms of behavior and values. As a result, individuals, particularly those not in the dominant group, must decide whether and how to conform to these workplace norms.

*711 Described alternatively as “covering” demands and “cultural profiling,” assimilation demands in the workplace are made when an institution, through its members, explicitly or implicitly requires that an individual adapt to the organization's culture by performing her identity in a specific, organizationally-sanctioned way. The demand can be obvious: a partner at a law firm tells a female associate to wear a skirt rather than pants because “it's an old-fashioned kind of place.” It can also be subtle: the boss announces that she wants to go to drinks with her team after work, and an employee who would typically decline goes to fit in. In both examples, the employer asks or otherwise indicates that she expects the employee to do something that “is not her” to satisfy some sort of organizational need or desire. The employee must then choose whether to give in to the demand—to cover—or remain “true to herself” and face possible backlash.

Social scientists have found that covering—and the struggle presented by the “choice” of whether to cover—comes at a cost to both individuals and organizations. In a seminal study, Arlie Russell Hochschild coined the term “emotional labor” to describe the pressure placed on flight attendants to feign happiness in the face of customers—and bosses—who demand that they do so and the flight attendants' corresponding effort to meet those demands. In other words, Hochschild found that forcing employees
to act inauthentically had negative effects on their well-being. Subsequent research on emotional labor suggests that conflicts between expressed and felt emotions are likely to lead to emotional exhaustion and work burnout. \(^\text{63}\) Other studies have found that when workers feel pressure to conform their views to those they believe the dominant group holds, they are more likely to keep their ideas and opinions to themselves. \(^\text{64}\) Research suggests that such self-censorship limits organizational creativity, innovation, and group learning. \(^\text{65}\)

\(^{712}\) People who feel that they must behave inauthentically to conform to social expectations often experience what scholars call “identity conflict.” \(^\text{66}\) The strain posed by such a conflict is particularly acute for those with stigmatized identities, such as women and minorities, for whom the emotional labor required at work often implicates a core aspect of the self. \(^\text{67}\)

A few examples are illustrative. In their study on Hispanic managers in a predominantly white organization, Bernardo Ferdman and Angelica Cortes found that, when asked to describe how ethnicity was relevant to their work, the interviewees usually talked about negative experiences. \(^\text{68}\) Many of these Hispanic managers viewed their workplace as inhospitable to their culturally influenced workstyle--a style that favored face-to-face dialogue and confronting work-related disagreements openly and directly rather than engaging indirectly, such as writing a memo, or delaying in addressing a workplace conflict. \(^\text{69}\) Many reported receiving “subtle hints” or even being told directly that their workstyle was not appropriate and needed to change, leading at least one manager “to be less emotional, friendly and outgoing.” \(^\text{70}\) These managers were torn between wanting “positive recognition” of their Hispanic heritage and not wanting to be stereotyped; “[t]hey wanted to maintain their individuality but without losing their identity.” \(^\text{71}\) Unable to achieve this balance, many deemphasized their ethnicity at work and felt stifled as a result. \(^\text{72}\)

In another example, David Berg, using himself as a case study, described his struggle to make his Jewish and professional identities peacefully coexist. An avid student of the Talmud and a management consultant, Berg found himself continually separating his two worlds, even when he saw fruitful connections between them. \(^\text{73}\) When presented with the opportunity to provide a Talmudic analogy in a management consulting session, Berg, who had encountered this situation before, stopped himself: “Again, I made the choice to suppress a thought rooted in my Jewish experience in favor of an action born of my professional role. And again I was disturbed, unsettled by the experience and my handling of it.” \(^\text{74}\) He realized that, without his knowledge, he had “slowly accommodated in these settings, putting aside what [he] thought and felt.” \(^\text{75}\) His unconscious desire to protect his “appropriateness” resulted in an “increasing lack of vitality in [his] work.” \(^\text{76}\)

In her work on career-oriented African American women, Ella Bell found a very stark illustration of identity conflict: her interview subjects perceived themselves as living in two wholly distinct cultural contexts--Black at home and white at work. \(^\text{77}\) Describing her subjects’ “bicultural life experience[s]” as “a constant push and pull,” Bell found that her subjects were continuously trying to prove their competence in their predominantly white workplaces while also trying to maintain ties to their Black communities. \(^\text{78}\) The work her interviewees did internally to reduce the identity conflict, and externally to respond to a series of stereotypical projections in both communities, required cognitive resources that might otherwise have been directed elsewhere.

Scholars have theorized that fostering \textbf{authenticity} in the \textit{workplace} holds great potential for both individual and organizational well-being and growth. Roberts, Cha, Hewlin and Settles have hypothesized that \textit{authenticity} promotes the construction of more positive identities “by increasing private regard (i.e., how positively people feel about themselves).” \(^\text{79}\) They have argued that “becoming more authentic often requires an individual to defy or complicate other people's stereotypic, simplistic, and/or restrictive expectations of his or her role or group membership.” \(^\text{80}\) For women and minorities in particular, “becoming more authentic means finding ways to integrate one's gendered and cultural experiences into the values and practices of their work environment, perhaps even drawing on such aspects of one's background as a source of strength that enhances ... one's work and relationships.” \(^\text{81}\) In the context of organizations, social scientists Frances Bowen and Kate Blackmon contend that individuals who believe themselves able to freely disclose their various identities at work--including less visible identities \(^\text{714}\) such as sexual orientation--are more likely to express their views on important organizational issues and to “engage in organizational voice.” \(^\text{82}\)
Recent empirical research supports these hypotheses. On an individual level, researchers have found that increased employee authenticity correlates to increased employee well-being. 83 For example, one study examined “authenticity climate” in Australian health institutions in relation to emotional exhaustion. 84 The researchers defined an “authentic” climate as a shared perception by a group that the group values and accepts the self-expression of its members, especially negative emotions. 85 The study showed that a climate of authenticity mitigated the negative relationship between engaging in emotion work and emotional exhaustion. 86 That is, if employees worked in a group with a high climate of authenticity, they showed reduced strain compared to employees who worked in a group with lower levels of climate authenticity. 87 Particularly pertinent here, research has also found this to be true for people with marginalized identities. For example, numerous studies have linked degree of disclosure of one's sexual orientation at work to increased job satisfaction, career commitment, affective commitment, promotion rates, and belief in the support of top management. 88

Empirical research also shows that organizations benefit when employees can be themselves. Researchers conducting a study on employee onboarding found that both employees’ and organizational outcomes were more positive when organizations focused on encouraging newcomers’ authentic self-expression, rather than organizational fit. 89 Employees who felt welcome to express their authentic selves at work exhibited higher levels of organizational commitment, individual performance, productivity, and quality of work. 90 Similarly, in a study of Army action teams, those teams with higher levels of authenticity, together with authentic leadership that fostered such an environment, displayed superior teamwork and productivity. 91

In one particularly illuminating study involving qualitative research of three culturally diverse organizations, Robin Ely and David Thomas investigated the role that cultural diversity played in group functioning, specifically whether and under what conditions women and people of color expressed their views openly. 92 They found that how an organization viewed diversity—that is, “group members' normative beliefs and expectations about cultural diversity and its role in their work group”—had a large impact on “how they expressed and managed tensions related to diversity” and “whether those traditionally underrepresented in the organization felt respected and valued by their colleagues.” 93 Where an organization viewed cultural differences among its members as a valuable resource to use in its core work, rather than a means to gain entry into a particular demographic market, group members were encouraged “to discuss openly their different points of view because differences—including those explicitly linked to cultural experiences—were valued as opportunities for learning.” 94 The implication of Ely and Thomas’s work is that diversity initiatives only achieve their potential when employees genuinely feel able to be themselves.

Yet, the push for greater authenticity in the workplace should not be confused with a call to end all inhibition. Scholars have clarified that “[a]uthenticity is not reflected in a compulsion to be one's true-self, but rather in the free and natural expression of core feelings, motives, and inclinations.” 95 Indeed, full disclosure of all of one's internal experiences to one's colleagues is not always beneficial for the organization or the individual. 96 As in the legal context, social scientists subscribe to the idea that “[y]our right to swing your arms ends just where the other man's nose begins.” 97 The right to freely express one's authentic self in the workplace does not mean that one is at liberty to cause harm to others.

B. Importance of Work to Our Lives

Work—and the environment in which we do it—makes up much of our lives. Whether a clerical worker, a teacher, or the CEO of a Fortune 500 company, an employed adult spends most of her waking time at work. On a basic level, work enables our economic survival and our ability to provide for our families. Yet, as historians and social scientists have demonstrated, work is far more than a paycheck; people derive self-worth from working—they associate work with dignity, respect, independence, and civic participation. 98 As legal scholar Kenneth Karst writes, work “is a means of proving yourself worthy in your own eyes and in the eyes of others.” 99 At work, one can acquire or lose social status, be encouraged or deterred, accepted or rejected.

Just as importantly for the development of self, the workplace is where adults form relationships and engage with people different from themselves. It is the place Cynthia Estlund describes as “the single most important site of cooperative interaction and sociability among adult citizens outside the family.” 100 Employees interact with their co-workers all day—both during work hours and after. Colleagues become friends, and conversations range from shared frustration over a work-related issue to political and personal chatter. Studies have found that employees talk to their co-workers about things that matter to them more
than anyone else outside their families, and more people say that they get “a real sense of belonging” among their co-workers than among any other group outside of family. 101

The current workplace is also a place of comparative diversity and integration. Since the enactment of Title VII, there has been a significant increase in representation of non-whites and women in higher paying jobs. 102 In contrast to other *717 arenas of social interaction, such as informal social networks, religious congregations, and voluntary groups, the workplace—at least theoretically—contains people from different cultural, religious, racial, and ethnic backgrounds. As Estlund explains, the involuntariness of workplace associations—such as the economic need to work, managerial authority within the workplace, and external regulations of law—plays a “curiously constructive role” in enabling close and regular interaction between people across racial and social lines. 103 This is not to say that the current workplace is without friction or that the work of integration is complete—hardly. Rather, it is because the workplace is often the only place many people interact across social divisions, particularly in the context of race, that fostering authentic self-representation is important not only for the individuals involved but also for society as a whole. 104

C. What We Seek From Work Today

People's relationship to work has evolved over time. At the corporation's height, the prevailing sentiment was that “the job makes the person.” 105 Employees adapted in order to function as well as possible within their institutions, where, unlike today, many remained until retirement. 106 Although scholars disagree on just how much, there is little doubt that things have changed. 107 Declining job stability, changing demographics, and the spread of communication technologies are just a few of the factors that have transformed the American workplace. 108 Boundaries between work and non-work are eroding. 109 In the age of nonlinear *718 and self-guided careers, many adults are seeking to enhance their experiences of authenticity at work. 110

In their five-year study on the complex issues facing the modern worker, Sherry Sullivan and Lisa Mainiero concluded that today's workers, particularly GenXers 111 and Millennials, 112 are forging what they describe as “Kaleidoscope Careers,” or “careers that were not defined by a corporation but by the individual worker, based on his/her own values and life choices.” 113 Working with a staggering amount of data, they found that rather than mindlessly climbing the corporate ladder, today's workers make career decisions based on their need for authenticity, work-life balance, and challenge. 114 Over the course of her life, a worker's relative prioritization of each principle will shift in response to her personal and career choices. 115 Nevertheless, unlike past understandings of career trajectories that focused only on the dichotomy of career and family, Sullivan and Mainiero found that today's workers increasingly focus on, as they described the priority in a later study, “being true to oneself and behaving in ways that matched their internal values.” 116

In choosing where to work, people are actively seeking organizations where they can be their authentic selves. Rob Goffee and Gareth Jones spent three years investigating what people thought “the organization of [their] dreams” looked like. 117 Speaking to hundreds of executives all over the world, they found that people wanted to work somewhere that nurtures individuality—not simply an organization that accommodates differences along traditional diversity categories *719 like gender, race, age, and ethnicity, but one that embraces “differences in perspectives, habits of mind, and core assumptions.” 118 They found that the ideal organization “is aware of dominant currents in its culture” but “makes explicit efforts to transcend them.” 119

A recent Deloitte University report suggests that these executives' views reflect changing generational attitudes toward diversity and inclusion in the workplace. The report found that Millennials take a different approach to diversity and inclusion than their predecessors: whereas GenXers and Baby Boomers most commonly defined diversity in the context of demographic representation and fairness, Millennials spoke more of unique perspectives, experiences, identities, and ideas. 120 For them, an inclusive workplace brings together people of different backgrounds but views them as individuals, rather than as representatives of gender, racial, or ethnic groups. 121 Describing millennial workers as “intolerant of workplaces that don't allow them to be themselves,” the report's authors concluded that “Millennials are refusing to check their identities at the doors of organizations today, and they strongly believe these characteristics bring value to the business outcomes and impact.” 122
Although still early in its development, the social science research on authenticity strongly supports the conclusion that both employers and employees benefit when people can be themselves at work. Employers who foster authenticity in their organizations attract people who are more committed to both their employers and their own personal performance. Greater workplace authenticity also has resulted in higher quality teamwork and more productivity. When employees can be their authentic selves at work, job satisfaction goes up, personal wellbeing increases, and fewer cognitive resources are spent attempting to resolve identity conflicts. This is particularly important for women and minorities, who often face the greatest identity conflicts, given their historically non-dominant status. Finally—and most importantly—authenticity is what the incoming workforce cares about.

*720 III. TITLE VII: AN INADEQUATE PROTECTION FOR AUTHENTICITY

As mounting social science demonstrates, authenticity and individuality are values that benefit people and the organizations they work for. American employment law, however, does not reflect the importance of those values. Title VII provides protection for an individual based on her status as a member of a protected class. It does not protect how she expresses her identity, even if that expression is intimately connected to her protected status. Even in the context of religion, where Title VII ostensibly provides greater protection for employees to act upon their identities, the courts' treatment is not as different as one might expect. Employers are thus free to enforce social norms on, and compel certain expression from, employees during their time in the workplace, regulating much of what makes each individual employee who she is without running afoot of Title VII.

By contrast, the First Amendment forbids the government--as opposed to private actors--from doing precisely those things, in part, because they hinder our ability to express ourselves. While a clear difference separates government and private regulation--a tyrannical state surely trumps the proverbial horrible boss--the First Amendment remains instructive: it captures the value of individuality and intuits the importance of authenticity to the American way of life. By ignoring those same values in the workplace, the law “tolerate[s] denial of those values which, in the polity, it cherishe[s].”

This is not to argue that the law should ignore employers' legitimate interest in running their businesses effectively “any more than the recognition of individual constitutional rights requires the law to blind itself to the interests of the community.” Rather, the concern is twofold. First, as Karl Klare wrote, “employers routinely abuse their power and impose restrictions that cannot be justified on productivity, safety, or any other legitimate grounds.” Second, courts act in “reflexive deference” to an employer's purported justification for constraining self-expression instead of scrutinizing it. The combination of these two factors leaves an employee's expression of identity in the workplace almost entirely unprotected. For that reason and, in light of the myriad benefits generated by greater authenticity in the workplace, I argue that the constitutional model embodied in free speech jurisprudence gets it right. Like the government in the free speech context, employers should bear the burden of justifying significant intrusions upon employee authenticity.

This section will explain what Title VII does and where it falters. It will then describe various elements of First Amendment theory and jurisprudence that demonstrate how our society and, most importantly for the purposes of this article, our legal system value authenticity outside of the workplace.

A. Background of Title VII

A monumental step towards eradicating discrimination in the workplace, Title VII of the 1964 Civil Rights Act is a federal law that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion. It applies to all private employers, state and local governments, and educational institutions that employ fifteen or more individuals. The law addresses two types of discrimination: disparate treatment, which occurs when an employer intentionally discriminates against someone because of a protected characteristic, and disparate impact, which occurs when policies or practices that appear to be neutral result in a disproportionate impact on a protected group. In both cases, the employee faces the ultimate burden of proof.
action, and (4) an individual who is not a member of the protected class replaced her or the employer continued to seek applicants from people with the same qualifications. If the employee successfully makes out a prima facie case, the employer has the opportunity to present a “legitimate, non-discriminatory reason” for the adverse employment action. Courts often refer to this as a “business necessity” and are very deferential to employers when determining whether it exists. If the employer's reason is accepted by the court, the burden then shifts back to the employee to show either that the reason was pretextual—that discrimination was the real reason for the adverse action—or that the employer had a mixed motive and discrimination played a part in the decision.

Title VII has accomplished a lot of good for members of historically subordinated groups. As Robert Belton has explained, it was a “powerful engine for social change” in its first decades of enforcement, equalizing employment opportunities for African-Americans, Latinx, Asian-Americans, and women. Since its passage, incidents of blatantly discriminatory actions have decreased significantly, and courts have recognized more sophisticated theories of discrimination.

Title VII also tries to straddle the line between protecting group membership and individuality. While the statute is typically associated with group protections, its purpose is to free the individual from unlawful discrimination. Justice John Paul Stevens emphasized this point in his majority opinion in City of Los Angeles, Department of Water and Power v. Manhart, where the Court held that female employees could not be required to contribute more to an employer's pension fund than male employees because women live longer than men on average. Writing for the Court, Justice Stevens said, “[t]he statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.” He continued, “[e]ven if [Title VII's] language were less clear, the basic policy of the statute requires that we focus on fairness to individuals rather than fairness to classes. Practices that classify employees in terms of religion, race, or sex tend to preserve traditional assumptions about groups rather than thoughtful scrutiny of individuals.”

Despite its successes and promises, Title VII has proven inadequate in addressing subtle instances of discrimination and in prompting “thoughtful scrutiny of individuals.” As numerous scholars have noted, the statute provides protection for specific group statuses only—it neither goes beyond those groups nor protects the many ways one might express one's identification with a protected group. The goal, as suggested by the name of the statute's enforcing agency, the Equal Employment Opportunity Commission (“EEOC”), is to provide equal opportunity. However, the statute's assurances of equal opportunity only protect immutable characteristics, such as skin color; if the characteristic in question is not immutable, courts assume that the employee can adapt to the regulation and, therefore, is not denied equal opportunity. As a result, the statute (1) limits how members of a protected class can express their minority identities at work by allowing employers to force them to assimilate to dominant cultural norms; and (2) fails to protect other aspects of identity that one considers fundamental to her sense of self but which are not clearly connected to a protected group status.

B. How Title VII Limits Expression of Protected Identities

While the law prohibits discrimination based on certain protected group identities, courts have refused to extend protection to employees based on how they choose to individually express those identities. By going no further than protecting immutable characteristics—the manifestations of identity that one cannot change—the law constrains individuality in two particular ways. First, it forces employees to “cover” what makes them different, and, in the process, extinguishes authentic expressions of identity. Second, and relatedly, it permits employers to force their employees to express their identity in line with dominant cultural norms. In both cases, it transfers control over one's identity and expression of that identity from the individual to the employer. This not only limits an individual's freedom to express her individuality qua individuality but also limits how she can express her affiliation with a protected group.

Instances of covering in the workplace are ubiquitous. Employees cover with respect to whom they associate and affiliate with, what messages they advocate, and how they fashion their appearance. For example, a gay individual who refrains from bringing her same-sex partner to a work event so as not to be seen as “too gay” engages in association-based covering. While that person's colleagues may know that she is gay, she adjusts her conduct to “make her difference easy for those around her.” As the social science research discussed earlier makes clear, changing oneself to “fit in” at an organization comes at a
tremendous personal cost to the individual. Since this “identity work” most often falls to organization outsiders—those who fall outside of the typical culture, such as women and minorities—legal scholars have argued that those costs are not merely demoralizing but also discriminatory.

Courts have not seen it that way, often siding with employers when employees refuse to cover. In the landmark opinion Rogers v. American Airlines, Inc., Renee Rogers, an African American woman who wore corn rows, challenged the company's policy prohibiting employees in certain positions from wearing an all-braided hairstyle as discriminatory on the basis of race and gender. She argued that corn rows had special significance for Black women, “reflective of cultural, historical essence of the Black women in American society.” In rejecting Rogers' claims, the district court noted that the policy was neutral on its face—that is, it applied to all genders and races—and, to the extent that the policy disproportionately affected African American women, wearing corn rows was a choice, not an immutable fact. The court distinguished Rogers' braids from an Afro, which the court conceded might implicate Title VII because an Afro is “natural,” as compared to the braids, which it described as “artifice.” Moreover, the court stated, the matter was “of relatively low importance in terms of constitutional interests,” and the policy allowed Rogers to keep her braids, so long as she placed them in a wrap while on the job. Although the court found that Rogers had not alleged sufficient facts to shift the burden to American Airlines to provide a non-discriminatory purpose for the policy, it suggested that, even if she had, American Airlines' desire to “project a conservative and business-like image” would have sufficed.

The Rogers court dismissed the importance of Roger's hairstyle to her expression of self as a Black woman. By distinguishing between “natural” and “artific[ial]” expressions of Black female identity, the court implied that there was only one natural way to be a Black woman, namely by wearing an Afro. In so holding, the court, as Laura Morgan Roberts and Darryl D. Roberts write, “constrains the choices that minority employees can make in presenting their identity in ways that are authentic to them, while reifying the dominant culture.” With respect to Roberts and Roberts' latter point, the court did not even question the racialized implications of American Airlines' stated reason for the policy, suggesting that it was too obvious for comment that an employee's wearing corn rows would undermine the airline's “conservative and business-like image.” Contrary to Justice Stevens' vision of Title VII in Manhart, the Rogers court's interpretation of the statute both failed Rogers as an individual and stereotyped the group to which she belonged.

Courts have also upheld employer policies that compel employees to affirmatively present in ways that typify dominant cultural norms. In Jespersen v. Harrah's Operating Co., Darlene Jespersen was terminated for refusing to wear makeup while working as a bartender in a casino shortly after the company implemented a new grooming policy. While all employees had to don a specific uniform, female bartenders had to have their hair “teased, curled, or styled” and wear nail polish, face powder, blush, mascara and lipstick “at all times.” By contrast, male bartenders had to keep their hair short and could not wear makeup or nail polish. In her twenty years of working at the casino, Jespersen had never worn makeup and “felt very degraded and very demeaned” when forced to do so. In addition, Jespersen testified that the makeup requirement “prohibited [her] from doing [her] job” because “[i]t affected [her] self-dignity ... [and] took away [her] credibility as an individual and as a person.” She objected to the policy on the grounds that it subjected women to terms and conditions to which men were not similarly subjected and that, pursuant to Price Waterhouse's sex-stereotyping theory, it required women to conform to sex-based stereotypes.

Sitting en banc, the Ninth Circuit rejected both arguments. With respect to the first, the court held that the policy did not violate Title VII because Jespersen did not provide evidence that the requirements unduly burdened women when compared to the requirements imposed on men; without empirical data to suggest otherwise, the requirements were different but not unequal. The court explained that grooming standards that “appropriately differentiate” between the genders present no statutory problem.

Regarding Jespersen's sex-stereotyping argument, the Ninth Circuit found “no evidence ... to indicate that the policy was adopted to make women bartenders conform to a commonly-accepted stereotypical image of what women should wear.” It distinguished the casino's policy from dress and appearance requirements intended to be sexually provocative, stereotyping women as sex objects. In contrast, the majority wrote, there was nothing about the casino's grooming standards that “would...
objectively inhibit a woman's ability to do the job.”

As in *Rogers*, the court allowed the employer to require that Jespersen express her identity as a woman in a particular--and particularly narrow--way. Jespersen's reaction, the sincerity of which the court did not doubt, was largely irrelevant. Indeed, in describing her claim as “the subjective reaction of a single employee,” the court suggested the individual nature of Jespersen's claim was evidence of both its legal irrelevance and its strangeness; so-called normal women, the court seemed to be saying, were not upset by the policy. Despite the case being what one dissenter called “a classic case of *Price Waterhouse* discrimination,” the majority refused to acknowledge the gender stereotyping at work. By differentiating Jespersen's case from cases about sexually provocative uniform requirements, where Title VII violations have been found, the court legitimized the subtler means that employers use to enforce stereotypes and conformity.

Legal constraints on authentic expressions of self go beyond physical appearance and gender identity. In *Garcia v. Gloor*, the Fifth Circuit rejected the argument made by Hector Garcia, a Mexican-American, that his employer's rule prohibiting sales employees from speaking Spanish on the job constituted discrimination on the basis of national origin. Despite the fact that an expert witness testified that the Spanish language was “the most important aspect of ethnic identification for Mexican-Americans,” and Garcia stressed its importance to his identity, the circuit found no violation. It reasoned that national origin, a protected class, was “not to be confused with ethnic or sociocultural traits.” Or, in other words, you cannot change where you were born, but you can change what language you speak. Although the Fifth Circuit was slightly more sensitive to Garcia’s arguments about the importance of speaking Spanish to his identity than either the Ninth Circuit was towards Jespersen or the Southern District of New York was towards Rogers, it nonetheless elevated the employer's right to enforce dominant norms and punish employees who refused to comply.

The high point of protection for authentic expressions of self under Title VII is in the religious context. As the Supreme Court made clear in *E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, Title VII demands that employers accommodate an employee's religious practices unless doing so would constitute an undue hardship for the employer. In this case, Abercrombie & Fitch did not hire an otherwise qualified candidate because the candidate's headscarf would have violated Abercrombie's “Look Policy,” which prohibited employees from wearing “caps” of any kind. In response to Abercrombie's argument that its policy was neutral with respect to religion, the Court clarified that Title VII requires more than “mere neutrality” in the religious context--it gives religious practices “favored treatment,” thereby imposing an affirmative obligation on employers. The Court was quick to quarantine this exception, however, noting that the neutrality argument “may make sense in other [Title VII] contexts.”

As commentators have argued, the case law outside the context of religion is problematic for many reasons. First, the fact that one can change one's dress, appearance, and behavior does not mean that these are less essential to an individual's sense of dignity and self than race and sex. In fact, one could argue that the choice to manifest one's identity in a nonconforming way merits greater protection, not less. Moreover, as the aforementioned cases demonstrate, dress, appearance, and behavior are often intimately connected to the statuses Title VII is meant to protect. Second, it is inconsistent for courts to find dress, appearance, and behavior inconsequential to employees but pivotal to employers. Third, courts' use of commonly accepted social norms to uphold appearance and behavior codes undermines Title VII's goals by reinforcing prejudices and stereotypes. Or, as Klare has wryly put it in the gender context, “as the law stands, an employer may hold women to different standards from men, as long as it ... ‘merely’ enforces prevailing prejudice.”

**C. What Title VII Fails to Address**

Title VII fails to adequately protect *authenticity* in the workplace. In addition to its aforementioned limitations on which expressions of protected identities qualify for legal protection, Title VII wholly omits groups of people who undoubtedly face discrimination in the workplace. The law also ignores authentic expressions of identity that are unrelated to protected group membership--or to any group membership--yet fundamental to an individual's self-image.
Title VII neglects entire groups of people who face rampant discrimination in the workplace, because they do not directly fall under one of the enumerated categories in the statute. For example, Title VII does not reach transgender persons because courts typically construe the word “sex” narrowly to refer only to male and female cis-gendered people, excluding them from protection under that category. 192 As a result, transgender individuals encounter blatant discrimination in the workplace and are openly fired because of who they are. 193 Nor does the statute protect people from other types of bias, such as bias concerning perceived attractiveness or weight. 194

Despite its purported focus on the individual, Title VII also does not provide protection for people whose expressions of self, though central to their identities, cannot be linked to a protected status. This is true even though the way in which individuals present themselves to the outside world—in their clothing, hair, jewelry, and tattoo choices, for example—often implicates their core values and, as Gowri Ramachandran has pointed out, “affect[s] each one of us every single day.” 195 For example, divorced from religious or cultural arguments, Title VII does not protect someone who has a piercing, despite the potential significance of that piercing to the individual. 196 Nor does it offer any refuge for people who wish to voice or otherwise represent their political beliefs or regional affiliations. It also, of course, does not cover the various elements of diversity that Millennials found so important in the aforementioned Deloitte study, such as the ability to raise unique perspectives. 197

In response to some of these deficiencies, Ramachandran has proposed a legal right to “freedom of dress,” which she defines as “the right to choose the hairstyle, makeup, clothing, shoes, head coverings, tattoos, jewelry and other adornments that make up the public image of our sometimes private persons.” 198 Ramachandran connects the freedom of dress to “control over our own bodies”—control which “is essential to human dignity.” 199 Piercings, haircuts, and tattoos involve the right to modify and manipulate one's body as a means of exercising one's right to bodily autonomy—this connection is why individuals react so negatively to requirements to change these aspects of self. 200 “The relevant question,” she writes, “seems not to be whether businesses may create an image of their choosing and communicate ideas of their choosing, but rather whether businesses can co-opt the bodies of their employees to communicate those ideas.” 201 At present, the answer is yes, they can.

Building from Ramachandran's arguments, behaviors in the workplace that are central to one's sense of self--Berg's desire to voice a story rooted in his Judaism, for example--also deserve protection. 202 This is not because the behavior may be associated with a protected class but, rather, because it is an authentic expression of his identity. For Berg to represent himself authentically, he needed to tell a story rooted in the Talmud--that other Jewish people might not feel the same way does not diminish its significance to the individual. 203 Nor does it advocate for a legal scheme that balances an employer's interest in efficiency and an employee's interest in authentic self-expression, recognizing that Title VII's protected-group scheme does not cover all forms of self-expression that merit protection. Moreover, in striking this balance, it errs on the side of protecting employee authenticity by placing the burden on employers to justify their actions to courts in the face of increased scrutiny.

IV. FREE SPEECH: A DOCTRINE OF RESPECT FOR INDIVIDUALITY

The First Amendment's protection of freedom of expression embodies the same values that social scientists have concluded benefit individual employees and the organizations they work for—authenticity and individuality. However, Title VII does not protect these same values. Revered in jurisprudence as well as popular culture, 204 the First Amendment protects freedom of expression in its many forms. Although there are limits to the breadth of its guardianship, chief among them the fact that it shields expression only from government regulation, the First Amendment stands for the proposition that a well-functioning society must champion the autonomy of its citizens. It is, as Justice Cardozo said, “the matrix, the indispensable condition, of nearly every other form of freedom.” 205
To that end, the United States Constitution protects free speech, in part, because of the role individual expression plays in identity formation—in a citizen's ability to both realize and determine who she is. This foundational purpose is evident in scholarly justifications for the First Amendment, in the fact that government bears the burden of justifying limitations on expression, in the Supreme Court's protection of pure speech and extension to symbolic means of expression, and in the Court's rejection of speech compelled by the government. By examining the modes of expression the First Amendment protects and why it does so, I observe that the law already champions individuality and authenticity and, consequently, ask why Title VII should not do the same.

*732 Before doing so, it bears repeating that Title VII regulates private employers while the First Amendment regulates government conduct. One could argue that this distinction alone answers the question I pose above. However, given the importance of work to our lives and the eroding boundaries between one's work and non-work lives, I argue that the justifications discussed below do not lose their salience in the employment context. As the workplace increasingly occupies the role of the public square, it is time to question why employment law does not better reflect the virtues we protect there.

A. Theoretical Justifications for Valuing Free Speech

Scholars have long debated the theoretical foundations for protecting free speech. Most agree that First Amendment doctrine does not derive from one coherent theory but is, instead, supported by a number of different interests. Nevertheless, commentators have generally advanced three theories to explain the value of free speech in our society: the pursuit of truth, the promotion of democratic self-government, and the preservation of individual autonomy and self-realization. I will focus on the third, which has arguably emerged as the leading and, as C. Edwin Baker described it, “most coherent theory.”

The third theory of free speech is rooted in autonomy, or one's “authority (or right) to make decisions about herself.” C. Edwin Baker argues that we protect self-expression from government control because it is essential to individual personhood and flourishing. From Baker's perspective, “[s]peech is protected not as a means to a collective good but because of the value of speech conduct to the individual.” It enables us to realize who we are, assert who we are, and distinguish ourselves from others. This approach emphasizes the speaker, rather than the content, and it is why we protect not only political debate but also art and storytelling. As renowned First Amendment scholar Thomas Emerson put it, speech “is an integral part of the development of ideas, of mental exploration and of the affirmation of self”; therefore, “suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature.”

Although supporters of this theory do not necessarily use the specific word “authenticity” to define the value protected by free speech, many describe the virtues of free speech in the context of both internal development and outward expression. That is, they argue for protecting speech because it allows one to authentically present herself. Seana Valentine Shiffrin, for example, has argued for what she calls a “thinker-based” approach to the First Amendment. In her view, what makes one a “distinctive individual qua person is largely a matter of the contents of one's mind.” Speech and expression must be protected because they “are the only precise avenues by which one can be known as the individual one is by others.” They are necessary “to make one's mental contents known to others in an unscripted and authentic way.” Martin Redish similarly describes the “one true value” served by the First Amendment as “individual self-realization,” arguing that the First Amendment ultimately furthers both the “development of the individual's powers and abilities” and “the individual's control of his or her own destiny through making life-affecting decisions.”

Implicit in these descriptions is that self-realization is advanced not only by speech but also by conduct, or symbolic expression. Baker argues that certain nonverbal conduct is “inherently expressive” and “clearly contributes to” First Amendment values. Building off of Emerson's work, he points to meetings and assemblies as everyday examples: it is not only the speaking but also the nonverbal conduct, presumably such as standing and waving one's arms or congregating, that manifests the message. The First Amendment refers to “speech,” Baker posits, not because verbal conduct is inherently special, but because it is “a particularly good embodiment of a concern for expressive, nonviolent, noncoercive conduct that promotes self-realization and self-determination.” Guided by these principles, it is clear that the First Amendment's protection does not extend to “an individual doing whatever she chooses.”
about herself,” Baker explains, “until her choice involves taking away choice from another about himself.” Therefore, as Redish adds, it is not inconsistent to view self-realization as the paramount—or even the lone—First Amendment value while also choosing to limit free expression when there are certain “competing social concerns,” such as physical safety.

Scholars have also connected the autonomy rationale to systemic and communitarian interests. For Baker, the legitimacy of government depends on respect for individual autonomy. “Obligation,” he argues, “exists only in relationships of respect.” Likewise, without respect for individual autonomy, people lose the ability to contribute their perspectives to the marketplace of ideas on equal footing, making equality impossible. In this view, the autonomy rationale is the most coherent of the three prevailing First Amendment theories because it is a prerequisite to the societal goods—recognition of greater truth and effective functioning of government—that undergird the other two rationales. In recognizing both the individual and collective dimensions of autonomy-based rationales for protecting free speech, First Amendment theory mirrors social science research in the workplace context. Both grasp that individual (or employee) authenticity is a good in its own right and an essential ingredient in optimal societal (or workplace) functioning.

*735 B. Jurisprudential Examples

The importance of the autonomy theory of the First Amendment is manifest throughout the Supreme Court's First Amendment jurisprudence. Courts have developed and applied the autonomy theory in how they structure their First Amendment analyses, in their protection of pure speech and expressive conduct, and in their rejection of compelled speech.

I. Doctrine

Before looking at the substantive ways the First Amendment jurisprudence protects authenticity, it is helpful to summarize the method of legal analysis courts use when assessing First Amendment issues. In general, the government bears the burden of justifying a restriction on expression. When analyzing a government regulation, a court first determines whether the restriction targets speech because of its communicative content. If it does, the court ascertains whether the regulated expression falls into one of a few historically excepted categories, such as advocacy of illegal action, true threats, and fighting words, among others. If the targeted speech does not fit into one of the categories but is regulated because of its content, the court applies “strict scrutiny”: the law must serve a compelling government interest and be the least restrictive means available to obtain the desired result. That is, the First Amendment requires that the government's chosen restriction be “actually necessary” to achieve its interest. As in most contexts where strict scrutiny is applied, this is typically a death knell for the regulation.

If, on the other hand, a court concludes that the government is regulating speech for reasons unrelated to its communicative impact, the government bears a lesser burden. In circumstances where a law regulates conduct that incidentally affects speech, the court applies the four-part *O'Brien* test: (1) the regulation must be within the constitutional power of the government; (2) it must further an important or substantial government interest; (3) the government interest must be unrelated to the suppression of free speech; and (4) the incidental restriction on the alleged First Amendment freedom can be no greater than is essential to the furtherance of that interest.

Finally, if a court concludes that the law is aimed at speech in a content-neutral way, such laws that prohibit using megaphones in residential areas, it applies a “time, place, and manner” analysis. It asks whether the government has shown that the regulation is “justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant governmental interest, and [whether it] leave[s] open ample alternative channels for communication of the information.”

Most pertinent to this article is the burden-shifting in First Amendment cases: simply put, when the government chooses to regulate individual expression, it must justify its actions. This contrasts with Title VII, where an employee must first make out a prima facie case and her employer then has wide latitude to rebut her argument. Moreover, the First Amendment's burden-shifting applies regardless of whether the government specifically targets speech or incidentally burdens it while seeking to regulate conduct. In both cases, First Amendment law recognizes the fundamental nature of the right being infringed through a structure that offers greater protection to the individual. While First Amendment law recognizes competing government interests
and adjusts the standard of scrutiny accordingly, courts do not simply take officials at their word. In this context, they recognize that the interest at stake—the ability of individuals to express themselves—is far too precious.

2. Speech

The Supreme Court has often emphasized the importance of preserving individual autonomy when justifying its protection of speech. The best known early articulation of this idea comes from Justice Louis D. Brandeis's concurrence in *Whitney v. California*:

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty.\(^{238}\)

Since then, the Court has repeatedly emphasized the significance of self-expression.\(^{239}\) For example, the Supreme Court in *Procunier v. Martinez* confronted the question of whether the First Amendment forbids prison officials from censoring letters sent by prisoners.\(^{240}\) Observing that the First Amendment serves not only the public but also the “human spirit,” Justice Thurgood Marshall argued in a concurring opinion that self-expression is central to human flourishing—it is “an integral part of the development of ideas and a sense of identity”—and to suppress it “is to reject the basic human desire for recognition and affront the individual's worth and dignity.”\(^{241}\)

The Court has gone so far as to protect an individual's use of specific words, viewing word choice as an integral part of an individual's message and identity. In *Cohen v. California*, for example, Paul Robert Cohen was convicted of disturbing the peace for wearing a jacket with the words “Fuck the Draft” on it while in the corridor of the Los Angeles County Courthouse.\(^{242}\) In stark contrast to Title VII cases dealing with self-expression, the Court found nothing trivial about the issues presented in *Cohen*.\(^{243}\) Finding for Cohen, the Court stressed that the First Amendment was “designed and intended to remove governmental restraints from the arena of public discussion” based on “the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.”\(^{244}\) The Court treated Cohen's jacket as if the message it bore were an extension of Cohen himself, impossible to remove without wounding his “individual dignity and choice.”\(^{245}\)

In *Cohen*, the Court also commented on the emotive function of speech. It defended Cohen's ability to use the specific “distasteful” word that he did, recognizing that expression “conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.”\(^{246}\) In so doing, the Court acknowledged the importance of protecting and deferring to the specific choices an individual makes to present herself.

*738 3. Symbolic Speech and Expressive Conduct

In addition to speech, the Supreme Court has extended First Amendment protections to conduct that has expressive elements.\(^{247}\) In these “expressive conduct” cases, the Court determines whether the law under review targets certain conduct *because of* its message or in spite of it. To do this, the Court assesses whether the conduct possessed sufficient expressive elements to be considered on par with speech by asking whether “[a]n intent to convey a particularized message was present,” and whether, “in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”\(^{248}\) Context, therefore, helps determine whether conduct is sufficiently expressive to warrant First Amendment protection.\(^{249}\) In more recent cases, the Court has articulated a broader standard, requiring only that the activity be “sufficiently imbued with communicative elements.”\(^{250}\) While the government generally has greater leeway to restrict conduct than it does language, it cannot prohibit conduct *because* it has expressive elements.

In some cases, the Court has found conduct clearly expressive. In *Tinker v. Des Moines School District*, three students wore black armbands to school to protest the Vietnam War and, pursuant to a school policy forbidding them from doing so,
were suspended.\textsuperscript{251} The school district justified the policy on the grounds that it was necessary “to prevent disturbance of school discipline.”\textsuperscript{252} Describing the students' wearing of armbands as “a silent, passive expression of opinion,” the Court characterized their actions as “closely akin to ‘pure speech’” and said that they merited “comprehensive protection.”\textsuperscript{253} While the Court emphasized the political nature of the armbands, it also underscored the students' interest in self-expression: students “may not be confined to the expression of those sentiments that are officially approved .... [S]tudents are entitled to freedom of expression of their views.”\textsuperscript{254} Ultimately, it held that the school could not censor the students *\textsuperscript{739} unless they could show that their conduct would “materially and substantially” interfere with the operation of the school.\textsuperscript{255}

The Court's holding demonstrates its willingness to balance core values--such as order versus individuality--in the First Amendment context when self-expression is at stake. Throughout its opinion, the Court acknowledged the uniqueness of academic environments and “the comprehensive authority of the States and of school officials ... to prescribe and control conduct in the schools.”\textsuperscript{256} Nevertheless, the Court refused to defer to the unsubstantiated fears of those whom it conceded had authority in the educational context. For the restriction to pass muster, the Court said that the school district “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”\textsuperscript{257} Unlike the employers in Rogers and Jespersen, the school officials could not simply rely on their authority over students to demand compliance. Finding no evidence of disorder or disruption, the Court held that the school could not suppress the students' expression.\textsuperscript{258}

This is not to say that First Amendment jurisprudence is uniformly protective of symbolic speech. In the context of clothing, litigants have achieved mixed success when bringing symbolic speech claims.\textsuperscript{259} Lower courts have dismissed First Amendment claims on the grounds that an individual's clothing choices are not sufficiently communicative to overcome even a nominal state interest justifying the restriction. These decisions, however, are at odds with other First Amendment doctrine.

In Zalewska v. County of Sullivan, for example, the Second Circuit upheld a municipal transit authority's dress code, mandating all employees wear pants as part of the driver's uniform, when applied to Grazyna Zalewska, for whom “the wearing of a skirt constitute[d] ... an expression of a deeply held cultural value.”\textsuperscript{260} The court acknowledged that “for most people--clothing and personal *\textsuperscript{740} appearance are important forms of self-expression.”\textsuperscript{261} However, it found that Zalewska's message was “not a specific, particularized message” and upheld the dress code under rational basis review based on the government's purported interest in safety.\textsuperscript{262}

The Second Circuit's holding in Zalewska arguably violates Supreme Court precedent and is inimical to First Amendment values. Despite acknowledging that the standard for what constitutes sufficiently communicative speech had become more forgiving, the court nevertheless required Zalewska to provide “a particularized message.”\textsuperscript{263} Even if such a “particularized message” were required, it is not clear why Zalewska's message of femininity was not comprehensible.\textsuperscript{264} As Klare has said, “[a]ll dress and appearance practices create and communicate meaning, not just special dress items like the black protest armband.”\textsuperscript{265} The court's conclusion that “no particularized communication can be divined simply from a woman wearing a skirt” was also incorrect for another reason.\textsuperscript{266} In a workplace context where skirts were forbidden, Zalewska represented the nonconformist the First Amendment typically protects.

While the First Amendment does not prohibit employers from implementing new safety requirements, it requires courts reviewing the legality of those requirements to consider whether they single out conduct because of the message it expresses. In Zalewska, the Second Circuit allowed traditional gender norms to influence its analysis--Zalewska's dress was somehow less communicative because women typically wear skirts--while also ignoring that this position placed Zalewska as an outsider in her specific work environment. Even if reasonable minds could disagree over whether the First Amendment protects Zalewska's decision to wear a skirt regardless of if others understood what “message” she was expressing, it is beyond reasonable dispute that the First Amendment protects conduct that expresses alternative norms, as it did in this case. That Zalewska's nonconforming appearance choice, in this context, aligned with traditional gender norms does not change this fact.

Other courts have been more willing to protect appearance choices as symbolic speech, especially when plaintiffs have demonstrated the centrality of those choices to their identities. In Doe ex rel. Doe v. Yunits, a Massachusetts state court found that a transgender high school student's decision to wear traditionally female clothes to school as an expression of female
gender identity was protected. *741* speech and enjoined the school from prohibiting her enrollment. 267 The court described the plaintiff's clothing as “a necessary symbol of her very identity” and found that “the school's vehement response and some students' hostile reactions are proof of the fact that the plaintiff's message clearly ha[d] been received.” 268 For similar reasons, a federal district court in South Dakota found a student's wearing of his traditional native tribal clothing expressive under the First Amendment. 269 “Mr. Dreaming Bear sees himself as a Lakota warrior who takes pride in who he is and where he comes from,” the court wrote. 270 “Clothing is an integral part of his identity.” 271

In contrast to the lengths many courts go to protect expression when confronted with a First Amendment challenge, courts have often failed to grasp the importance of identity and to protect it in the Title VII context. For example, when evaluating a Title VII claim, courts routinely dissect an individual's presentation to determine what is “natural” versus “artifice,” as the court did in Rogers. When evaluating First Amendment claims, however, courts show more deference to how individual plaintiffs characterize their appearance choices and articulate their meaning. Accordingly, where individuals can demonstrate the centrality of their choices to their identities, they may succeed in securing First Amendment protection. 272 While plaintiffs may not ultimately prevail on their First Amendment claims if the government's justification for a regulation is important and unrelated to expression, courts are more deferential to an individual's articulation of the importance of their expression to their identity than they are in the Title VII context.

This difference in deference is particularly evident in cases that implicate an individual's expression of a marginalized identity, as in Doe. In such cases, courts are even more aware of the socially constructed nature of identity and are most protective of expressions that subvert the status quo. Without overtly saying so, courts addressing First Amendment claims in this context have gleaned--and found worthy of protection--messages of protest inherent in identities of difference. 273 They grasp that the “very act of differentiation” imbues certain identities with meaning and that the First Amendment must protect those expressions of *742* difference. 274

4. Compelled Speech

The Supreme Court has a particular distaste for instances where the government compels individuals to support, verbally or otherwise, messages with which they disagree. In *West Virginia Board of Education v. Barnette*, the Court held that public schools could not require students to recite the Pledge of Allegiance or salute the American flag. 275 The case arose in the context of Jehovah's Witnesses who, because of their religious beliefs, refused to salute the flag and were expelled. 276 The Court primarily relied on autonomy justifications to justify its holding, invoking the First Amendment's role in “guard[ing] the individual's right to speak his own mind.” 277 It chastised local authorities for “inva[d]ing students' sphere of intellect and spirit” and portrayed the First Amendment as a pivotal protection against forced conformity. 278 “If there is any fixed star in our constitutional constellation,” wrote Justice Jackson for the majority, “it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or ... opinion or force citizens to confess by word or act their faith therein.” 279 Notably, the Court did not look to the religion clauses to solve the issues at hand. Instead, it expressed profound concern about having a pledge that required “affirmation of a belief” at odds with what the students actually thought, without limiting that concern to circumstances where the compelled belief clashed with religious conviction. 280 The Court also noted that this was not a case of colliding rights. 281 To allow the students to refuse to participate did not affect the rights of others to do so; the students' choices caused no disruption. The Court saw the “sole conflict” as being “between authority and rights of the individual.” 282

The Court employed a similar rationale in *Wooley v. Maynard*, where it struck down a New Hampshire statute that required individuals to display the state motto, “Live Free or Die,” on their license plates. 283 As in Barnette, the Wooley Court was concerned with the individual's “freedom of thought,” describing the “right to speak and the right to refrain from speaking” as “complementary components of the broader concept of 'individual freedom of mind.'” 284 It emphasized that the intrusion into the “sphere of intellect and spirit which it is the purpose of the First *743* Amendment ... to reserve from all official control” happened “constantly while [the] automobile is in public view.” 285
Seana Valentine Shiffrin has described this repeated indoctrination aspect of compelled speech as perhaps its most disturbing. In her view, compelled speech, especially that which is frequent and presented as “normal,” can have a corrupting influence on “the autonomous agent's control over her mind.” If one is forced to repeatedly say something, such as a pledge, or present oneself in a particular way, the individual will likely be affected, even if not consciously. According to Shiffrin, this may be true even if the individual is aware that she is being compelled to do something. In an effort to avoid what she calls “performative dissonance,”--“states of conflict or tension between what one says or appears to say and what one thinks”--an individual may unconsciously alter her thoughts to conform to the content of what she is forced to say or do. Shiffrin also argues that compelled speech undermines “the value of sincerity, a virtue that is integrally related to the well-functioning of a robust First Amendment culture.” For both the individual speaker and broader society, the ripple effects of compelled speech may “encourage cynicism and ambivalence about the value of truth,” negatively impacting everyone.

Although abundant social science research shows that Shiffrin's fears about compelled expression also apply to the workplace, the decision in Jespersen exemplifies how courts express less concern about its consequences in the employment context. This dichotomized approach is illogical and contrary to judicial decisions that acknowledge the essential nature of personhood. If an individual should be free from indoctrination because of the surreptitious ways it negatively influences one's self, that right should not depend on who does the compelling. Moreover, as Shiffrin has emphasized, courts in the First Amendment context recognize that society at large suffers when those in authority have an unfettered right to demand expressions from people that they do not believe.

As free speech theory and jurisprudence demonstrate, First Amendment law recognizes autonomy--and, I have argued, authenticity--as foundational elements in American society. Although the First Amendment prohibits what government, and not private employers, may do with respect to its citizens, the values it protects do not vanish when individuals go to work.

V. LESSONS, LIMITS, AND SUGGESTIONS FOR HEALTHIER WORKPLACES

We generally accept as a given the contrast between our time at work and the rest of our lives. Once you enter the office or factory, you lose many of the rights you enjoy as a citizen. There's no process for challenging--or changing--bad decisions made by the authorities. There's no mechanism to vote for people to represent you in decision-making bodies .... We take for granted that such rights and protections don't apply to the workplace partly because most of us have never seen examples to the contrary.

In a society whose commitment to autonomy is constitutionally enshrined and whose citizens, perhaps now more than ever before, demand that their workplaces also honor that value, the courts and the public must critically rethink their approach to employment law. While management best practices related to authenticity cannot serve as the standard for determining discrimination in the workplace, they should not be irrelevant. Research on authenticity in the workplace demonstrates that the ability to bring one's whole self to work has a substantial positive impact on employees--on their happiness, job performance, attachment to their employer, and so on. To the extent that laws should protect the ever-evolving realities of people's lives--lives which are spent, for the most part, at work--the law must concomitantly evolve to support and protect employees who are forced to cover and require employers to structure healthier workplaces.

But, more than that--and of most significance to those in the legal profession--the notion of elevating and protecting the value of authenticity is not foreign to U.S. law. As free speech theory and jurisprudence make clear, treating as fundamental the right to be one's authentic self is not a radical idea. It is a foundational one. This section explains how the valuable insight that the First Amendment provides can be applied in the employment context to better foster employees' abilities to be themselves in the workplace. It then provides doctrinal suggestions for how to actualize these authenticity goals. Finally, it addresses potential critiques.

*745 A. Lessons
First and foremost, authenticity matters to individual, organizational, and societal wellbeing. Employment law should be grounded in social science research and follow First Amendment law in reflecting this fact. Unlike the Title VII context where courts often remark on the triviality of issues related to self-expression, courts in the First Amendment context take questions related to self-determination seriously. As numerous theorists have argued, self-determination is an important—if not the principal—justification for the First Amendment's protection of expression. The Supreme Court has demonstrated the significance of autonomy interests in cases like Cohen v. California, where the Court went out of its way to underscore the importance of the autonomy issues presented by the writing on the back of a jacket, and West Virginia Board of Education v. Barnette, where it stood guard against the invasion of children's minds. It is not enough for courts to acknowledge autonomy interests in passing, as the Fifth Circuit did in Gloor when it allowed the plaintiff's employer to prohibit him from speaking Spanish at work. It is illogical that protection and promotion of an individual's right to self-expression should be limited solely to the First Amendment context: if autonomy matters to First Amendment interpretation and enforcement, it should similarly matter to Title VII interpretation and enforcement.

Second, though there may be competing interests that warrant the tempering of protection of an employee's authenticity in the workplace, those interests should be substantial; the presumption should be in favor of protecting the employee's authenticity. As the Supreme Court implied in Barnette, the assertion of authority does not itself justify intrusion into fundamental rights. The nature of fundamental rights is such that the intruder's identity—whether government or private employer—is irrelevant. The Tinker Court's "substantial disruption" balancing test better reflects the importance of authenticity than that used by courts in the private workplace. Although Tinker is well-known for its holding in an educational context, the Court's analysis is no less applicable in the employment context with respect to the values being protected: while an employer has a valid interest in stopping conduct that would "materially and substantially" interfere with her business, she has no legitimate interest in controlling her employee's self-expression absent such a disruption.

To ensure that employers are not unfairly trampling on employee self-expression, courts must scrutinize employers' rationales for regulating employee expression. They cannot deem a business's desire for a "conservative" image legitimate, as the Rogers court did, without evaluating what is meant by the asserted interest and determining whether an employee's expression actually impedes it. In Tinker, the Court found that the school had a legitimate interest in the school's proper functioning but went on to hold that there was no evidence of substantial disruption: students had not broken out into fistfights or arguments until class could not continue. Moreover, other political and controversial symbols, such as the Iron Cross associated with Nazism, apparently caused no problem. Therefore, the Court found it obvious that what the school was trying to stop was only the anti-Vietnam opinion symbolized by the black armband. If the Rogers court had engaged in a similarly thorough analysis, it seems unlikely that it would have been able to ignore the racial dimension of American Airlines's purportedly neutral interest in maintaining a "conservative" business image. As Yoshino has argued, forcing employers to explain their reasoning will "encourage a culture of greater rationality." Where employers cannot justify their regulations based on legitimate business concerns, the presumption in favor of an employee's right to free expression should stand. More rationality, therefore, will lead to more authenticity in the workplace.

Third, protecting authenticity in the workplace requires protecting an individual's decision about how to express her identity. As the court in Doe recognized, individuals are the experts on what constitutes authentic representations of themselves. Courts have no business evaluating whether an individual's presentation is "natural" or "artificial," as the Rogers court did, and social scientists have made abundantly clear that individual identity is simply too complex for them to do so. The Supreme Court recognized this fact in Cohen when it protected Cohen's speech not only for its specific message but also for its "inexpressible" emotive content. More importantly, courts do not need to make this distinction to determine whether an employee's expression is in tension with her employer's ability to run its business effectively.

Fourth, businesses and courts should be suspicious of regulations that compel specific expression. Social science research demonstrates that both employees and their employers suffer when employees are forced to act inauthentically. As the Supreme Court insinuated in Maynard, and as Seana Valentine Shiffrin argues, there is something particularly unnerving about those in authority forcing their subordinates to daily parrot their messages, especially when those messages relate solely to an individual's self-expression. While an employer may undoubtedly require that its employees say or do things that are substantially related to the business's functioning, it should not be able to demand that its employees present themselves in ways that have no bearing on the success of the business. Darlene Jespersen received positive performance reviews for twenty years before Harrah's Casino forced her to wear makeup, giving her no choice but to leave her job or stand up for what she
believed in. While there was no reason to believe that a painted face would have made Jespersen a more valuable employee, there was plenty of evidence that compelling her to essentially wear a mask would cause her real harm.

Taken together, these lessons highlight the need for the law to protect nonconforming self-expression in the workplace.

B. Solutions and Critiques

Companies at the forefront of authenticity efforts know that creating an environment where people can be themselves at work is not solely about compliance with the law. Of great additional importance are both an organization's decision to embrace employee authenticity as an institutional value--whether because companies believe it is the right thing to do or because it enhances profitability--and society's willingness to elevate its importance as a cultural value. The law, however, is the ultimate guardian of individual workers' rights: it must express those values and rights so that they are not misunderstood and provides the mechanism to ensure that those rights are not violated. To harmonize the free speech and Title VII jurisprudence and provide the means to counter forced conformity and celebrate individuality at work, I suggest the following changes to Title VII enforcement.

Individual employees should have a statutory right to challenge any workplace regulation that burdens an authentic--or, in legal vernacular, "sincere"--expression of their identity in the workplace--whether that regulation limits their ability to appear, speak, or conduct themselves as they wish. Building off Yoshino's argument that employers should be required to engage in "reason-forcing conversation[s]" to justify burdens placed on protected groups, I argue that courts should scrutinize all limitations on an employee's authentic representations of self, whether or not that employee is a member of one of the traditionally protected groups.

To that end, a new statutory scheme would require courts to apply the following intermediate scrutiny test: If an employee establishes a prima facie case that a workplace regulation burdens a sincere expression of self, then the employer must prove that the challenged workplace rule is necessary to further an important business interest and that the rule furthers that interest by using means substantially related to that interest. Only when an employer proves that a challenged workplace regulation is necessary to its business will a court uphold an employer rule that burdens employee expression. The assumption--and intended goal--is that, as in the religion context, courts would defer to individuals that their expressions are sincere unless patently unreasonable. The meat of the test would be the application of intermediate scrutiny that follows. In this framework, the burden would effectively be flipped; instead of an employee of a protected class being unable to make out a prima facie case of discrimination because her employer inhibits a mutable rather than an immutable characteristic, courts would, upon a minimal showing by the employee, assume that the employee is sincerely expressing her authentic self.

As a corollary, this new statutory scheme would also expand the protections already afforded to suspect classifications under Title VII to presumptively shield all employees from adverse employment actions premised on an employer's consideration of that employee's expression of individuality. However, an employer could rebut this by, again, showing that the employee's expression interferes with an important business interest and no accommodation was available.

Although limiting protection to "sincere" expressions of identity is purposefully not burdensome on the employee, it nevertheless ensures that employees at least articulate a reasonable rationale for their challenge. More importantly, the scheme obviates the need for courts to engage in any rigorous process of determining what qualifies as authentic--or, as we saw in Rogers, what expressions are sufficiently integral to one's identity as a Black woman to qualify for protection under Title VII--by placing the onus on the employer to justify its workplace regulation. Presuming the expression is authentic alleviates fears associated with line drawing and minimizes the specter of essentialism that currently lurks in a scheme dependent upon group categorization.

The adoption of intermediate scrutiny, rather than strict scrutiny, also acknowledges that employers have important interests linked to the success of their businesses. Even still, intermediate scrutiny ensures that employers will not have carte blanche to require their employees to do more than is necessary to successfully fulfill their work responsibilities. As Yoshino writes, "[t]he goal is not to eliminate assimilation altogether, but to reduce it to the necessary minimum." By expanding the scope of Title VII protection beyond suspect classes, individuals would be able to express their identities--not only cultural traits but also, for example, political beliefs--without fear of adverse employment action.
Where the job requires certain expression in appearance or action, such as a fashion model or an actor, the employer would face little difficulty in prevailing under the proposed scheme. However, where an employer simply decides that she would rather her employees cut their hair short because of personal preference, the employer would face pressure to justify her decision. In the context of uniforms, for example, Ramachandran has made the obvious but still important point that “[c]ustomers go to restaurants primarily for food, not to be served by people in uniforms. If there were few restaurants with waitstaff in uniforms, customers would still eat out.” 308 For identification purposes, employers could require that employees wear nametags--something less intrusive than a uniform requirement--and life would go on. 309

But not all uniforms would be so easily done away with under the proposed approach. To show how this scheme would work in practice, I present the following examples.

1. Six Flags requires its ride operators to wear a specific uniform. One such operator objects to the uniform because it quashes her authentic expression of self, which she argues includes wearing her own clothes. This employee has made out a prima facie case. The employer argues that the uniform is critical because members of the public need to know who has the authority to operate rides so that they only trust the correct person. Because of the crowds, a nametag would not be a sufficiently obvious way to signal who that person is. Here, the employer's uniform requirement would likely survive intermediate scrutiny.

2. A dental hygienist has numerous piercings. Her employer says that her piercings are inappropriate because she works closely with patients. The employee refuses to remove the piercings and is fired. She argues that she was fired because of an authentic expression of herself, making out a prima facie case. The employer argues that piercings seem unclean, and she just does not want anyone who works for her to have them. The employer might be able to survive intermediate scrutiny if she can show that the appearance of cleanliness is an important business interest and that forbidding body piercings substantially furthers *750 that interest. While the employer may be able to show the former, she would have a harder time proving that prohibiting body piercings substantially furthers the interest in the appearance of cleanliness, and she could not rely on unfounded stereotypes about people with piercings. If she cannot prove that her rule substantially furthers the business interest in cleanliness, she will be found to have discriminated against the employee.

3. An associate at a law firm wears a pin signaling gay pride. Her employer advises her to take the pin off, but she does not do so. She is passed over for a promotion. She alleges discrimination based on her refusal to take off the pin, which she argues is essential to her identity. The employee has made out a prima facie case. The employer argues that the political statement is distracting and the law firm has an interest in ensuring its associates are focused solely on their work and not distracted by political or personal concerns. While the employer could show that having its employees focus is an important business interest, it would have to show that was truly the interest as opposed to another, such as merely protecting the comfort of the other employees. This would be a factual determination. If a court determined that “distraction” was code for, or at least partially based on, the prejudice of other employees or the employer, the employer would not prevail. If the employer argued that it prohibited all forms of workplace political expression by its employees because it believed that political expression would alienate clients, the employer would have to demonstrate that this fear was well-founded and objectively supportable--it could not simply assert it. Moreover, the employer would have to show that restricting the employee's ability to wear the pin substantially furthers the firm's interest in appearing apolitical, assuming the court found such an interest objectively valid. While this is a closer call, it is still unlikely that the employer would prevail. Unless the firm could show that it specifically marketed itself as apolitical--that such a lack of ideology was part and parcel of the legal services it provided--the burden would be too heavy.

In all of these cases, the sincerity of the employee is all but assumed and the burden to justify the rule is on the employer. The employer only has a chance of succeeding on a challenge to the employee's prima facie case in the last scenario because there
is factual evidence that calls her assertion into doubt. Nevertheless, these examples show that applying intermediate scrutiny significantly alters which restrictive workplace scenarios can be justified by employers.

The dual action of expanding the scope of the protection under Title VII and shifting the burden of proof to employers raises legitimate concerns about an increase in litigation and a diminution of employers' rights. With respect to worries about unceasing litigation, more litigation is precisely the point: the new scheme gives employees private rights of action with the expectation that they will seek the protection of the laws in court. That said, courts will develop a body of case law designed to exclude truly frivolous claims or Congress will enact additional requirements, such as requiring employees to exhaust administrative-like remedies before turning to litigation, that will keep the amount of litigation under control.

Regarding arguments about diminishing employer rights, there are a few responses. To the extent that one believes that an employer should be able to do whatever she wants simply by virtue of her position as business-owner, First Amendment jurisprudence and existing anti-discrimination law provide the appropriate response: naked assertions of power are insufficient justifications for trampling individual liberty. To that end, incorporating authentic self-representation into Title VII's already existing protective scheme is the logical next step. Title VII proscribes what an employer can do; it should be the employer who justifies its assertion of power over an employee if such assertion constrains an employee's authentic expression. With respect to an employer's right to make decisions based on customer preferences, Deborah Rhode notes that we must be wary of succumbing to preferences that merely “reflect and reinforce” the dominant bias of the day. As she writes, “Customers who want what a Hooters' spokeswoman described as a ‘little good clean wholesome female sexuality’ are no more worthy of deference than the Southern whites in the 1960s who didn't want to buy from [B]lacks, or the male airline passengers in the 1970s who liked stewardesses in hot pants.”

Ultimately, although some might find it hard to believe that legal protections for authentic expression of individuality in the workplace could ever become a reality, society is already shifting in the direction of providing more flexibility to workers to be themselves in the workplace. It is time for the law to catch up and, in doing so, bring up to speed the employers who are straggling behind some of America's more innovative businesses.

VI. CONCLUSION

America's workforce is changing: it is becoming more diverse in terms of cultures, nationalities, religions, philosophies, and lifestyles. With these changes, what American workers want from work is shifting as well: they want to perform their jobs without losing themselves. To do so, employees must be able to bring their multi-faceted identities to work, and employers must accept and hopefully embrace the reality that their employees are simultaneously members of many groups and also unique individuals. While some companies have heeded employees' calls for greater opportunities to be authentically themselves at work, many have not. And with reason--collaboration across differences is difficult. Nevertheless, as recent research has found, the difficulty of fostering authenticity in the workplace reaps rewards for employees and employers alike. Beyond their instrumental value, autonomy and authenticity are bedrock principles of American law guaranteed by the First Amendment. They are the steel that supports our fundamental values as Americans. Just as they merit protection in our constitutional jurisprudence, they must be defended from harm in the crucible of the workplace.

Footnotes

a1 Law Clerk to the Honorable Cheryl Ann Krause of the United States Court of Appeals for the Third Circuit; former law clerk to the Honorable Allyn R. Ross of the United States District Court for the Eastern District of New York; N.Y.U. School of Law, J.D. 2017; Trinity College Dublin, M.Phil Gender & Women's Studies 2014; Yale University, B.A. 2011. Thank you to Kenji Yoshino, not only for his invaluable support and mentorship, but also for his commitment to making N.Y.U. Law a place where students can be themselves. Thank you also to the outstanding editors at the N.Y.U. Review of Law & Social Change for making this article a reality. And finally, thank you to my family and particularly my husband--for everything. All opinions and errors are my own.


E.g., David N. Berg, Bringing One's Self to Work, 38 J. APPLIED BEHAV. SCI. 397, 413 (2002) (using himself as a case study, the author examines the costs and benefits of bringing more of himself to work and the dilemmas he faced in doing so); Bernardo M. Ferdman & Laura Morgan Roberts, Creating Inclusion for Oneself: Knowing, Accepting, and Expressing One's Whole Self at Work, in DIVERSITY AT WORK: THE PRACTICE OF INCLUSION 93, 95 (Bernardo M. Ferdman ed., 2014) (exploring the practice of “bringing one's whole self to work” as a fundamental component of inclusion overall).

See infra Section II.C.

See infra Section II.A.2.

See infra Section II.A.2.

See infra Section II.A.2.

See infra Section II.A.2.

See, e.g., Danielle Allen, Toward a Connected Society, in OUR COMPPELLING INTERESTS: THE VALUE OF DIVERSITY FOR DEMOCRACY AND A PROSPEROUS SOCIETY 71, 77 (Earl Lewis & Nancy Cantor, eds., 2016) (“Over the course of the past two decades, across the corporate sector, the educational sector, and the organizational sector of civil society, one after another institution, organization, or association has produced a ‘diversity statement.’”); see also Allan H. Church, Christopher T. Rotolo, Amanda C. Shull & Michael D. Tuller, Inclusive Organization Development: An Integration of Two Disciplines, in DIVERSITY AT WORK, supra note 4, at 260, 262 (noting that corporations “clearly have taken on” the diversity and inclusion change agenda “over the past decade, given shifting demographic trends and changes in generational differences, technology, and the global workforce”). This is not to say that companies are achieving their goals. Nancy Leong has argued that the focus on diversity may actually be commodifying “nonwhiteness,” relegating minorities to “trophyes” or “passive emblems” while allowing predominantly white organizations to claim social capital. Nancy Leong, Racial Capitalism, 126 HARV. L. REV. 2151, 2156 (2013); see also PETER FLEMING, AUTHENTICITY AND THE CULTURAL POLITICS OF WORK: NEW FORMS OF INFORMAL CONTROL ix (2009) (arguing that “difference, diversity, and the sui generis of individual actualization become expressive instruments that reinforce the conservative politics of accumulation. Difference is especially transmuted into a forced visibility that effaces its radical potential in significant ways ...”).

Cf. Sherry E. Sullivan & Lisa A. Mainiero, Kaleidoscope Careers: Benchmarking Ideas for Fostering Family-Friendly Workplaces, 36 ORG. DYNAMICS 45, 47-48 (2007) (discussing new employer attitudes and workplace policies aimed at providing employees with a better balance between work and family as a way to promote authenticity).

See infra Section III.A.


See infra Section III.C.


See infra Section III.A.

U.S. CONST. amend. I; see Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 HARV. L. REV. 1765, 1790 (2004); see also THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (characterizing “assuring individual self-fulfillment” as one of the four main values of free speech); DANIEL BOORSTIN, THE GENIUS OF AMERICAN POLITICS 8-9, 138-39 (1953) (writing that First amendment freedom is part of the “givenness” of the American polity).

See infra Section IV.B.

See Schauer, supra note 18, at 1797 (“[O]ne can say with some confidence that courts rarely find stretched First Amendment claims to be frivolous.”); see also infra Section IV.B.4.

See infra Section IV.

See Schauer, supra note 18 at 1765 (“Although the First Amendment refers to freedom of ‘speech,’ much speech remains totally untouched by it.”). For example, the government cannot abridge your right to advocate civil disobedience, but it can prevent an employee of a company from providing false or misleading information to company shareholders despite the fact that both actions involve communication of a message. Id. at 1773, 1779.

Substantive due process rights guaranteed under the Fourteenth Amendment are deeply connected to notions of personal autonomy and self-determination. See, e.g., Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (describing “the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life” as being “[a]t the heart of [the] liberty” protected under the Fourteenth Amendment). This article does not address that link because other scholars have drawn that comparison. See, e.g., Joshua D. Hawley, The Intellectual Origins of (Modern) Substantive Due Process, 93 TEX. L. REV. 275, 316-17, 322-23 (2014); Bruce J. Winick, On Autonomy: Legal and Psychological Perspectives, 37 VILL. L. REV. 1705, 1715-19 (1992). It also does not address substantive due process rights because the Supreme Court often characterizes these rights as being related to privacy and intimacy, rather than to outward expressions of self, the focus here. See, e.g., Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015) (“The fundamental liberties protected by [the Due Process Clause] ... extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs.”); Lawrence v. Texas, 539 U.S. 558, 562, 567 (2003) (invoking the right to privacy in striking down a criminal sodomy law, as it invaded privacy by inviting “unwarranted government intrusions” that “touch[] upon the most private human conduct, sexual behavior ... in the most private of places, the home”).

In addition, this paper focuses only on the Free Speech Clause of the First Amendment, not on its religious counterparts. While the Free Exercise Clause offers insight on the link between one's status and one's conduct and protection of conduct as it relates to the exercise of religious beliefs, the Free Speech Clause offers more latitude for exploration because it is not limited to one dimension of self-expression. As such, all subsequent references to the First Amendment should be understood to mean the Free Speech Clause.

See Anastasia Niedrich, Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections, 18 MICH. J. GENDER & L. 25, 28-29 (2011) (arguing that “discrimination operates in such
a way that a categorical approach ... is not now and will never be enough to combat all of the forms of discrimination and protect the victims thereof.

26 The paper focuses on Title VII, rather than on all federal anti-discrimination legislation. It uses Title VII as the exemplar of the class-based system in place today because it covers a spectrum of protected statuses—not because it is more important than the Age Discrimination in Employment Act (ADEA) or the ADA. While, again, it is true that the accommodation model under the ADA provides employees with more opportunity to exhibit their whole selves at work than Title VII does, see supra text accompanying note 16, the ADA similarly works backward from the assumption of assimilation—the goal is to accommodate difference, not to view difference as the starting place. This article challenges that broader assumption.

27 Others have persuasively argued for such an extension. See, e.g., Erwin Chemerinsky, Rethinking State Action, 80 NW. U. L. REV. 503, 505-506 (1985).

28 See Laura Morgan Roberts, Sandra E. Cha, Patricia F. Hewlin & Isis H. Settles, Bringing the Inside Out: Enhancing Authenticity and Positive Identity in Organizations, in EXPLORING POSITIVE IDENTITIES AND ORGANIZATIONS: BUILDING A THEORETICAL AND RESEARCH FOUNDATION 149, 150-51, 153-54 (Laura Morgan Roberts & Jane E. Dutton, eds., 2009) (explaining that “authenticity has been a topic of discussion among philosophers, literary scholars, sociologists, and psychologists for centuries ... [y]et, scholars hold differing assumptions about the nature of authenticity” and noting that research indicates “authenticity has been associated with fewer physical and depressive symptoms, lower anxiety, lower stress, and greater subjective vitality”).

29 Id. at 150. See also Michael Knoll & Rolf van Dick, Authenticity, Employee Silence, Prohibitive Voice, and the Moderating Effect of Organizational Identification, 8 J. POSITIVE PSYCHOL. 346, 347 (2013) (“Despite its long tradition in philosophy, authenticity has been addressed only recently as a concept in empirical psychology.”).

30 Roberts, Cha, Hewlin & Settles, supra note 28, at 150; see also Michael H. Kernis & Brian M. Goldman, A Multicomponent Conceptualization of Authenticity: Theory and Research, 38 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 283, 294 (2006) (“We have seen that most perspectives on authenticity stress the extent to which one's thoughts, feelings, and behaviors reflect one's true- or core-self.”).

31 Ferdman & Roberts, supra note 4, at 98.

32 Id.

33 Id. at 98-99; see also Laurie P. Milton, Creating and Sustaining Cooperation in Interdependent Groups: Positive Relational Identities, Identity Confirmation, and Cooperative Capacity, in EXPLORING POSITIVE IDENTITIES AND ORGANIZATIONS, supra note 28, at 295 (“Broadly conceived, a person's self includes all of the person's thoughts and feelings about himself or herself as an object, that is, as a physical, social and spiritual or moral being.”).

34 Ferdman and Roberts, supra note 4, at 99.


36 Roberts, Cha, Hewlin & Settles, supra note 28, at 151; see also ROB GOFFEE & GARETH JONES, WHY SHOULD ANYONE BE LED BY YOU?: WHAT IT TAKES TO BE AN AUTHENTIC LEADER 16 (2006) (describing elements of authentic leadership, including comfort with self).

37 Roberts, Cha, Hewlin & Settles, supra note 28, at 151; see also Michael H. Kernis, Toward a Conceptualization of Optimal Self-Esteem, 14 PSYCHOL. INQUIRY 1, 13, 15 (2003) (arguing that a “relational orientation” is one of four essential components of authenticity—the others being awareness, unbiased processing, and action).
See Roberts, Cha, Hewlin & Settles, supra note 28, at 151 (“W[e define authenticity as the subjective experience of alignment between one's internal experiences and external expressions.”); see also Daniel M. Cable and Virginia S. Kay, Striving for Self-Verification During Organizational Entry, 55 ACAD. MGMT. J. 360, 362 (2012) (“[T]he concept of authenticity emphasizes discovering (becoming aware of) and living out (communicating or acting on) whatever one learns about his or her self.”); Susan Harter, Authenticity, in HANDBOOK OF POSITIVE PSYCHOLOGY 382, 382 (R.C. Snyder & J. Shane Lopez, eds., 2002) (defining authenticity as “owning one's personal experiences, be they thoughts, emotions, needs, wants preferences, or beliefs” and “expressing oneself in ways that are consistent with inner thoughts and feelings”).

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See Roberts, Cha, Hewlin & Settles, supra note 28, at 151-152.

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See id. at 152; see also Alexandra Sedlovskaya, Valerie Purdie-Vaughns, Richard P. Elbach, Marianne Lafrance, Rainer Romero-Canyas & Nicholas P. Camp, Internalizing the Closet: Concealment Heightens the Cognitive Distinction Between Public and Private Selves, J. PERSONALITY & SOC. PSYCHOL. 695, 696 (2013) (“As people become comfortable in a given … context, the drive for an authentic self leads cognitive representations of the self-in-public and the self-in-private to converge.”); CARL ROGERS, ON BECOMING A PERSON: A THERAPIST'S VIEW OF PSYCHOTHERAPY 351 (1961) (describing the human tendency to actualize one's self as “the directional trend which is evident in all organic and human life--the urge to expand, extend, develop, mature--the tendency to express and activate all the capacities of the organism, or the self”).

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Indeed, for many, authenticity is critical to psychological well-being. This is especially true for people with concealable stigmas such as minority sexual orientation and undocumented immigration status. See, e.g., Sedlovskaya, Purdie-Vaughns, Elbach, Lafrance, Romero-Canyas & Camp, supra note 43, at 697 (finding that people that conceal stigmatized identities experience on average more psychological distress); Laura Smart & Daniel Wegner, The Hidden Costs of Hidden Stigma, in THE SOCIAL PSYCHOLOGY OF STIGMA 220, 221 (Todd F. Heatherton et al., eds., 2000) (“Concealing a stigma leads to an inner turmoil that is remarkable for its intensity and its capacity for absorbing an individual's mental life.”).

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See Berg, supra note 4, at 398. As Berg explains, this was true of both blue- and white-collar work. Id.

46

See discussion infra; see also, e.g., Ralph van den Bosch & Toon W. Taris, The Authentic Worker's Well-Being and Performance: The Relationship Between Authenticity at Work, Well-Being, and Work Outcomes, 148 J. PSYCHOL: INTERDISCIPLINARY & APPLIED 659, 676 (2014) (finding that “authenticity at work is related to well-being and work outcomes, even after controlling for work characteristics and demographic variables”).

47

See Berg, supra note 4, at 399-400.

48

See id.

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Cf. Charles A. O'Reilly III, Jennifer Chatman, & David F. Caldwell, People and Organizational Culture: A Profile Comparison Approach to Assessing Person-Organization Fit, 34 ACAD. OF MGMT. J. 487, 492 (1991) (“[O]rganizations attempt to select recruits who are likely to share their values. New entrants are then further socialized and assimilated, and those who don't fit leave. Thus, basic individual values or preferences for certain modes of conduct are expressed in organizational choices and then reinforced within organizational contexts.”).

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See Berg, supra note 4, at 400-02; Ferdman & Roberts, supra note 4, at 111, 114.

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See Berg, supra note 4, at 399.
See id. at 398-99.

See id. at 400.

See id.

See, e.g., Jason Lambert, *Cultural Diversity as a Mechanism for Innovation: Workplace Diversity and the Absorptive Capacity Framework*, 20 J. ORG. CULTURE, COMMS. & CONFLICT 68, 72 (2016) (explaining that while “the mere presence of diversity is not sufficient to introduce creativity or innovation ... some studies demonstrate that over time, diverse work groups are more creative than homogeneous groups, generate more solutions and perspectives when addressing problems ..., and introduce innovation in team settings ...”) (internal citations omitted); Frances Bowen & Kate Blackmon, *Spirals of Silence: The Dynamic Effects of Diversity on Organizational Voice*, 40 J. MGMT. STUD. 1393, 1398 (2003); Robin J. Ely & David A. Thomas, *Cultural Diversity at Work: The Effects of Diversity Perspectives on Work Group Processes and Outcomes*, 46 ADMIN. SCI. Q. 229, 232-33 (2001) (describing theories and empirical research that support the notion that demographic diversity “increases the available pool of resources—networks, perspectives, styles, knowledge, and insights—that people can bring to bear on complex problems”). Although, as Ely and Thomas explain, the research on the benefits of diversity is mixed, *id.* at 229, 233, their research showed that cultural diversity enhances organizational outcomes under certain conditions, such as when “a work group views cultural differences among its members as an important resource,” *id.* at 266-67. Social scientists Michele Jayne and Robert Dipboye similarly found that the benefits of diversity are contingent upon situational factors, such as organizational culture. See Michele E. A. Jayne & Robert L. Dipboye, *Leveraging Diversity to Improve Business Performance: Research Findings and Recommendations for Organizations*, 43 HUM. RESOURCES MGMT. 409, 413 (2004).

See Berg, *supra* note 4, at 400; see also Bowen & Blackmon, *supra* note 55, at 1398 (noting that “differences in demographic attributes - diversity - can create the potential for group faultlines”).

See Joan Acker, *Inequality Regimes: Gender, Class, and Race in Organizations*, 20 GENDER & SOCIETY 441, 443-448 (2006). “All organizations have inequality regimes, defined as loosely interrelated practices, processes, actions, and meanings that result in and maintain class, gender and racial inequalities within particular organizations.” *Id.* at 443. “In general, work is organized on the image of a white man who is totally dedicated to the work and who has no responsibilities for children or family demands, other than earning a living.” *Id.* at 448; see also Frank Linnenhan & Alison M. Konrad, *Diluting Diversity: Implications for Intergroup Inequality in Organizations*, 8 J. MGMT. INQUIRY 399, 400 (1999) (“Members of powerful groups in organizations accrue privileges or unearned advantages obtained by virtue of their identity group membership(s) .... History and culture determine the specific details associated with any particular privilege ... The privileges institutionalized in organizational structures and processes work to re-create and reinforce inequalities between identity groups.”); see generally Robin J. Ely, *The Power in Demography: Women's Social Constructions of Gender Identity at Work*, 38 ACAD. MGMT. J. 589 (1995).


See Knoll & van Dick, *supra* note 29, at 346 (documenting studies that show that employees are often required to act in specific ways at work).

See *id.* at 346-47; YOSHINO, *supra* note 14 at 93-96 (detailing how Robin Shahar lost her job at Georgia's Department of Law after she stopped covering and married another woman).


See Hakan Ozcelik, *An Empirical Analysis of Surface Acting in Intra-Organizational Relationships*, 34 J. ORGANIZATIONAL BEHAV. 291, 291 (2013) (finding such “surface acting” to be positively related to emotional exhaustion and negatively related to performance); Celeste M. Brotheridge & Raymond T. Lee, *Development and Validation of the Emotional Labour Scale*, 76 J. OCCUPATIONAL & ORGANIZATIONAL PSYCHOL. 365, 375 (2003) (“Surface acting was significantly associated with higher levels of emotional exhaustion, depersonalization, the requirement to hide and control one's emotions, self-monitoring of expressive behavior, and negative affectivity.”).
See Roberts, Cha, Hewlin & Settles, supra note 28, at 153 (listing studies).

See id.; See also Frances J. Milliken, Elizabeth W. Morrison & Patricia F. Hewlin, An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why, 40 J. MGMT. STUD. 1453, 1473 (2003); Elizabeth Wolfe Morrison & Frances J. Milliken, Organizational Silence: A Barrier to Change and Development in a Pluralistic World, 25 ACAD. MGMT. REV. 706, 719 (2000) (arguing that “the negative effects of silence on organizational decision making and change processes will be intensified as the level of diversity within the organization increases”).

See, e.g., Isis. H. Settles, When Multiple Identities Interfere: The Role of Identity Centrality, 30 PERSONALITY & SOC. PSYCHOL. BULL. 487, 487-88, 496 (2004) (finding that for women-scientists for whom one or both the woman and scientist identities were central, increased levels of identity interference resulted in lower self-esteem, performance, and life satisfaction); Isis H. Settles, Robert M. Sellers & Alphonse Damas Jr., One Role or Two? The Function of Psychological Separation in Role Conflict, 87 J. APPLIED PSYCHOL. 574, 574 (2002); see also Roberts, Cha, Hewlin & Settles, supra note 28, at 153.


See id. at 255-57, 261 (noting how Hispanic managers had preferences for stronger interpersonal relationships, participatory leadership, and open confrontation of work-related disagreements).

Id. at 266-67.

Id. at 271.

Id.

See Berg, supra note 4, at 402-04.

Id. at 405.

Id.

Id.

Bell, supra note 67, at 472-73.

Id. at 475.

Roberts, Cha, Hewlin & Settles, supra note 28, at 154-155.

Id. at 161.

Id. at 160; see also Ferdman & Roberts, supra note 4, at 102 (“[W]e believe that ultimately, when we can be authentic and draw on our full range of identities in an integrated and holistic way, we will be better off-- and so will our work groups and organizations.”).

See Bowen & Blackmon, supra note 55, at 1408-09.

See, e.g., Vanessa Buote, Most Employees Feel Authentic at Work, but It Can Take a While, HARV. BUS. REV. (May 11, 2016), https://hbr.org/2016/05/most-employees-feel-authentic-at-work-but-it-can-take-a-while [https://perma.cc/DS8Y-PFT9] (“[F]indings indicated that authentic employees fared better than inauthentic employees, reporting significantly higher job satisfaction and engagement, greater happiness at work, stronger sense of community, more inspiration and lower job stress .... [R]esults show a clear link between authenticity and well-being.”)

*Id.* at 4.

*Id.* at 8 (study results supported “that a low climate of authenticity exacerbates the resource depletion from self-regulating with patients, but [a] high climate of authenticity replenishes the self”).

*Id.* at 9. Using data from 646 workers, another study similarly found that authenticity at work was related to employee well-being—specifically, greater work engagement, in-role performance, and job satisfaction. See Ralph van den Bosch & Toon W. Taris, *Authenticity at Work: Development and Validation of an Individual Authenticity Measure at Work*, 15 J. HAPPINESS STUD. 1, 14 (2013).

*See*, e.g., Kristin H. Griffith and Michelle R. Hebl, *The Disclosure Dilemma for Gay Men and Lesbians: “Coming Out” at Work*, 87 J. APPLIED PSYCHOL. 1191, 1195-96 (2002) (finding that disclosing sexual identity at work was related to higher job satisfaction); Nancy E. Day & Patricia Schoenrade, *Staying in the Closet Versus Coming Out: Relationships Between Communication About Sexual Orientation and Work Attitudes*, 50 PERSONNEL PSYCHOL. 147, 159-60 (1997) (finding that work attitude levels of gay and lesbian workers are predicted in part by how much they communicate about their sexual orientation); see also Kristen P. Jones & Eden B. King, *Managing Concealable Stigmas at Work: A Review and Multilevel Model*, 40 J. MGMT., 1466, 1476 (2013) (listing various studies that support “the notion that openness about one's concealable stigma is associated with increased job satisfaction”).


*See id.*


*Id.* at 234, 260.

*Id.* at 265-66.

Kernis & Goldman, *supra* note 30, at 299 (emphasis in original); see also Berg, *supra* note 4, at 402 (“But ‘wholeness’ too can be stressful.”).

*See*, e.g., Ferdman & Roberts, *supra* note 4, at 112 (“‘Bringing one's whole self” does not constitute the freedom to behave impulsively at work in ways that will be detrimental to other people in that environment--and likely harmful to oneself as well.”).


Karst, *supra* note 98, at 532. Karst describes how, as far back as the colonial era, colonists invested work “with an almost religious character,” noting that “it was not work in general that they dignified, but the autonomy that was both expressed and reinforced by the free choice to work.” *Id.* at 531.


*Id.*


See Ramarajan & Reid, supra note 106, at 622-23; Sullivan & Baruch, supra note 107, at 1542-43; Green, supra note 14, at 101 (“Although ... organizational theorists disagree on the degree ... there is general agreement that the employment relationship in both white? and blue-collar sectors of the American workplace is on the whole becoming more contingent, flexible, and individualized than in years past.”).

See Sherry E. Sullivan & Lisa A. Mainiero, The Changing Nature of Gender Roles, Alpha/Beta Careers and Work-Life Issues: Theory-Driven Implications for Human Resource Management, 12 CAREER DEV. INT’L 238, 238-39 (2007) (describing the adoption of flexible work arrangements by a growing number of organizations); Ramarajan & Reid, supra note 106, at 622-24 (positing that the shift toward serial employment and declining job security, increasing demographic diversity, and the proliferation of communication technology are blurring and reshaping the boundaries between work and non-work identities); Baruch, supra note 106, at 58 (noting the emergence of boundaryless careers).

See Sullivan & Mainiero, supra note 109, at 239-40.


Millennials were born between 1982 and 2004. See id.

Sullivan & Mainiero, supra note 11, at 46-47; see also Green, supra note 14, at 107 (“The new employment relationship marks an important ideological shift toward freedom and individualism over control.”).

See Sullivan & Mainiero, supra note 11, at 47-48.

See id. at 48 (“Consider the working of a kaleidoscope; as one part moves, so do the other parts change.”).

Sullivan & Mainiero, supra note 109, at 247.


Id.

Id.

Other studies show a gap in approaches between GenXers and Baby Boomers, further suggesting an evolving attitude over generations. See Sherry E. Sullivan, Monica L. Forret, Shawn M. Carraher & Lisa A. Mainiero, Using the Kaleidoscope Career Model to Examine Generational Differences in Work Attitudes, 14 CAREER DEV. INT'L. 284, 295 (2009) (finding that in a survey of 982 professionals across the country, members of Generation X had “a significantly higher desire for authenticity than Boomers.”).

SMITH & TURNER, supra note 120, at 7.

Id. at 6, 15.

See Debbie N. Kaminer, Religious Conduct and the Immutability Requirement: Title VII's Failure to Protect Religious Employees in the Workplace, 17 VA. J. SOC. POL'Y & L. 452, 456 (2010) (“While [the provision related to religion in Title VII] collapsed the conduct/status distinction, religion is nonetheless often treated in a similar manner to the other protected traits, with courts requiring little more than ‘neutral’ treatment of religious employees. Courts have done so, in large part, by assuming that religion is nothing more than a matter of personal preference or a lifestyle choice.”). In addition, Title VII does not require religious accommodations that impose more than de minimis costs on an employer. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).


Id. at 6.

See Katharine T. Bartlett, Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality, 92 MICH. L. REV. 2541, 2554 (1994) (“Dress conventions like judicial robes, theme-park costumes, and police uniforms can make employees more aware and, therefore, more faithful to those roles.”).


Id. at 1406.


42 U.S.C. § 2000e-2(k)(1)(A) (disparate impact); Watson v. Fort Worth Bank & Tr., 487 U.S. 977 (1988) (“[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.”); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973) (disparate treatment); Texas Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-56 (1981) (“The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.”); see also Ricci v. DeStefano, 557 U.S. 557, 577-78 (2009) (describing standards). The following analysis focuses on disparate treatment claims.
See McDonnell Douglas, 411 U.S. at 802 (laying out the burden a Title VII complainant carries to make out a prima facie case of discrimination).

Id. An employer will have a complete defense to an allegation of employment discrimination if she can show that religion, sex, or national origin is a bona fide occupational qualification. 42 U.S.C. § 2000e-2(e)(1). However, far from obstructing authenticity, in those limited cases an employee is acting authentically in that she has chosen a job where a specific aspect or presentation of herself is essential to the job.

Griggs, 401 U.S. at 431.

See, e.g., Klare, supra note 127, at 1406 (describing judicial deference to employer justifications in the context of constitutional appearance doctrine).


See Green, supra note 14, at 95-96; Thomas H. Barnard & Adrienne L. Rapp, Are We There Yet? Forty Years After the Passage of the Civil Rights Act: Revolution in the Workforce and the Unfulfilled Promises That Remain, 22 HOFSTRA LAB. & EMP. L.J. 627, 670 (2005).

A hostile work environment claim, for example, does not involve something as explicit as firing someone on the basis of their sex, but courts recognize it as discrimination. See, e.g., Meritor Sav. Bank, 477 U.S. at 64 (“Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor ‘discriminates’ on the basis of sex.”). In regard to gender, the Supreme Court has come to recognize sexual harassment and sex-stereotyping as forms of sex discrimination. See Price Waterhouse, 490 U.S. at 251; Harris, 510 U.S. at 22-23.


Id. at 708.

Id. at 709.

Id.

See supra note 14 and accompanying text (collecting works critiquing the limited scope of Title VII).


YOSHINO, supra note 14, at ix. It is important to note that “Authentic” here implies a shifting, subjective state, not a static or essentialized one. See Roberts, Cha, Hewlin & Settles, supra note 28, at 151-52.

See generally YOSHINO, supra note 14.

Id. at 79.

See Yoshino, supra note 58, at 847 (“Gays can cover by being or by appearing to be single. By not presenting a partner, such individuals prevent others from visualizing same-sex sexual activity.”).

Id. at 837.

See supra Section II.B.
See Carbado & Gulati, supra note 14, at 1262.


Id. at 231.

Id. at 232.

Id.

Id.

Id. at 231.

Id. at 233.

Id. at 232.

Roberts & Roberts, supra note 12, at 388 (emphasis added).

This argument is not dissimilar from those put forth during the Civil Rights Era by Southern employers who argued that hiring Blacks would put them out of business because white customers would go elsewhere—the customer preference defense. See, e.g., Deborah L. Rhode, The Injustice of Appearance, 61 STAN. L. REV. 1033, 1065 (2009). Whereas Congress and courts rejected such customer preference defenses when articulated explicitly on the basis of race, see id., the Rogers court was either incapable of reading between the lines or unfazed by what it found.

Unfortunately, the reasoning of the Rogers court is not a relic of the past. In 2016, the Eleventh Circuit held that an employer's decision to rescind its offer of employment to a woman who refused to cut off her dreadlocks did not constitute discrimination based on race. E.E.O.C. v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016), cert denied, 138 S. Ct. 2015 (2018). Although the court noted that times are changing and that “[i]t may be that today ‘race’ is recognized as a ‘social construct,’” the court said it was wedded to precedent based on distinctions between immutable and mutable characteristics. Id. at 1027-29 (citation omitted). See also Pitts v. Wild Adventures, Inc., No. CIV.A.7:06-CV-62-HL, 2008 WL 1899306, at *6 (M.D. Ga. Apr. 25, 2008) (“Dreadlocks and cornrows are not immutable characteristics, and an employer policy prohibiting these hairstyles does not implicate a fundamental right.”); Ria Tabacco Mar, Why Are Black People Still Punished for Their Hair, N.Y. TIMES (Aug. 29, 2018), https://www.nytimes.com/2018/08/29/opinion/black-hair-girls-shaming.html [https://nyti.ms/2NB3OoQ].

Jespersen v. Harrah’s Operating Co., 444 F.3d 1104, 1106-08 (9th Cir. 2006).

Id. at 1107.

Id. at 1108.

Id.

Id.

Id. at 1110.

Id.

Id. at 1112.

Id.
See id. (“We respect Jespersen's resolve to be true to herself and to the image that she wishes to project to the world. We cannot agree, however, that her objection to the makeup requirement, without more, can give rise to a claim of sex stereotyping under Title VII.”).

Id. at 1113.

Although the Supreme Court has not clarified the precise contours of Price Waterhouse's sex-stereotyping theory, lower courts have been more amenable to the theory. For example, the Seventh Circuit recently held that a person who alleges that she experienced employment discrimination on the basis of her sexual orientation put forth a viable sex discrimination claim under Title VII. See Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339, 341 (7th Cir. 2017). The Seventh Circuit did so on the grounds that gender non-conformity represents “the ultimate case of failure to conform to the female stereotype” in a society, such as the United States, where heterosexuality is the norm. Id. at 346. Despite this clear step forwards in Title VII jurisprudence, the Seventh Circuit hewed very closely to the statutory language, arguing that “it would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'” Id. at 350. Therefore, it seems unwise to assume courts will broaden their readings of Title VII far enough to sufficiently protect expressions of self that cannot be so clearly connected to the statute.

See Rhode, supra note 163, at 1055-56 (“Some requirements of alluring apparel are of particular concern because they expose women to humiliation, harassment, or, in the case of high heels, physical injury. But even less burdensome standards can reinforce demeaning stereotypes. Examples include the Midwest television station that wanted its anchor to feminize her clothing by wearing bows and ruffles; the Bikini Espresso, a drive-through espresso bar with waitresses in sheer babydoll negligees and matching panties; the Heart Attack Grill, featuring women in 'naughty nurses' costumes; the casino that wanted ‘Barbie doll’ dealers, and the ‘Valet of the Dolls' valet parking service with a ‘wild’ and ‘sexy’ all-female staff.”).

618 F.2d 264, 270 (5th Cir. 1980).

Id. at 267.

Id. at 269.

See id. at 270 (“We do not denigrate the importance of a person's language of preference or other aspects of his national, ethnic or racial self-identification.”).


Id.

Id. at 2034.

Id.

As Klare explains, “judges create a peculiar dissonance by trivializing appearance claims while at the same time asserting the need for the authorities to possess vast powers to enforce conventional attitudes and prejudices.” Klare, supra note 127, at 1401 (citing Mary Whisner, Gender-Specific Clothing Regulation: A Study in Patriarchy, 5 HARV. WOMEN'S L. J. 73, 74 (1982)).

The judgments in this area, as Katherine Bartlett has explained, “reflect more about the high degree of societal consensus regarding dress and appearance expectations than about the value that individuals or businesses attach to dress and appearance.” Bartlett, supra note 126, at 2558.
America's lack of protection in these situations stands in contrast to other countries, such as Germany, whose constitutions have been read to include a “right of personality.” See Paul M. Schwartz & Karl-Nikolaus Peifer, Prosser's Privacy and the German Right of Personality: Are Four Privacy Torts Better than One Unitary Concept, 98 CAL. L. REV. 1925, 1927, 1950-53 (2010) (“German personality interests have a constitutional dimension that applies both to the government's behavior and to that of private parties.”).


See Niedrich, supra note 25, at 29-30.

Rhode, supra note 163, at 1038-39 (citing statistics that show that “[a]bout 60% of overweight women and 40% of overweight men report experiences of employment discrimination,” and “[r]esearchers consistently find a significant income penalty for being overweight”).


Even in the context of religion, these claims typically fail. See, e.g., Cloutier v. Costco Wholesale Corp., 390 F.3d 126, 129, 134-37 (1st Cir. 2004) (holding that while an employee's facial piercing might constitute a religious practice according to the Church of Body Modification, accommodating it would impose an undue hardship on the employer).

See SMITH & TURNER, supra note 120, at 7.

Ramachandran, supra note 195, at 13.

Id. at 36.

Id. (“This connection between freedom of dress and a notion that control over our own bodies is essential to human dignity is part of why it strikes many of us as intrusive and unwarranted when someone tells us what to wear, how to cut our hair, or whether we can have a tattoo.”).

Id. at 53.

See supra Section II.A.2.

See, e.g., Johnson v. Austal, U.S.A., L.L.C., 805 F. Supp. 2d 1299, 1315-16 (S.D. Ala. 2011) (holding that a reasonable jury could find harassing conduct sufficiently severe to make out a hostile work environment claim where, among other things, the plaintiff's colleagues wore shirts that displayed the Confederate flag).

See Schauer, supra note 18, at 1793 (“[J]udges are also likely to be, or at least to seem to be, disproportionately sympathetic to First Amendment arguments.”) (emphasis in original).


See supra Section II.C.

See, e.g., Steven Shiffrin, Dissent, Democratic Participation, and First Amendment Methodology, 97 VA. L. REV. 559, 559-60 (2011) (“No theory has dominated the Court's complex accommodations.”); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 15 (1970) (“The outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases.”).

Now associated with John Stuart Mill and Justice Oliver Wendell Holmes, the argument trades on the idea of survival of the fittest: let ideas into the marketplace so the best may surface. See JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859); Abrams v. United States, 250 U.S. 616, 630 (1919)
(Holmes, J., dissenting). Under this view, falsities should be protected as a means of challenging truth to emerge or because they contain an element of truth, however small.

To effectively govern themselves, the theory goes, citizens must be able to propose ideas, discuss their ramifications, and become informed. Because the people have decided to govern themselves, Meiklejohn argues that “it is they--and no one else--who must pass judgment upon unwisdom and unfairness and danger.” ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26 (The Lawbook Exchange, Ltd. 2000) (1948).


Id. at 964; see also Marc O. DeGirolami, Virtue, Freedom, and the First Amendment, 91 NOTRE DAME L. REV. 1465, 1473 (2016) (describing “‘individual-centered theories' of the First Amendment” as having achieved “special prominence and centrality in the later twentieth century”) (internal citation omitted).


Baker, supra note 210, at 966.


Id. at 291 (emphasis in original).

Id. (emphasis in original).

Id. at 294.

Redish, supra note 214, at 593.

Baker, supra note 210, at 966, 1019.

See id. at 1011.

Baker, supra note 210, at 1029.

Baker, supra note 212, at 252.

Id. at 257-58.

See Redish, supra note 214, at 595. While the autonomy-based approach to the First Amendment has drawn some criticism for presenting a difficult line-drawing problem, the boundaries are not difficult to discern--nor do they require a judge fulfilling her role to do anything differently than she would in other legal contexts that require making difficult decisions. See id. at 624-25 (“The point, however, is to balance with a 'thumb on the scales' in favor of speech. Although the [F]irst [A]mendment cannot practically be interpreted to provide absolute protection, the constitutional language and our political and social traditions dictate that the [F]irst [A]mendment right must give way only in the presence of a truly compelling governmental interest. To be sure, such an analysis places a good deal of faith in the ability of judges to exercise their authority with wisdom and discretion, both in establishing and applying general rules of [F]irst [A]mendment construction and, where necessary, in engaging in ad hoc balancing. But, after all, that is what they are there for, and in any event we appear to have little choice.”).

Baker, supra note 210, at 991.

See id. at 984.

See McCullen v. Coakley, 134 S. Ct. 2518, 2530 (2014); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95 (1972).
See Virginia v. Black, 538 U.S. 343, 358-59 (2003). Because the rationales behind these categories are rooted more in history than in logic, I will not address them.


Id. (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

See United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 816 (“When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.”); Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 658 (1981) (Brennan, J., concurring in part and dissenting in part) (“As our cases have long noted, once a governmental regulation is shown to impinge upon basic First Amendment rights, the burden falls on the government to show the validity of its asserted interest and the absence of less intrusive alternatives.”).

See supra Section III.A.

274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

See, e.g., Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485, 503 (1984) (“The First Amendment presupposes that the freedom to speak one's mind is ... an aspect of individual liberty--and thus a good unto itself ...”).


Id. at 427 (Marshall, J., concurring).

403 U.S. 15, 16 (1971).

Id. at 15 (“This case may seem at first blush too inconsequential to find its way into our books, but the issue it presents is of no small constitutional significance.”).

Id. at 24.

Id.

Id. at 25-26.

See Texas v. Johnson, 491 U.S. 397, 404 (1989) (“The First Amendment literally forbids the abridgement only of 'speech,' but we have long recognized that its protection does not end at the spoken or written word.”).


See id.
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250 Johnson, 491 U.S. at 404 (quoting Spence, 418 U.S. at 409); see also Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston (GLIB), 515 U.S. 557, 569 (1995) (“[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a ‘particularized message,’ would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.”) (internal citations omitted).


252 Id. at 504-05.

253 Id. at 508, 505-06.

254 Id. at 511. As Baker has argued, “A person sometimes participates in a political demonstration or a religious ritual not, or not only, to communicate with another but to establish herself as having openly embodied self-defining commitments.” C. Edwin Baker, Harm, Liberty, and Free Speech, 70 S. CAL. L. REV. 979, 984 (1997).

255 Tinker, 393 U.S. at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

256 Id. at 507.

257 Id. at 509.

258 See id. at 514.

259 RONNA GREFF SCHNEIDER, EDUCATION LAW § 2.23 (2004 & Supp. 2018) (“Lower courts have been mixed as to whether hairstyles, particularly hair length, or general clothing styles have sufficient communicative impact to warrant protection under the Free Speech Clause of the First Amendment.”). Notably, the Supreme Court has not directly confronted the issue of hairstyle regulations. See Joshua Waldman, Symbolic Speech and Social Meaning, 97 COLUM. L. REV. 1844, 1869 n.115 (1997) (explaining that the Court has denied certiorari to cases that have both upheld and invalidated regulations of hairstyle); see also E.E.O.C. v. Catastrophe Mgmt. Sols., 852 F.3d 1018 (11th Cir. 2016), cert. denied, 138 S. Ct. 2015 (2018) (denying review of an Eleventh Circuit ruling that an employer's decision to rescind its offer of employment to a woman who refused to cut off her dreadlocks did not constitute discrimination based on race).

260 316 F.3d 314, 318 (2d Cir. 2003).

261 Id. at 319.

262 Id. at 319-20, 322. The government said that it instituted the policy because it was safer for employees to operate vans while wearing pants but did not mention having any safety issues when Zalewska wore a skirt. See id. at 317.

263 Id. at 319.


265 Klare, supra note 127, at 1410 (emphasis omitted).

266 Zalewska, 316 F.3d at 320.

is likely to succeed on the merits and “is likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she is expressing her identification with that gender.”).

268 \textit{Id.} at *3-*4.


270 \textit{Id.}

271 \textit{Id.}

272 \textit{See, e.g.} \textit{Doe}, 2000 WL 33162199 at *3; \textit{Bear}, 714 F. Supp. 2d at 983.


274 \textit{Id.} at 3.

275 319 U.S. 624, 642 (1943).

276 \textit{Id.} at 629-30.

277 \textit{Id.} at 634.

278 \textit{Id.} at 642.

279 \textit{Id.}

280 \textit{Id.} at 633-34.

281 \textit{Id.} at 630.

282 \textit{Id.}


284 \textit{Id.} at 714 (quoting \textit{Barnette}, 319 U.S. at 637).

285 \textit{Id.} at 715 (quoting \textit{Barnette}, 319 U.S. at 642).


287 \textit{Id.} at 859.

288 \textit{Id.} at 860.

289 \textit{Id.} at 862. Shiffrin argues that, from the individual's perspective, “[o]ne may reasonably object to having to stand in a relation of distrust to oneself.” \textit{Id.} at 861. But there are implications for broader society as well. Even if the speaker and audience know that the speaker does not believe what she is saying, Shiffrin contends that “[o]ther kinds of significant performances may be cheapened if people engage in them insincerely or in pretense.” \textit{Id.}

290 \textit{See supra} Section III.B.


292 As Rosabeth Moss Kantor wrote in her seminal work \textit{Men and Women of the Corporation}, “Employment practices that enhance individual welfare and the quality of work life should not be private decisions based on the voluntary goodwill
or noblesse oblige of employers but rather a question of vital social concern to those outside the enterprise.” ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION 10 (2d ed. 1993).

293 See supra Section IV.B.2.

294 See supra Section IV.B.4.

295 See supra Section III.B.

296 See supra Section IV.B.3.

297 See supra Section III.B.


299 YOSHINO, supra note 14, at 178.

300 See supra Section IV.B.3.

301 See supra Section IV.B.4.

302 See supra Section IV.B.4.

303 See supra Section II.A.2.

304 YOSHINO, supra note 14, at 178 (emphasis omitted).

305 See Ramachandran, supra note 195, at 42 (“Identity is something which, like religion, is unstable and mutable, yet it structures and colors our entire experience of the world.”).

306 As in the religion context where an employer may challenge whether a belief is “sincerely held,” as opposed to the truth of the belief, the employer would still be able to challenge whether the employee's authentic expression was integral to her identity. See United States v. Seeger, 380 U.S. 163, 185 (“[W]hile the ‘truth’ of a belief is not open to question, there remains the significant question of whether it is ‘truly held.’”) The question of sincerity generally depends on a factual assessment of an employee's credibility. See E.E.O.C. v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico, 279 F.3d 49, 56 (1st Cir. 2002). For example, if an employee said that she was a vegan and, therefore, could not wear leather work shoes and needed instead to wear flip flops, an employer could challenge this expression of self on the grounds that the employee often ate meat at work. Cf. id. at 56-57 (finding an employee's conduct that was contrary to the tenets of his professed religious belief important to an assessment of whether the belief was “sincerely held”).

307 YOSHINO, supra note 14, at 186.

308 Ramachandran, supra note 195, at 62-63.

309 See id. at 63.

310 I also join the scholars who echo Justice William J. Brennan Jr. in dismissing concerns of “too much justice.” See, e.g., YOSHINO, supra note 14, at 181.

311 See Niedrich, supra note 25, at 96 (arguing that courts will develop a body of case law designed to exclude truly frivolous claims and noting that administrative procedures are already in place).

312 Rhode, supra note 163, at 1065.

313 Id. at 1066.
PERCEIVED HOMOSEXUALS: LOOKING GAY ENOUGH FOR TITLE VII

Under the conventional view of Title VII, gay and lesbian workers can bring discrimination claims based on gender stereotyping but not sexual orientation. This Article analyzes 117 court cases on gender stereotyping in the workplace in order to show that the conventional view is wrong. In cases brought by “perceived homosexuals,” courts distinguish not between gender stereotyping and sexual orientation claims, but between two ways that violations of gender norms can be perceived: either as something literally seen or as something cognitively understood. This Article shows that plaintiffs who “look gay” often find protection under Title VII, while plaintiffs thought to violate gender norms—through known or suspected sexual activity, friendships, hobbies, or choice of partner—almost never win.

By privileging appearances over identity, these cases run counter to theories of antidiscrimination law that favor blindness and assimilation, and they upend accounts of “covering” that are widely accepted in discussions of law and sexuality. These cases reverse courts’ usual hostility to appearance claims, especially Title VII challenges to makeup and grooming requirements, as well as courts’ usual sympathy to claims based on activities like child rearing, known to take place outside of work. Meanwhile, on a practical level, these cases threaten to increase the salience of sexual orientation in the workplace; help entrench the stereotypes they are meant to proscribe; and isolate the claims of successful Title VII litigants from the more assimilationist demands made by gay plaintiffs in areas like marriage, adoption, and military service. As courts have quietly begun granting protection to only the most visible subset of gay workers, this Article asks: at what cost, both to LGBT workers and to ongoing debates over the protections those workers should receive under federal law?

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Introduction

If you look or act sufficiently “gay” at work, you might currently find protection from discrimination in at least half of the nation's courts of appeals. If, however, your coworkers or employers simply know or think you are gay, you are not only unprotected under federal law, but your claim is that of a “bootstrapper” trying to force sexual orientation into Title VII against the will of Congress.2

Contrary to popular wisdom and most academic theorizing, employment-discrimination law has become, for gays and lesbians, an area not only where “appearances . . . matter,”3 but in fact where appearances take precedence over knowledge, and one’s look and affect receive more protection than one’s sexual identity. Under federal law as interpreted by an increasing number of federal courts, gay and lesbian workers can be fired, demoted, not hired, or openly harassed because of their sexuality--unless the victims of discrimination are sufficiently flamboyant (if male) or butch (if female). These courts protect “actual or perceived sexual orientation”--the words come from legislation repeatedly introduced in Congress--only when an employee's sexuality is “perceived” through the senses as something that can literally be seen or heard. What it might mean to look or sound “gay,” or what courts seem to think it means, is a question on which this Article will linger.

Title VII, federal law's chief protection against employment discrimination, does not explicitly prohibit discrimination based on sexual orientation,5 and judges have almost uniformly declined to enfold sexuality within Title VII's “sex” prong.6 But, for the past two decades, courts have recognized Title VII claims by employees who are perceived to violate gender stereotypes.7 In recent years, gay and lesbian employees have increasingly followed this course, describing themselves as violators of gender stereotypes for the purpose of federal employment-discrimination claims.8 Under what is now the conventional view of Title VII, gender stereotyping and sexual orientation comprise two categorically different kinds of discrimination claims, and Title VII recognizes only the former.

The conventional view is wrong. The distinction it draws is both conceptually untenable and descriptively inaccurate, as this Article demonstrates through a study of five years' worth of federal district court opinions concerning gender stereotyping, as well as every federal appellate decision that has combined both gender stereotyping and sexuality. From these cases, the distinction that emerges is not between gender stereotyping and sexuality, but between two ways in which violations of gender stereotypes concerning sexuality are perceived: either literally, as something seen or heard, or cognitively, as when we “see” a point or “hear” a concern--that is, when we know or understand something.

To speak of “actual or perceived sexual orientation,” as the long-stalled Employment Non-Discrimination Act (ENDA) repeatedly does,11 would seem to use “perceived” in the cognitive sense, referring not to voyeurism but to something known or thought--possibly falsely--about a person's sexual preferences. Surprisingly, though, it is the literal perception of sexuality that pervades recent Title VII case law and, more importantly, that marks those cases in which plaintiffs win. As this Article shows, employees who manifest traits coded as gay in observable ways at work often succeed under Title VII. But when an employee's sexuality is cognitively perceived--when coworkers think that a man is sleeping with another man or know that a woman lives with a female partner--courts refuse to extend Title VII's protections.

Things are different elsewhere in Title VII case law. In cases not involving “perceived homosexuals,” known or knowable violations of gender stereotypes-- for example, by women known to have small children at home--get no less protection than visible violations.12 The anomalous privileging of appearances solely in cases involving gay and lesbian workers should therefore come as a surprise, and not just because it has not previously been shown in the comprehensive way that this Article
I. The Title VII Dilemma

Title VII of the Civil Rights Act of 1964 protects workers from discrimination “because of . . . race, color, religion, sex, or national origin.” Sexual orientation and gender identity are not explicitly named among the protected grounds. Since 1974, however, Congress has made several attempts to amend Title VII or, since 1994, to supplement it with an additional statute in order to protect employees’ sexual orientation, whether “real or perceived.” These attempts have repeatedly failed in Congress, though the most recent iteration of ENDA won approval in the Senate in November 2013. Gender identity was added to the version of ENDA first proposed in 2007.

In the absence of ENDA or a similar law, the federal courts have almost universally refused to derive protection for sexual orientation from Title VII’s “sex” prong. In a well-known 1979 case, DeSantis v. Pacific Telephone & Telegraph Co., the Ninth Circuit held that “Title VII’s prohibition of ‘sex’ discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.” Since then, every other circuit to address the issue has agreed: “Title VII does not prohibit harassment or discrimination because of sexual orientation.”
The fact that Congress has repeatedly failed to override courts’ narrow reading of Title VII has only entrenched that reading further.  

Only one federal court has departed from this consensus. In a 2002 harassment case, a magistrate judge in the U.S. District Court for the District of Oregon found it likely that the defendant “would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.” Had that been the case, the court concluded, “then Plaintiff was discriminated against because of her gender.” This opinion has remained a lonely outlier for over a decade.

Alongside the nearly unanimous refusal to recognize sexuality and gender identity claims, another line of cases has offered a far more expansive interpretation of Title VII's sex prong. This series begins with the U.S. Supreme Court's 1989 decision in Price Waterhouse v. Hopkins, in which a woman who was denied partnership at her accounting firm claimed that she had been the victim of “sex stereotyping,” and thus, of discrimination “because of sex.” Ann Hopkins, the plaintiff, had been praised as “an outstanding professional” who had secured more major contracts than any of her competitors for partnership. But she was also criticized as an “overly aggressive, . . . tough-talking somewhat masculine hard-nosed” manager. Hopkins received evaluations suggesting that she “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled,” and “take a course at charm school.”

Six members of the Court found considerations like these to be impermissible under Title VII. Writing for four Members of the Court, Justice Brennan broadly declared:

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

It is Justice Brennan's sweeping prohibition of disparate treatment based on stereotypes that makes Price Waterhouse such a crucial case for gay workers. Although it took courts some time to realize the full implications of the opinion, Price Waterhouse, on its face, makes it illegal to base employment decisions on gender stereotypes, whatever those may be. Thus, Title VII's protections should extend however widely the spectrum of sexual stereotypes does. For Ann Hopkins, the plaintiff in Price Waterhouse, the spectrum included stereotypes about how women should walk, talk, and dress. It also included personality traits such as aggressiveness. Later decisions have proscribed employment actions based on stereotypes not tied to an employee's appearance or behavior at work, such as stereotypes that mothers should remain home with their children. And since Title VII protects both women and men from sex-based discrimination by people of either sex, the stereotypes proscribed by Title VII clearly include those about femininity and masculinity alike.

As may already be clear, the two lines of cases just described lie on a collision course. The gender stereotyping spectrum described in Price Waterhouse seems to include the gender stereotype that, as one district court put it, “real men should date women, and not other men.” In that court's words:

Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what ‘real’ men do or don't do.

Indeed, if sexual stereotypes include societal beliefs that men should be macho, women should be feminine, and everyone should be attracted to the people of the opposite sex, then under Price Waterhouse, Title VII should protect not only heterosexual men who are effeminate and women with masculine traits, but gay, lesbian, and transgender employees as well.
This, then, is the dilemma. Following Price Waterhouse to its logical conclusion would appear to require that sexual orientation be brought, along with the rest of the spectrum of gender stereotypes, under the protective umbrella of Title VII. But courts have almost universally held that sexual orientation does not fall under Title VII, as shown by Congress's repeated failure to include it there explicitly.  

The challenge facing the lower courts since Price Waterhouse is finding a way to protect against the entire spectrum of gender stereotyping while scrupulously not protecting against the stereotype that people should be attracted only to those of the opposite gender.

As Part II and especially Part III show, courts have overwhelmingly resolved this dilemma in one particular way. Before examining this “solution,” however, it is worth looking briefly at two other possible ways out of the Title VII dilemma, if only to show that courts' preferred course was not inevitable.

The first of these routes would abandon the notion that federal law does not protect gays and lesbians from discrimination based on sexuality. Courts could do this on their own, should they take Price Waterhouse and its progeny to their logical conclusion. Courts might find, for example, that Congress's failure to “correct” the Price Waterhouse Court's broad proscription of gender stereotyping is no less meaningful than Congress's failure to enact ENDA. The less controversial way down this route, however, would be for Congress to enact ENDA and do away with the dilemma entirely. Yet some worry that ENDA's passage might eliminate both horns of the dilemma, not just one: by protecting sexual orientation and gender identity under a new law, codified separately from Title VII's “sex” protections, ENDA could be interpreted as a repudiation of the gender stereotyping theories that have bridged these concepts thus far. Intersectional claims--those brought by lesbians, for example--could also find themselves in danger of falling between the cracks of the two distinct laws.

These worries aside, ENDA provides the clearest solution to the Title VII dilemma. The point here is not to advocate for ENDA, however. This Article's intervention into the ongoing debate over ENDA's passage is more indirect: its descriptive account of recent Title VII case law shows that the pre-ENDA status quo is significantly different than those on either side of the debate seem to realize. Members of Congress have spent nearly forty years debating whether protections like those in ENDA are worth having. Meanwhile, what this Article shows is that protections are already being offered by courts to a subset of gay and lesbian workers--a subset that would surely surprise ENDA's supporters and opponents both, if they only knew.

Coming back, then, to the alternate ways out of the Title VII dilemma: the second of these is to deny the first premise--the notion that Title VII strikes at the entire spectrum of gender stereotyping. This argument takes the form of a reductio: if prohibiting the entire spectrum of gender stereotyping leads to the conclusion that employers cannot discriminate against homosexuals, then this understanding of gender stereotyping must be wrong. Or, as Judge Posner, the leading advocate of this solution, has put it: “case law has gone off the tracks in the matter of ‘sex stereotyping’” when it is interpreted to imply “a federally protected right for male workers to wear nail polish and dresses and speak in falsetto and mince about in high heels.” According to Posner, gender stereotyping in Price Waterhouse is properly understood as evidence of sex discrimination, not itself a “subtype of sexual discrimination.” Thus, while the gender stereotyping of Ann Hopkins might have suggested that illegal sex discrimination was afoot at Price Waterhouse, gender stereotyping would itself be allowed under Title VII in contexts such as single-sex workplaces where, according to Judge Posner, discrimination between the sexes is not possible.

Judge Posner's approach to gender stereotyping has its critics and vulnerabilities. First, Posner fails to grasp all the ways in which discrimination within a single-sex workforce can be used to keep that workforce single-sex, thereby discriminating against the other sex. As Ann McGinley has argued, “permitting discrimination against effeminate men is a means of enforcing the masculinity of the job which, in turn, creates barriers not only to effeminate men, but also to women who would be interested in the job.” Early Title VII cases brought by married stewardesses provide an example. Airlines that fired flight attendants when they married may have been discriminating among women, not between women and men. But by reinforcing the notion that flight attendants must appear sexually available to (presumably heterosexual) male customers, airlines were also implicitly telling men not to apply for such work.

Judge Posner's account is hobbled further by his belief that post-Price Waterhouse case law only “protects heterosexuals who are victims of ‘sex stereotyping’ or ‘gender stereotyping.’” Posner wrongly assumes that because homosexuality is not protected under Title VII, homosexuals must not be either. From this erroneous starting point, Posner draws implications that he rightly finds absurd. Repeating just one of his examples: “If a court of appeals requires lawyers presenting oral argument to wear...
conservative business dress, should a male lawyer have a legal right to argue in drag provided that the court does not believe that he is a homosexual, against whom it is free to discriminate? 67 Judge Posner correctly recognizes that if this were the law, employers would be able to establish a defense by introducing evidence of the plaintiff's homosexuality. 68 A perverse *730 incentive to launch inquisitions into litigants' sexuality would result. 69 An analogous argument—that this kind of inquiry perversely serves to heighten the salience of characteristics that the law and most employers ordinarily try to downplay within the workplace—is made below. 70

Posner furthermore identifies a second ugly consequence: the “gratuitous disparagement of homosexuals” that results when plaintiffs subjected to gay slurs are pushed towards claiming not only that they are straight, but also that, because they are straight, the gay slurs flung at them are particularly insulting. 71 “[A]s if [the slurs] were unwounding when directed at a homosexual male,” Posner empathetically notes. 72 Again, Posner hints at, but does not develop, a theme returned to below: the way current gender stereotyping case law might cause gay and straight employees to emphasize, or even exaggerate, the differences between them. 73

The absurdities Posner identifies vanish if we remove the premise on which they are built—that gay or lesbian plaintiffs somehow cannot bring gender stereotyping claims. As Parts II and III show, courts throughout the country have rejected Posner's premise in no uncertain terms. 74 But once courts stop precluding homosexuals from bringing gender stereotyping claims, the dilemma returns in full force. So for a third time, we have to ask how Title VII, after Price Waterhouse, can protect against the entire spectrum of gender *731 stereotyping without protecting against the stereotype that, for example, “real men” are attracted to women. The following two Parts describe the unlikely course courts have taken in attempting to escape the Title VII dilemma.

II. Two Ways of Perceiving Gender Stereotypes

In cases brought by perceived homosexuals—and only in those cases—courts have chosen to redefine the gender stereotyping spectrum so as to limit actionable gender stereotyping to behavior and appearances that are observable at work. Having thus narrowed the spectrum, courts are able to treat discrimination based on gender nonconformity outside the workplace as non-actionable sexual orientation discrimination. The resulting doctrinal story treats gender stereotyping as something categorically distinct from sexual orientation discrimination. This distinction cannot hold. It is vulnerable from both sides, as the cases that follow show. 75 On the one hand, beliefs about sexuality often, if not always, involve gender stereotypes regarding who men and women should be attracted to. Courts fence these off from the stereotyping spectrum solely by fiat. As the U.S. Court of Appeals for the Sixth Circuit recently and revealingly wrote: “For all we know, [the plaintiff] fits every male ‘stereotype’ save one—sexual orientation—and that does not suffice to obtain relief under Title VII.” 76

On the other hand, many of the claims that are allowed to remain on the stereotyping spectrum implicate sexual orientation. As the first case discussed below demonstrates, one of the chief ways in which a worker can violate gender stereotypes is by looking or acting “gay.” 77 And this is not necessarily the same thing as looking or behaving like someone of the opposite gender. To be as crudely stereotypical as some of the cases that follow: A man who speaks with a lisp or obsesses about Liza Minnelli does not exhibit feminine traits. But nor would society see him as stereotypically masculine. Instead, his gender nonconformity, such as it is, stems from being perceived as “gay.” 78

*732 If the gender stereotypes recognized by courts include stereotypes about looking or sounding gay—and examples of this will multiply in Part III—then the sharp divide between gender stereotyping and sexuality claims that the official doctrinal story insists upon must be illusory. What courts actually exclude from the stereotyping spectrum is not sexuality, but stereotypes about sexuality whose violations are known rather than seen. As the two sections that follow explain, the real distinction is between perception that occurs through the senses and that which is merely known.

Before being laid off from his job and becoming a plaintiff in a Title VII suit, Brian Prowel worked for thirteen years at Wise Business Forms in Butler, Pennsylvania. He spent his final seven years at Wise “operating a machine called a nale encoder, which encodes numbers and organizes business forms.”

According to his deposition testimony, Prowel did not “fit in” with his male coworkers. Whereas his colleagues hunted, fished, drank beer, and liked football, Prowel testified that he had a high voice and did not curse; was very well-groomed; wore what others would consider dressy clothes; was neat; filed his nails instead of ripping them off with a utility knife; crossed his legs and had a tendency to shake his foot “the way a woman would sit”; walked and carried himself in an effeminate manner; drove a clean car; had a rainbow decal on the trunk of his car; talked about things like art, music, interior design, and decor; and pushed the buttons on the nale encoder with “pizzazz.”

Not coincidentally, Prowel's coworkers perceived him--accurately--to be gay. The Third Circuit claimed that “Prowel was 'outed' at work when a newspaper clipping of a 'man-seeking-man' ad was left at his workstation with a note that read: ‘Why don't you give him a call, big boy.’” Coworkers called Prowel “Princess,” “Rosebud,” or sometimes just “faggot.” They left a feathered tiara and lubricant on his nale encoder and wrote messages in the bathroom claiming that he had AIDS.

The Third Circuit found sufficient “evidence of harassment based on gender stereotypes” for Prowel to survive summary judgment. Suggesting that a jury would need to apply a mixed-motive analysis, the court pointed to allegations that “Prowel was harassed because he did not conform to Wise's vision of how a man should look, speak, and act,” not just because he was gay.

As its name implies, a mixed-motives analysis prohibits harassment or adverse employment decisions that spring from a mix of motives, legitimate and proscribed. In Prowel, sexuality was the legally permissible motive for harassing and firing Brian Prowel; gender stereotyping was the motive forbidden by Title VII. The Prowel court considered a second mixed-motive claim as well: sexual orientation discrimination plus religious discrimination. Yet the Third Circuit found those two claims to be coextensive, and dismissed them as a result. Prowel, the court said, had identified only one religious disagreement with his employer: their respective beliefs about homosexuality. Since “Prowel's religious harassment claim [was] based entirely upon his status as a gay man,” the court dismissed it as “a repackaged claim for sexual orientation discrimination.”

The lesson here is that an employee cannot bring a mixed-motive claim if the illicit motive is coextensive with the permissible one. Prowel's religious discrimination claim highlights the fact that a gender stereotyping claim cannot reduce, without remainder, to a claim about sexuality discrimination. Prowel itself, however, presents the opposite situation of a sexuality claim that threatens to reduce to a gender stereotyping claim. Since the Prowel court was not entirely clear about this, it is worth analyzing its opinion a bit more closely. The Third Circuit's opinion purported to separate discrimination based on gender stereotypes from that based on homosexuality. After surveying Prowel's “demeanor and appearance,” the court immediately noted that “Prowel also testified that he is a homosexual”—as if this might surprise readers who have just been told of Prowel's grooming habits and “pizzazz,” not to mention the rainbow decal on his car.

The opinion then went on to relate the incident in 1997 when Prowel was “outed”—even the court put this in scare quotes—and described how “[a]fter Prowel was outed, some of his co-workers began causing problems for him, subjecting him to verbal and written attacks.”

The distinction the court tried to draw, however, between the demeanor- and appearance-based stereotyping that preceded Prowel's “outing” and the sexuality-based discrimination that followed it remains utterly unconvincing. Ordinarily, to “out” someone is to publicize previously unknown information about that person's sexuality. The court claimed that Prowel was outed when someone posted a gay personal ad at his workstation. But here, the court failed to note how the prank in question could have revealed anything about Prowel's sexuality. The man appearing in the classified ad, after all, was not Prowel. If the same ad had been placed on the desk of another worker— one who trimmed his nails with a utility knife and operated machinery without “pizzazz”—it seems unlikely that coworkers would have suddenly suspected his sexuality. The so-called “outing” of
Prowel only had meaning in a context where Prowel's colleagues had already formed beliefs about his sexuality built upon gender stereotypes; it is implausible that the personal ad incident added to or altered those beliefs.

*735 This conclusion is bolstered by another omission in the court's opinion: the unanswered question of why Prowel was targeted for “outing” in the first place. Nothing in the opinion suggests that the person who left the newspaper clipping had any privileged knowledge about Prowel or his sexuality. So why was the same-sex personal ad placed at Prowel's workstation rather than at somebody else's? Again, the only explanation to emerge from the opinion is that Prowel's appearance and affect, his visible violation of gender stereotypes, prompted the harassment. Presumably, the anonymous “outer” targeted Prowel for the same reason that coworkers viewed that act as an “outing”: because Prowel's failure to conform to gender stereotypes had already spawned beliefs about his sexuality. The so-called outing was really not an outing at all; it was simply another manifestation of his ongoing gender-based harassment. As described by the Third Circuit, the act seems to have reflected coworkers' existing beliefs more than it formed new ones. 98 In Prowel's case, so-called sexuality discrimination reduced entirely to harassment based on gender nonconformity. 99

Looking in reverse, a second point underscores not how gender stereotyping led to Prowel's outing, but instead what his outing reveals about the content of those gender stereotypes. Prowel's demeanor and appearance, like his grooming, conversation topics, and “pizzazz,” all must have been perceived by coworkers as “gay” traits. 100 The court itself confirmed this in a revealing slip. As it described Prowel's various violations of gender stereotypes, the court added that he “had a rainbow decal on the trunk of his car.” 101 Rainbow insignia are, of course, symbols of gay pride. 102 That the court found nothing strange about including the decal in its list of details about the way Prowel walked and talked and dressed suggests that it also must have seen the latter traits as indicators of his sexual orientation.

*736 Further, the traits on the Third Circuit's list, while all instances of gender nonconformity, 103 are decidedly not all feminine. To be sure, some are. Prowel's high voice, his “effeminate” walk, 104 his nail filing, and his tendency to cross his legs “the way a woman would sit” all reflect stereotypically female traits. 105 But discussing “art, music, interior design, and decor”; not cursing; keeping a clean car; and appearing well-groomed 106 all depart from masculine stereotypes without thereby becoming stereotypically feminine. The Third Circuit's most vivid descriptor, the “pizzazz” with which Prowel operated his nape encoder, 107 has a similar connotation. It suggests insufficient masculinity, but not necessarily effeminacy--unless “effeminate” is being used as a synonym for “unmanly.” To say that a man does something with “pizzazz” is not to say that he does it like a woman. It is to say he acts in a stereotypically gay manner. If Prowel “did not conform to Wise's vision of how a man should look, speak, and act,” 108 this was not (or not entirely) because he looked or acted like a woman. Rather, his gender nonconformity consisted largely of looking or acting in ways seen as gay. This is perceived homosexuality in its literal, sensory form.

A court might attempt to separate gender nonconforming traits that suggest sexual orientation from those associated with the opposite sex. In other words, the Prowel court might have made its mixed-motive analysis more fine-grained: rather than attempting to separate gender stereotyping from sexual orientation claims, it could have tried to divide stereotyping that was gender-based from stereotyping based on traits coded as homosexual. On remand, Prowel would have been able to rely only on harassment targeting his high voice and other effeminate traits; his “pizzazz” and grooming habits would be irrelevant since they are not stereotypically associated with the opposite gender. Notably, however, in the five years of federal gender stereotyping cases examined in Part III, courts hardly ever tried to make this sort of distinction. Only two cases do so explicitly. In one, *737 Anderson v. Napolitano, 109 the gay plaintiff had caught his coworkers making fun of him by “lisping and talking in a stereotypically flamboyant voice.” 110 Noting that nothing in the record suggested that the plaintiff actually lisped, the court went on to decide that even if he did, and even if his coworkers were imitating him, “the logical conclusion is that his coworkers were lisping because of the stereotype that gay men speak with a lisp.” 111 The court reasoned that “[l]isping is not a stereotype associated with women.” 112 The second case is somewhat different, in that it involved a straight female plaintiff harassed by her allegedly lesbian coworker. In Love v. Motiva Enterprises, LLC, 113 the plaintiff claimed that she did not “conform to [her boss's] idea of a liberated, physically fit woman.” 114 The court faulted her, however, for making no allegation that her boss “harassed her for having male traits or mannerisms.” 115 It explained: “[A]ll the circuit cases recognizing same-sex sexual stereotyping claims have involved harassment of men for having feminine traits or mannerisms, or women for having male traits or mannerisms.” 116 As Prowel shows, this claim is incorrect; a man can fail to conform to masculine norms in any number of ways that do not count as feminine. Insofar as Anderson and Love explicitly equate gender nonconformity with conformity
to stereotypes about the opposite gender, these cases are outliers. Far more commonly, courts first define gender stereotyping broadly to encompass all stereotypes observable at work and then ask which came first, the gender stereotyping or the beliefs about the plaintiff's sexuality. For example, in a somewhat obscure passage from Kalich v. AT&T Mobility, LLC, the U.S. District Court for the Eastern District of Michigan stated:

An employee may maintain an action under Title VII for gender stereotyping, that is, where employment decisions or workplace harassment are based on the perception that the employee is not masculine enough or feminine enough and he or she fails “to conform to [gender] stereotypes.” But that is not exactly what the plaintiff alleges here. Rather, the complaint and the discovery lay out a pattern of conduct by [the plaintiff's supervisor] David Rich that is designed to ridicule the plaintiff's effeminate characteristics, which Rich perceived to arise from his homosexuality.

In Kalich, the harasser unquestionably viewed the plaintiff as effeminate in the narrow sense of looking or acting stereotypically feminine. The plaintiff's supervisor called him women's names and told him “he looked like a girl.” Despite this, the plaintiff lost on summary judgment because his effeminacy was “perceived to arise from his homosexuality.”

According to Kalich's logic, being perceived as homosexual must be somehow separable from being seen or heard to exhibit certain gay-coded traits. Whereas in Prowel, awareness of Brian Prowel's sexuality arose from sensory perceptions of his “unmasculine” behavior and appearance, in Kalich “the plaintiff's effeminate characteristics . . . [were] perceived to arise from his homosexuality.”

In Kalich, “perceived” seems to refer to something other than that which is seen or heard. An explanation of this cognitive, as opposed to sensory, way of perceiving homosexuality emerges from the case the Kalich court itself cites: Vickers v. Fairfield Medical Center.

B. Cognitive Perception: Vickers v. Fairfield Medical Center

Christopher Vickers worked as a police officer at the Fairfield Medical Center in Lancaster, Ohio. According to the complaint Vickers filed in 2003, two fellow policemen began harassing him after they learned that he had befriended a gay male medic in the course of an investigation. Harassment increased after the coworkers discovered that Vickers had taken a vacation to Florida with another man. Despite the rumors spread by his colleagues, Vickers, both at work and in the subsequent litigation, “declined to reveal whether or not he is, in fact, homosexual.”

Vickers's harassment took a variety of forms. Coworkers sabotaged his firearm and handcuffs; sprayed a topical anesthetic on his drinking cup and a chemical irritant on his jacket; rubbed a sanitary napkin on his face and taped it to his coat; impressed the word “FAG” on official forms so that it would appear on the carbon duplicates; accused him of going to gay bath houses; implied that he had sex with a seventeen-year-old male employee; pretended to have sex with a Barney doll before shoving the doll in Vickers's crotch. Once, after handcuffing Vickers during a training exercise, a coworker simulated anal sex while their boss took pictures, which were later faxed to the Fairfield Medical Center's registration desk. Throughout this period, coworkers referred to Vickers as a “faggot”; attached a rainbow sticker to his mailbox; and made jokes about Vickers having “titties,” a heavy menstrual flow, and undescended testicles.

In what the district court described as “artful pleading,” Vickers claimed that “his harassment stemmed not from his real or perceived homosexuality but from 'real or perceived nonconformity with gender norms.'” His complaint equated, or conflated, allegations of homosexuality with questions about Vickers's masculinity. More pointedly, it characterized the defendants as having made “snide comments suggesting that Vickers regularly engaged in non-stereotypical behavior for men, such as having sex with men rather than women.”
Recognizing the Title VII dilemma before it, the Sixth Circuit contended that Vickers's stereotyping charge was merely a sexual *740 orientation claim under another name. 143 “[A]ny discrimination based on sexual orientation would be actionable under a sex stereotyping theory if [Vickers's] claim [were] allowed to stand,” the court claimed, “as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”144

Challenged with figuring out how Vickers's claim could not be “allowed to stand” given Price Waterhouse, a divided panel began by subtly re-characterizing his actual claim. 145 Rephased by the majority, Vickers's allegation was that, “in the eyes of his co-workers, his sexual practices, whether real or perceived, did not conform to the traditionally masculine role.” 146 Instead, the court continued, “in his supposed sexual practices, he behaved more like a woman.” 147

This characterization of Vickers's claim already contains the ambiguity that festers into the majority's holding. The coworkers' referenced “eyes” are metaphorical, no more tied to literal visibility than Vickers's perceived, or falsely imputed, sexual orientation. “In the eyes of his co-workers” surely means “in the minds of his coworkers”; Vickers's claim was that coworkers thought him to be gay. Yet two sentences later, the court began treating visibility as something more than mere metaphor. The court claimed that “[t]he Supreme Court in Price Waterhouse focused principally on characteristics that were readily demonstrable in the workplace.” 148 Later cases, the Sixth Circuit noted, limited Price Waterhouse to instances “where gender non-conformance is demonstrable through the plaintiff's appearance or behavior.” 149 In support of this, the court cited a 2005 decision from the U.S. Court of Appeals for the Second Circuit, adding its own emphasis to that case's holding: “an individual may have a viable Title VII discrimination claim where the *741 employer acted out of animus toward his or her ‘exhibition of behavior considered to be stereotypically inappropriate for their gender.”' 150 In quick succession, then, the court limited stereotypes first, to those readily demonstrable in the workplace, then to those demonstrable through appearance or behavior, and finally to those demonstrable through behavior that is exhibited. Once behavior was reduced to that which is exhibited at work, it too, no less than a worker's appearance, became limited to that which is seen in the workplace. With the spectrum of gender stereotyping so limited, Vickers was bound to lose, since neither his appearance nor the behavior he exhibited at work violated gender stereotypes. In the words of the Sixth Circuit:

[T]he gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming in some way and provided the basis for the harassment he experienced. Rather, the harassment of which Vickers complains is more properly viewed as harassment based on Vickers' perceived homosexuality, rather than based on gender nonconformity. 151

Underscoring the ambiguous language of visuality in this passage emphasizes just how much work the ambiguity does. What the court required were appearances literally “perceived” or “observed at work.” Yet Vickers's “perceived homosexuality” was something different; since the latter was something known rather than seen, the court was able to “view” it, which is to say, think of it, as something separate and unprotected. The court concluded that Vickers's claim failed not because he had been “classified . . . as a homosexual,” but because he “failed to allege that he did not conform to traditional gender stereotypes in any observable way at work. Thus, he [did] not allege a claim of sex stereotyping.” 152

It is worth pausing to notice the crucial non-sequitur in the passage just quoted. The second sentence drops the qualification of the preceding sentence, which talked of observable non-conformance with gender stereotypes. With this omission, “sex stereotyping” claims are defined as--and limited to--claims regarding stereotypes violated in an “observable way at work.” Instead of remaining a subset of *742 stereotyping claims, claims based on observable violations end up swallowing the whole. Observability thereby becomes, in Vickers, a necessary element of sex stereotyping. In sum, the Vickers court was faced with a set of mutually inconsistent propositions: (1) Price Waterhouse holds that Title VII protects against the entire spectrum of gender stereotypes; (2) beliefs that men should be attracted to women (and vice versa) count as gender stereotypes; and (3) Title VII does not extend to claims based on sexual orientation. The court rescued itself from this dilemma by redefining Price Waterhouse's definition of gender stereotypes to include only stereotypes concerning appearances or behavior observable in the workplace. 153
Thus, when Vickers alleged discrimination based on “perceived nonconformity with gender norms,” it turns out that he was using “perceived” in the wrong sense. Vickers's nonconformity was something his coworkers believed; the Sixth Circuit demanded instead that it be something seen. As the dissenter on the panel wrote, the majority required “an outward workplace manifestation of less-than-masculine gender characteristics.”

Two points are worth emphasizing here. First, the distinction between sensory and cognitive perception should not be overstated. Not only are sense perceptions the source of much of our knowledge, but sense perceptions are themselves mental processes. As applied here, coworkers might come to understand that a colleague is gay based on something they see or hear, such as a photo on someone's desk or an overhead phone conversation. These would still count as cognitive perception cases, akin to Vickers, for the purposes of this Article. After all, even in Vickers, officers must have seen Vickers with the gay medic or heard about his trip to Florida. The point is that coworkers harassed Vickers because they came to know or suspect something about his affective preferences and sexual activity, neither of which were observable at work. Contrast this with Prowel, in which colleagues literally saw the violations of gender norms described by the Third Circuit. In short, the distinction between cases like Prowel and those like Vickers turns on whether someone saw or heard, or merely heard about, the plaintiff's nonconformity with sex stereotypes. Second, Vickers's limitation of Price Waterhouse stereotyping claims to appearances and behavior observable at work is not the rule elsewhere in Title VII case law. The Vickers court derived this limitation from a 2005 Second Circuit case, Dawson v. Bumble & Bumble, in which the court claimed that “[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.” But even the Second Circuit in Dawson discussed at length an earlier application of gender stereotyping theory to mothers of young children in Back v. Hastings on Hudson Union Free School District. Back involved a school psychologist with small children at home. Back's supervisors alleged that her good performance at work was “just an ‘act’ until [she] got tenure,” after which, they believed, she would spend more time at home. Echoing Price Waterhouse, the Second Circuit determined:

> it takes no special training to discern stereotyping in the view that a woman cannot “be a good mother” and have a job that requires long hours, or in the statement that a mother who received tenure “would not show the same level of commitment [she] had shown because [she] had little ones at home.”

Importantly, these are cognitive stereotypes about mothers. The fact that Back's supervisors thought she was putting on “an act” proves that their stereotypes did not derive from her behavior or appearance at work, as the Dawson and Vickers courts require. As the next Part demonstrates, cognitive stereotypes about mothers have been recognized repeatedly in the federal courts. This makes all the more anomalous the holding in Vickers and Dawson that an employee's nonconformity with gender stereotypes must be observed at work, not ‘merely’ cognized. Yet this is the requirement that these cases establish for cases brought by gay, or allegedly gay, plaintiffs.

The Second Circuit has complained that, “[w]hen utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator.” Vickers and Prowel together suggest how courts have tried to address those problems. Expanding the inquiry's scope, the next Part shows that their proposed solutions are by no means unique.

III. Five Years of Federal Stereotyping Cases

A. Cases and Method

This Article focuses on 117 federal gender stereotyping cases from a period from 1992 to 2013. These cases were found by, first, conducting a search of all of the gender stereotyping cases heard in the federal courts over a five-year period. A search for opinions that mentioned “Title VII” along with a phrase such as “gender stereotyping,” “sex stereotyping,” “gender nonconformity” or cognate terms turned up 204 cases, from which 110 opinions that either were not on topic or had been superseded by a subsequent appellate opinion were removed. Since courts generally look to Title VII precedent when analyzing discrimination “on the basis of sex” under Title IX, cases were included in which plaintiffs brought gender stereotyping
claims under Title IX instead of, or in addition to, Title VII.169 Decisions were removed, however, if they failed to address the merits of the gender stereotyping claim at issue, focusing instead on matters such as class certification.170

While cases such as Prowel and Vickers came up in this initial search, leading cases from other circuits predated the search range. In order to ensure that the most important cases involving sexuality and gender stereotyping were included, an additional search was conducted for federal appellate opinions from any year that mentioned the previous search terms plus the terms “gay,” “homosexual,” “homosexuality,” or “sexual orientation.” This yielded an additional thirty-nine opinions, twenty-three of which addressed the merits of a plaintiff’s gender stereotyping claim. These twenty-three appellate cases, dating from 1992 to the present,171 together with the 94 cases decided between 2006 and 2011, yielded the 117 cases studied. As described below, each of these cases was categorized by circuit, as a win or loss for the plaintiff, by type of plaintiff, and by type of stereotype, whether perceptible or cognized.

The set includes cases arising out of every circuit except for the U.S. Court of Appeals for the Federal Circuit.172 Very few cases, district or appellate, arise out of the U.S. Courts of Appeals for the District of Columbia, the Fourth Circuit, or the Eleventh Circuit. Only two opinions come from the Fourth Circuit (with no district opinions from that circuit), and neither involves issues of sexuality.173 No opinion in the set comes from the D.C. Circuit, and the only opinion from the Eleventh Circuit involved a transgender, rather than gay, plaintiff.174 Yet every other circuit--the First through Third and Fifth though Tenth--has at least one appellate opinion involving both gender stereotyping and sexuality.

Every opinion in the set was characterized as either a win or a loss for the plaintiff. Since most of the decisions involved motions for dismissal or summary judgment, opinions marked as “wins” do not necessarily signal an ultimate victory in the case. A “win” in this context often simply means that the plaintiff was allowed to proceed further; the judge refused to dismiss the case or grant the defendant summary judgment on the plaintiff’s sex discrimination claim.

When considering the different kinds of plaintiffs involved, the cases divide into three main types: (1) those brought by homosexuals, whether actual or perceived;175 (2) those in which the sexuality of the plaintiff was not discussed (presumably because the plaintiff was an actual or perceived heterosexual);176 and (3) cases involving transgender plaintiffs.177 While cases brought by transgender plaintiffs are easy to distinguish from the first two subsets of cases, the distinction between subsets one and two is not always as obvious.

Plaintiffs who are gay, or are thought to be gay, do not always disclose their sexuality.178 Nor do courts. The subset of cases involving perceived homosexuality has been interpreted broadly to include those where the plaintiff’s sexuality was discussed in coded rather than explicit terms. The paradigmatic example of such a case is Lewis v. Heartland Inns of America, L.L.C.,179 in which an employer described the female plaintiff as having “an Ellen DeGeneres kind of look.” It would seem obvious that this means she looked like (one stereotype of) a lesbian. Also included in this first subset are cases in which sexuality emerges more from the content of the alleged harassment than from any stated beliefs or revelations about the plaintiff. Gay-tinged slurs are, of course, not always indicative of some belief about the sexuality of their target.180 Often they are merely all-purpose insults, blunt indications of dislike. However, cases involving gay slurs were included within the first subset if they led the court to grapple with issues of sexual orientation under Title VII.

The remaining, second subset of opinions come closest to the Price Waterhouse model: these are the cases in which the gender stereotyping at issue does not raise or suggest questions about homosexuality.182 These include a number of cases like Back, in which stereotypes about parents, normally mothers, lead to adverse employment actions.183

Finally, all 117 of the gender stereotyping cases in the set were categorized as involving either perceptible or cognized violations of gender norms. This reflects the difference already described between the stereotyping of Prowel and that of Vickers.184 Cases were coded as perceptible stereotyping cases if they involve stereotypes about how the plaintiff appeared or behaved at work. Cognitive cases, by contrast, involve stereotypes related to knowledge or beliefs about the plaintiff.

*748 B. Cases Involving Perceived Homosexuality
Prowel and Vickers both involved perceived homosexuality, but “perceived” had different meanings in the two cases. Prowel looked gay, at least in the eyes of his coworkers and, it seems, the Third Circuit. Vickers was thought to be gay. The fact that Prowel won and Vickers lost is not unusual. Table 1 shows the sharp discrepancy in outcomes between cases involving literally perceptible and cognitively perceived stereotype violations in cases brought by perceived homosexuals.

Table 1. Discrimination Cases Involving Perceived Homosexuality

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<tr>
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<th>Plaintiff Wins</th>
<th>Plaintiff Loses</th>
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</thead>
<tbody>
<tr>
<td>Visible Stereotypes</td>
<td>12</td>
<td>3</td>
</tr>
<tr>
<td>Cognized Stereotypes</td>
<td>1</td>
<td>35</td>
</tr>
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1. Visible stereotypes

A wide variety of appearances and behaviors seem to violate gender stereotypes in American workplaces. Earrings and certain hairstyles on men are predictable violations. Less expected, perhaps, is an iron worker’s use of “Wet Ones” wipes rather than toilet paper on the job site. A coworker thought that using those wipes was “kind of gay,” “feminine,” or “homo.” In opinions involving sensibly perceptible stereotypes, some plaintiffs’ ways of walking, talking, or gesturing were explicitly compared to those of women. Others, however, were described not as feminine, but as insufficiently “macho.” For example, colleagues of a municipal employee “made fun of his appearance, mannerism, gestures, patterns of speech and”--somewhat more strangely--“his seriousness” because “he did not fit [Defendant’s] ‘macho’ image.” In another case, “a small, non-muscular man with a disability” had a boss who thought he “was not a ‘real man’ or a ‘manly man.’”

The cases just described all involved male plaintiffs. In fact, of the fifteen visible perception stereotyping cases in this subset, only three were brought by women. Two were successful: a hotel front desk worker who was fired because of her “Ellen DeGeneres kind of look” and an eighth-grade student whose “gothic” dress and friendship with a female classmate attracted harassment. The one female plaintiff who lost presented an unusual case in which not she, but her female harasser, was perceived to be gay. In a particularly unsympathetic opinion, the court first denied the plaintiff's Oncale v. Sundowner Offshore Services, Inc. (same-sex harassment) claim in part because she could not prove that her harasser was a lesbian, despite a declaration that the harasser had said “men did not like her . . . because she was gay or female.” The court treated this as logically disjunctive: it proved only that she was one or the other. The plaintiff's gender stereotyping claim--to which the court then turned--was that she did not conform to her alleged harasser's “idea of a liberated, physically fit woman.” Noting, without deciding, that the U.S. Court of Appeals for the Fifth Circuit might not even recognize gender stereotyping claims, the court distinguished individuals' idiosyncratic ideas about gender from “society's general ideas about traits commonly thought to be shared by persons of the same physical type.” The court concluded that “[w]hatever the alleged harasser's individual ideas may have been about women's liberation and physical appearance, these do not constitute gender stereotypes.” In marked contrast to the thoroughly idiosyncratic stereotypes at issue in the Wet Ones case, the court in Love held that individually held stereotypes are not cognizable under Title VII.

In the other two perceptible stereotype cases in which plaintiffs lost, courts used a somewhat different procedure: in both cases, the courts seemingly weighed harassment based on perceptible stereotypes against harassment based on knowledge or beliefs in order to determine which did more explanatory work overall. The court in EEOC v. Family Dollar Stores, Inc., which involved a retail manager whose harassment drove a teenage employee to quit, was especially explicit about this balancing process. On the one hand, the court admitted that comments made about the plaintiff “arguably implicate[d] gender stereotypes.” The store's manager, Michael Garrison had asked why the plaintiff, Kendrick Jones, “walk[ed] like that,” called him “half-female,” and accused him of “using tampons.” The plaintiff's brief, meanwhile went still further:

* In the warped mind of Garrison, Kendrick did not meet this [sic] expectations of a stereotypical heterosexual male. A heterosexual man should, in Garrison's words, “get pussy.” A heterosexual male should not
walk the way Kendrick walked. A masculine heterosexual male should not be clean cut, shirt tucked-in, pants creased and neat.  

All of these were ways in which, according to the plaintiff, his supervisor had perceived him as “appearing gay or effeminate.” Once again, being seen as “clean cut” and “neat,” like being perceived as “serious,” emerges as a way in which a man can violate masculine stereotypes without thereby fitting feminine stereotypes.

Despite these instances of gender stereotyping, the Family Dollar court determined that “the record clearly reflects that the harassment at issue was based primarily on Jones's perceived sexual orientation, rather than his gender or gender stereotypes.” After considering the instances of harassment as a whole, the court determined that “most” of the comments expressed a belief about the plaintiff's sexual orientation.

In making this determination, the court explicitly followed Kay v. Independence Blue Cross, the last of the three “losses” in the visible stereotyping row of Table 1. In Kay, a divided panel of the Third Circuit decided that references to the plaintiff's sexual orientation outnumbered insults about his not being a “real man.” The appellate opinion failed to mention, as the court below had done, that a coworker viewed the plaintiff as “a ‘miss prissy.’” Further, the Third Circuit lumped together the slurs about sexuality with phrases such as “fem” and, even more bizarrely, “ass wipe.” While these details may have affected the case's outcome, so too did Kay's failure to emphasize his earring. Kay might have been more successful had he explained what it was about his appearance or behavior that caused his coworkers to say, just after his transfer to a new floor: “Did you see that fag that moved up on the floor yesterday?” Presumably, since the workers did not know him yet, they were drawing their assumptions from his visible gender non-conformance. The Kay court might also have left this question for trial. That was the solution used in Prowel, where the Third Circuit, unlike the district court it reversed, ignored its own earlier opinion in Kay. Rather than attempting to weigh the visual versus cognized sources of the anti-gay invective directed at the plaintiff, the Prowel court instead treated this issue as a factual matter best left for a jury. This is the approach also followed by the leading appellate cases from the U.S. Courts of Appeals for the Seventh and Ninth Circuits.

In Doe v. City of Belleville, for example, the Seventh Circuit found that a jury might “reasonably infer” gender-based harassment from “the harassers' evident belief that in wearing an earring, [the plaintiff] did not conform to male standards.” Focusing on abusive questions about whether the plaintiff was “a boy or a girl,” the court seemed unfazed by the far more frequent slurs that focused on the plaintiff's sexuality. Such evidence, the court held, “does not establish, as a matter of law, that [the plaintiff] was being discriminated against solely on the basis of his perceived sexual orientation, as opposed to his sex.” The court offered two reasons for this holding: First, sex or gender only needed to be a motivating factor in the harassment, not the sole one. Second, and more relevant here, homophobic and sex discrimination cannot be “rigidly compartmentalize[d].” “[A] homophobic epithet,” the Seventh Circuit held, “may be as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation.”

Importantly, nothing in Doe suggested that Doe's harassers had any knowledge about his sexual orientation. In fact, the Seventh Circuit made a point of stating that the plaintiff was “not in fact gay.” Perhaps this explains the difference between Doe and Kay: what the Doe court claimed cannot be compartmentalized is something different from what the Kay court tried so hard to put into boxes. In Kay, the court separated bias against the plaintiff's appearance (which, as in Doe, included an earring) from knowledge about his sexuality. In Doe, on the other hand, perceived effeminacy and perceived sexual orientation both referred to something visual. As the Seventh Circuit aptly summarized Doe in a subsequent case: “the harassers in Doe expressed and exhibited hostility to the way in which plaintiff H. exhibited his sexuality.”

Doe also raises a larger point: courts often cannot determine whether harassment is “because of” an impermissible trait simply by noting the form the harassment takes. Gay slurs are employed in nearly all of the cases discussed in this section, winners and losers both. Faced with slurs that mostly sound the same, courts are forced to ask whether these slurs stem from knowledge
about plaintiffs' sexuality, or merely reflect antipathy towards the plaintiffs' appearance or affect. Compare, in this regard, an en banc case from the Ninth Circuit, Rene v. MGM Grand Hotel, Inc., 236 in which the supervisor and coworkers of an openly gay hotel butler blew kisses at him, called him names, and touched him sexually "like they would to a woman." 237 A concurring opinion and the dissent 238 differed in their interpretations of one key piece of testimony. When asked if one of the harassers had teased him about the way he walked and had whistled at him "like a woman," the plaintiff responded: "Right. Like a man does to a woman." 239

According to Judge Hug's dissent, "the whistling was because [Rene] was gay, not because of the way he walked." 240 However, according to Judge Pregerson's concurrence:

There would be no reason for Rene's co-workers to whistle at Rene "like a woman," unless they perceived him to be not enough like a man and too much like a woman. That is gender stereotyping, and *755 that is what Rene meant when he said he was discriminated against because he was openly gay. 241

The difference separating Judges Hug and Pregerson is that which separates winning cases from losing ones. Importantly, both looked at the same harassment: male workers whistling at a man as they would to a woman. Yet Judge Hug's dissent found this to be rooted in the workers' knowledge of the plaintiff's sexuality. 242 Judge Pregerson's concurrence instead began with what the workers saw; it underscored the fact that the plaintiff's sexuality was open, presumably meaning visible. 243 According to the concurrence, being "openly gay" means being seen as "not enough like a man and too much like a woman." 244

The dissenters in Rene instead proposed a general principle:

Discrimination in the form of harassment or assault on the job because of a man's activity outside the workplace, such as his sexual activities, is not a basis for discrimination based on gender stereotyping of how he is expected to work on the job. A person might conform to all the stereotypes of masculinity on the job yet have a homosexual orientation in his own private life. 245

The dissenters' proposed distinction is untenable. Rene's sexual orientation was not confined to "his own private life"; rather, his sexuality was known at work, and that knowledge violated "stereotypes of masculinity on the job." 246 The dissent's outside-the-workplace/on-the-job distinction must be understood as the cognitive/visual distinction discussed above. 247 The stereotypes of masculinity at issue in Rene were all present at the workplace; what the dissent and the concurrence really disagreed about is whether their violation was primarily known or seen.

2. Cognized stereotypes

The dissent's reading of the facts in Rene provides the model for the thirty-six cases to be considered next: those involving cognized stereotypes. These are cases in which the plaintiff's alleged harassment or adverse employment action stemmed from someone's knowledge or beliefs about the plaintiff's sexual orientation and, possibly, his or her sexual activity or associations outside the *756 workplace. Plaintiffs do not fare well in these cases. As shown in Table 1, only one plaintiff won in a case of this sort; thirty-five lost.

Part II discussed Vickers as a paradigmatic example of a knowledge-based, rather than appearance-based, stereotyping case. 248 In Vickers, harassment of the plaintiff stemmed from his colleagues' belief that he was gay, a belief based on their knowledge that Vickers had befriended a gay medic and then gone on vacation with another man. 249 Facts like these are not unique in the cases falling into this group. In Hamm v. Weyauwega Milk Products, Inc., 250 for example, a rumor had spread around the milk plant that the plaintiff, Hamm, was involved in a romantic relationship with another coworker, Zietlow. 251 "Hamm's coworkers thought it odd when Hamm gave Zietlow a boat and let him use his four-wheel vehicle." 252 In Hamm as in Vickers,
knowledge about “suspicious” activity outside of work led to slurs about the plaintiff's sexuality. Hamm was no doubt speaking of cognitive perception when, in his complaint, he bemoaned how he'd grown “so sick of being threatened for what people perceive!”

The court in Hamm relied on an earlier Seventh Circuit case, Spearman v. Ford Motor Co., which involved a more specific knowledge claim. The harasser in that case “claimed that his brother-in-law and a coworker told him that they saw [the plaintiff] at gay nightclubs.” The harasser in a 2009 district court case had still more specific knowledge: the harasser had dated the harasser, his coworker, for three months. Echoing the rainbow decal snuck into Prowel's list of gender non-conforming traits, the plaintiff in Kalich v. AT&T Mobility, LLC had a blue and yellow bumper sticker from the Human Rights Campaign, a gay-rights organization, on his car; his supervisor would teasingly refer to the emblem as the Swedish flag. In Wilken v. Cascadia Behavioral Health Care, Inc, coworkers saw the plaintiff kissing, hugging, and holding hands with her girlfriend, an employee in a neighboring department. Though Wilken might have provided the starkest possible example of literally perceived homosexuality, the plaintiff did not bring a gender stereotyping claim. She succeeded instead on a gender-association claim under Oregon state law.

Not all of the cases in the set reveal such clear sources of knowledge or belief. A seminal opinion from the Second Circuit, Simonton v. Runyon, stated simply: “Simonton's sexual orientation was known to his co-workers.” An early Sixth Circuit case left matters even more mysterious. In Dillon v. Frank, the court wrote that, after the plaintiff, Ernest Dillon, had worked as a mail handler for four years, a coworker “began calling Dillon ‘fag,’ and saying that ‘Dillon sucks dicks.’” As with Kay, cases like Dillon raise questions about what led coworkers to know or suspect the plaintiff's sexuality. One wonders, yet the record in these cases fails to answer, whether they might have been tipped off by something gender non-conforming in the plaintiff's appearance or affect.

* Plaintiffs’ failure to point to any specific gender non-conforming traits leads to the downfall of many of the cases in the set. But, importantly, plaintiffs also tend to lose if they add a stereotyping claim after previously making a sexual orientation claim. Worried about “bootstrapping,” courts appear wary of plaintiffs whose story changes over time. Even a plaintiff who had been referred to “as acting and dressing like ‘a girl,’ ‘a pussy’ and a ‘fag’” and had been told “to ‘man up,’” failed in his gender stereotyping claim because he had previously claimed, in a letter to his company's CEO, that “he was a victim of discrimination because he is [a] ‘gay man in a straight man's world.’”

A better-known example comes from Higgins v. New Balance Athletic Shoe, Inc., the case that introduced the sexuality-as-stereotyping theory into First Circuit case law. In Higgins, the court rejected the plaintiff's gender stereotyping claim because he had failed to raise it in the court below. Nonetheless, in influential dicta, the court noted for the first time in that circuit that “a man can ground a [Title VII] claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.” Higgins is exemplary in showing that a plaintiff's loss can still provide the rule under which future plaintiffs in that circuit might win. Simonton plays the same role in the Second Circuit, just as Vickers does in the Sixth. Meanwhile, leading cases from the Third, Seventh, Eighth, and Ninth Circuits all feature winning plaintiffs.

This leaves the Tenth Circuit. Its sexuality-as-stereotyping case, Medina v. Income Support Division, involved stereotyping based on knowledge rather than appearance and, unsurprisingly, a losing plaintiff: Rebecca Medina, a straight woman who worked with a number of lesbians at the Income Support Division (“ISD”) of New Mexico. Medina claimed that her lesbian supervisor “harassed her because of her failure to comport with gender stereotypes.” As the Tenth Circuit explained, however, “there [was] no evidence—and no claim—that Ms. Medina did not dress or behave like a stereotypical woman.” Rather, the plaintiff “apparently argue[d] that she was punished for not acting like a stereotypical woman who worked at ISD—which, according to her, [was] a lesbian.”
Despite the opinion's “opposite-day” quality--in which gender nonconformity meant not looking like a lesbian--the ultimate point was the same as in the other cases examined so far: success required visible nonconformity with stereotypes regarding dress or behavior. Lacking that, the Tenth Circuit's resolution of the case was no surprise. The court rejected Medina's hostile work environment claim, construing it to allege that “she was discriminated against because she is a heterosexual,” and holding that “Title VII's protections . . . do not extend to harassment due to a person's sexuality.” The Tenth Circuit did not ask, and Medina did not think to tell, how her colleagues came to know that she is heterosexual. On the record before the court, it thus appeared that Medina, like so many gay plaintiffs, had violated stereotypes at her workplace in a purely cognitive rather than literally perceptible manner. Her claim failed as a result.

C. Cases Not Involving Perceived Homosexuality

Among the 117 analyzed cases are forty-nine which do not raise questions about the sexuality of the plaintiff. Though not themselves the focus of this Article, they are important comparators to the cases already discussed. Table 2 shows the outcomes in the subset of cases not involving perceived homosexuality. Strikingly, the results are far more equivocal than those reported in the previous Table.

**Table 2. Discrimination Cases Not Involving Perceived Homosexuality**

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<thead>
<tr>
<th>Visible Stereotypes</th>
<th>Plaintiff Wins</th>
<th>Plaintiff Loses</th>
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<tr>
<td></td>
<td>11</td>
<td>8</td>
</tr>
<tr>
<td>Cognized Stereotypes</td>
<td>12</td>
<td>18</td>
</tr>
</tbody>
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The first subcategory, the visible-stereotyping cases, includes Price Waterhouse's direct successors. The plaintiffs who successfully brought these cases were women who were told to be more “sweet,” who were disliked for being “strong” or “aggressive,” or who were suspected of managing “on emotions.” Analogously, a male plaintiff, though in a Title IX case, successfully claimed to have been stereotyped about being “not man enough” to stand up to the bullies at school who had repeatedly assaulted him.

Other cases in the visible-stereotype subcategory center more on appearance than behavior. These include two cases brought unsuccessfully by men with long hair, and one brought successfully by a woman harassed by female coworkers who called her “loose” and made fun of the size of her breasts. Much better-known is Jespersen v. Harrah's Operating Co., brought by Darlene Jespersen after she was fired, having bartended at Harrah's Casino in Reno for twenty years, because she refused to comply with newly implemented makeup requirements. In deposition testimony, Jespersen claimed that wearing makeup “would conflict with her self-image,” undermine her “credibility as an individual and as a person,” and hinder her from doing her job.

Split seven to four, an en banc panel of the Ninth Circuit held that an employee's personal objection to a makeup requirement cannot, by itself, give rise to a sex stereotyping claim. Judge Pregerson, joined by three others, dissented. “The inescapable message” of Harrah's makeup policy, Pregerson argued, “is that women's undoctored faces compare unfavorably to men's, not because of a difference between men's and women's faces, but because of a cultural assumption--and gender-based stereotype--that women's faces are incomplete, unattractive, or unprofessional without full makeup.” Jespersen is often cited as emblematic of courts' refusal to take appearance-based claims seriously, a topic discussed more fully in the following Part. Here, I pause only to note one particularly important point: Durkin v. Verizon, N.Y., Inc. --the case, already mentioned, in which the plaintiff was sexually harassed because of her breast size --is the only appearance-based case in the “straight plaintiff” subset in which the plaintiff won. Like Jespersen, the plaintiffs in every other case lost.

Plaintiffs bringing cognitive-stereotyping claims, the second sub-category of cases, are more successful. Forty percent of straight cognitive-stereotyping plaintiffs won, compared to a three-percent success rate for cognitively perceived homosexuals. These cognitive-stereotyping cases divide into two main groups: (1) those in which the employer harbors descriptive stereotypes about members of a certain gender, and (2) those in which an employer's knowledge or belief about the employee contrast with some prescriptive stereotype the employer holds. It is the latter group that is most closely analogous to the cognitive
stereotyping cases discussed above. In those cases too, the stereotypes in question were thoroughly prescriptive ones about what “real” men and women should be—namely, attracted to the opposite sex. Beliefs or knowledge about the plaintiff—cognitive perceptions of his or her sexuality—collided with these prescriptive stereotypes and an adverse employment action or harassment resulted.

As already suggested, plaintiffs frequently win when their cognitively perceived stereotype violation has to do with being a parent. The Second Circuit’s decision in Back does not stand alone. In a Fourth Circuit case, the plaintiff was asked during an interview for a promotion “‘how [her] husband handled the fact that [she] was away from home so much, not caring for the family.’” The man interviewing her went on to admit “he had ‘a very difficult time’ understanding why any man would allow his wife to live away from home during the work week.” In a more recent First Circuit case, the plaintiff claimed she was not awarded a promotion after her employer discovered she had young triplets at home. The case turned on the “stereotype that mothers, particularly those with young children, neglect their work duties in favor of their presumed childcare obligations.”

While four of the twelve cognitive stereotyping “wins” in Table 2 involve knowledge about motherhood, the only male caregiver among the plaintiffs in the cases studied lost, perhaps because he did not make his stereotyping claim explicit. Still, the importance of these parenting cases remains: they provide examples from several circuits of actionable gender stereotyping based on knowledge about a plaintiff’s activities outside of work. This, of course, is exactly what Vickers and the other cognitive stereotyping sexuality cases rejected. Whatever Vickers and its kin might suggest, there is no general rule under Title VII that gender stereotyping must be based on appearances or behavior observable at work in order to be actionable. Two cases stand as counterexamples to this Article's thesis that courts have required visible stereotype violations only in cases involving perceived homosexuals. Both cases arise out of the Sixth Circuit, and both extend Vickers's holding to presumably heterosexual plaintiffs. These cases thus provide potential ammunition against this Article's claim that Vickers creates a special rule for gay plaintiffs under Title VII. The first of these is Willingham v. Regions Bank, a case brought by a female banker who was fired after she appeared on the cover of a motorcycle magazine as “Ms. Cruzin' South August 2008.” Willingham's employer fired her on account of her appearance in the magazine. Applying Vickers, the district court found her termination permissible under Title VII. The crucial fact, the court reasoned, was that the plaintiff's violation of gender stereotypes—her failure to “dress or appear ‘conservatively’ at all times”—occurred as part of a “non-work-related activity.” The court failed to address the potentially determinative fact that the bank's prescriptive stereotype regarding conservative dress might not have had anything to do with gender at all—particularly in the context of a bank, where a conservative appearance is often required of men and women alike.

The second case that possibly cuts against this Article's thesis is Maturen v. Lowe's Home Centers, Inc., brought by a male worker who alleged that he was harassed and fired after his wife wrote an email to the store manager expressing complaints about the store. According to the plaintiff, the manager told plaintiff that “he ‘should learn to control [his] wife and keep her in her place.’” Hypothesizing a Price Waterhouse claim on the pro se plaintiff's behalf, the magistrate judge argued: “At most, Plaintiff has averred facts that demonstrate that the store manager held a chauvinistic view that men should control their wives’ behavior and that, since Plaintiff was unable to do so, he did not live up to the store manager’s conception of masculinity.” But even if this were the case, the magistrate judge went on to hold, the stereotype in question would have turned on knowledge about gender non-conforming behavior outside of work. Under the Vickers test, Maturen's gender stereotyping claim was bound to fail.

A better-pled version of this case reaching the same result would pose a real challenge to this Article's thesis. It would show courts being consistent in culling cases where the gender stereotyping concerned behavior that, while known at work, occurred outside the workplace. If, for example, effeminate straight men won their cases but men who were thought not to “wear the pants in the family” did not, the dividing line this Article has traced between Prowel and Vickers, and their many analogues, would not, in fact, be peculiar to gay claims. Notably, however, Maturen is the only Title VII case, out of the 117 studied, in which a man's gender nonconformity did not implicate his sexuality. Astonishingly, there are simply no other cases in which a plaintiff was perceived to violate masculine stereotypes without also being perceived as, or at least labeled, a homosexual.
IV. Analyzing the Trend

The descriptive story told in Parts II and III leads to a number of conclusions worth summarizing at this point. The first is that gender nonconformity does not equal opposite-gender conformity. Traits not perceived as feminine may be perceived nonetheless as violating masculine stereotypes, and vice versa. For this reason, the purported distinction between gender stereotyping and sexuality claims is unsustainable. Effeminacy in men is perceived as homosexuality, and looking “gay” is perceived as a type of gender nonconformity. Beliefs about homosexuality themselves often, if not always, turn on gender stereotypes. Courts are right, then, to acknowledge that “[s]tereotypical notions about how men and women should behave”—and, I might add, look—“will often necessarily blur into ideas about heterosexuality and homosexuality.”

The cases surveyed in the previous two Parts suggest that rather than trying to separate the gender stereotyping wheat from the homosexual chaff, courts instead distinguish between two types of stereotypes: those violated visibly and those whose violations are cognitively perceived. Or, given the blurring of categories just endorsed, this distinction might be rephrased in terms of sexuality rather than stereotyping. Plaintiffs who “look gay” succeed under Title VII while those merely known or thought to be gay do not.

Courts resist this description. Gender stereotyping, they say, only concerns “appearance or mannerisms on the job.” Thus, Title VII is said not to protect “merely” known or suspected violations of gender stereotypes. This claim is belied, however, by cases in which mothers of young children fall victim to gender stereotypes not because of how they look or act on the job, but because of knowledge about facts outside of work. In those cases, stereotypes based on cognitive “perceptions” do run afoul of Title VII.

The upshot is that courts treat “perceived homosexuality” cases differently from other Title VII stereotyping cases. If the term “perceived homosexuals” can refer either to those seen or thought of (accurately or not) as gay, courts have protected the former but not the latter. Employment-discrimination claims brought by perceived homosexuals survive dismissal or summary judgment if and only if the perception in question is sensory. This Part first explains how anomalous this privileging of appearances is within antidiscrimination law. Second, this Part discusses why, or even if, this matters. After all, increased protections for a subset of homosexual employees—those who look or act in ways seen as “gay”—would seem to be a welcome development, at least for anyone who shares the First Circuit's view that discrimination based on sexual orientation “is a noxious practice, deserving of censure and opprobrium.”

Given that some formerly unprotected employees are now receiving protection under Title VII, why should anyone quibble about doctrinal coherence or theoretical purity? Answering that question requires a look at the effects of the distinction courts have drawn and a consideration of the costs incurred when courts make the unusual move of privileging appearance over knowledge.

A. Perceptibility in Context

1. The dominant conception

The emphasis placed on sensory perception in the cases described in Parts II and III is starkly at odds with the rhetoric of blindness that, for better or worse, has long driven antidiscrimination law in the United States. American antidiscrimination law, in what Robert Post describes as its “dominant conception,” traditionally identifies certain proscribed characteristics like race and gender and “speaks as though [they] could be placed behind a screen and made to disappear.” Hoping to transcend these categories, antidiscrimination law requires their invisibility, and thus our blindness. In the Title VII context, “[b]lindness renders forbidden characteristics invisible; it requires employers to base their judgments instead on the deeper and more fundamental ground of ‘individual merit’ or ‘intrinsic worth.’”

The contrast between unseen depths and superficial aesthetics gives the metaphor of blindness its power. If sight distracts people from seeing others as they really are or recognizing their true worth, then blindness becomes a virtue rather than a defect. Of course, all of this trades on the dual meanings of perception traced throughout this Article, for the blindness metaphor is merely the negative of the metaphor of sight as knowledge. Taken literally, it would be absurd to say that sight keeps us from seeing people as they are. What this really means is that literal (or sensory) perception sometimes keeps us from knowing people as they really are. Antidiscrimination law's blindness requires us to forgo literal sight in order to “see” deeper truths. The
familiarity of these metaphors suggests just how unusual the privileging of perception in gender stereotyping cases really is. As shown above, almost all of the “perceived homosexuals” who survive dismissal or summary judgment are those who were persecuted not “just” because coworkers knew, or thought they knew, something about them, but instead because coworkers literally saw (or heard) them appearing or behaving in ways coded as gay. The ordinary hierarchy of sight and knowledge has thus been turned on its head. In their attempt to evade the Title VII dilemma, courts have focused not on what people “really are”—the unseen depths of their sexual identity—but rather on how they look. Metaphorical blindness has been replaced by literal eyesight.

There is a seemingly compelling objection to this claim: namely, Title VII plaintiffs always have to be seen as part of a protected class before they can get relief. In other words, the blindness idealized by antidiscrimination law itself presupposes sight. Courts are forced to see a worker's race, for example, in order to determine that discrimination has occurred “because of” race so as to remedy that discrimination and thereby promote a workplace in which race is no longer “seen.” How is this any different from courts demanding to see a worker's effeminacy or “pizzazz”?

The objection is correct that antidiscrimination law's proscribed categories always have to be taken into account in order to satisfy Title VII's “because of” requirement. A truly color-blind court would never have the means to recognize that discrimination had occurred because of race. But the ultimate goal of removing discrimination based on a proscribed category like race is, at least according to the dominant conception, to “render[] yet another attribute of employees invisible to their employers.” Antidiscrimination law seeks to eliminate society's use of the proscribed categories, thereby lessening their salience and making them less visible.

The case law described in Part III produces the opposite result.Appearances never lose their salience if courts only allow gay and lesbian plaintiffs to succeed on discrimination claims when their sexuality manifests itself through visible nonconformity with gender stereotypes. Employers and workers would always have to remain on the watch for visible markers of homosexuality, if only to know who is and is not protected. Imagine a human resources (HR) department worried about the company's legal liability for firing, failing to hire, or allowing the harassment of a homosexual employee. Under current case law, HR workers would be well-advised to consider whether the employee “looked gay.” The employee's look and affect determines the legality of the company's actions. Companies need to know whether their employee is a Vickers or a Prowel.

The difference between this outcome and the color-blind ideal stems from the fact that, with regard to traits such as race, differential treatment is proscribed no matter what race the employee is. The law does not allow employers to discriminate against whites but not Hispanics, or blacks but not Asians. Imagine, counterfactually, a law that only protected Hispanics. In that world, the question of whether one is Hispanic would become even more salient than it is presently—especially to those who wanted to follow the law. As this Article demonstrates, this is precisely the state of affairs for perceived homosexuals. Employers are allowed to discriminate against “unmarked” homosexuals but not those who are marked or visible. The result: were Title VII to achieve all of its ends, race would become irrelevant in the workplace; the perceptible markers of homosexuality, on the other hand, would become even more salient—a necessary focus of law-abiding employers' attention.

2. Appearance discrimination

The dominant conception's tendency to privilege inner worth over outer appearances comes at a price: those discriminated against on the basis of their appearance often find little sympathy from courts, which have tended to give such discrimination no more weight than they give the “mere” appearances themselves. This has long been the case under Title VII, a fact that can be seen even in a joking exchange enshrined in the law's legislative history: when asked by a colleague whether it would “be considered . . . discrimination if a person wished to employ a good-looking stenographer instead of an unattractive stenographer,” a Senator replied, “I have always tried to exercise that kind of discrimination in my hiring practice.”

There is admittedly some tension here with the ideal of blindness just described. If antidiscrimination law aims for a metaphorical blindness in the workplace, it would make sense for it to prevent employers from acting on the basis of workers’ appearances. Yet the belief underlying antidiscrimination law—that appearances are superficial and mask one's inner worth—cuts the other direction as well. More often than not, it leads courts to wonder why they should get involved in a matter of no deep importance. Unlike race or gender, where one side (the prejudiced discriminator) insists on seeing difference and the other side (the discriminatee) wants color or gender blindness, appearance discrimination involves sight on both sides. Harrah's Casino wants Darlene Jespersen to start wearing makeup; Jespersen wants to come to work appearing as she has for the
previous twenty years. Faced with employers and employees who both care about something that courts find “trivial,” courts have largely abdicated the field. Which is to say, employers have won.

A recent book-length study of appearance discrimination offers as examples of unsuccessful claims: “Muslim men who refuse to shave, Muslim women who wear headscarves, Jewish men who wear yarmulkes, and African American women who braid their hair.” Similarly, “[g]rooming codes that require women to wear makeup or skirts, prevent men from wearing earrings, and restrict transsexuals' ability to alter their gender identity” also have survived challenge. In all of these cases, courts downplayed the importance of appearance in comparison to some weightier underlying “identity.” As a district court wrote in one of the most widely discussed of these cases, Rogers v. American Airlines, Inc., an employer's regulation of its workers' hair styles “has at most a negligible effect on employment opportunity. . . . *772 It concerns a matter of relatively low importance in terms of the constitutional interests protected by the Fourteenth Amendment and Title VII, rather than involving fundamental rights . . . .”

Against this backdrop, the privileging of appearances in the cases discussed in Part III becomes all the more surprising. Consider the contrast between those cases and Rogers, which involved an African-American airline operations agent who had been told not to wear her hair in “corn row” braids at work. Dismissing Rogers's sex and race discrimination claims, the court distinguished braids from Afros, which the court noted might be protected under Title VII. According to the court, braids are an easily changed artifice that is only “socioculturally associated” with race, while Afros are natural and immutable. The result is the exact opposite of the cases in Part III, in which sociocultural associations—visible stereotypes—were precisely what mattered to the courts. We need not essentialize sexuality or settle debates about “nature versus nurture” in order to feel that Prowel's clothing choices, clean car, discussion topics, and even his “pizzazz” were less “natural” or “immutable” than his sexual orientation.

Yet the Prowel court, like the courts in Vickers, Dawson, Rene, and others, offered the possibility of protection from appearance-based stereotypes rather than those concerning Prowel's and other plaintiffs' affective preferences.

None of this is to suggest that courts have been justified in trivializing appearance claims under Title VII. Nor is it to suggest that Prowel did not deserve the protection he received for his appearance and affect, however anomalous that protection may be within ordinary Title VII doctrine. The worry I raise, and return to in the following section, stems not from the fact that certain appearance claims have succeeded, but from the fact that, in cases brought by homosexuals, only such claims have succeeded. Surprisingly, the distinction courts have drawn threatens to revive the kind of status-conduct distinction regarding homosexuality that the Supreme Court has seemingly disclaimed. More surprising still, courts do so not to protect status—that which the discarded distinction was meant to privilege—but, instead, to protect conduct.

3. Covering

The alleged immutability of Afros as compared to braids, as well as the former privileging of status over conduct, both highlight another driving concern of antidiscrimination law: protecting people from treatment based on traits beyond their control. The distinction between immutable and chosen traits provides additional support for courts' acceptance of appearance and grooming rules. The deep unfairness of penalizing employees for traits, like race or gender, that are largely beyond their control seems lessened when the traits are chosen. Appearances are seen to be the result of choices, and, as just discussed, trivial choices at that.

Kenji Yoshino has influentially argued, however, that this refusal to protect chosen appearances incentivizes certain choices about appearance. In short, it gives those whose appearance or behavior would subject them to discrimination a strong push toward assimilation. In Yoshino's words: “[C]ourts will not protect mutable traits, because individuals can alter them to fade into the mainstream, thereby escaping discrimination. If individuals choose not to engage in that form of self-help, they must suffer the consequences.”

This “assimilationist bias” in antidiscrimination law works hand-in-hand with the law's ideal of blindness; to stop seeing something, one can either close one's eyes or cover things up. Antidiscrimination law demands both. As Yoshino describes it: “[T]he law's dominant reaction to difference has been to instruct the mainstream to ignore it and the outsider group to mute
This Article has already shown how courts' focus on appearances in sexuality cases sits awkwardly with the ideal of blindness. These cases are no less unusual for the way they implicitly reject the demand that outsider groups mute their differences.

“Covering demands,” as Yoshino calls them, are pressures on outsiders to refrain from flaunting their difference; someone who covers makes it “easy for those around her to disattend her known stigmatized trait.” Covering differs from “passing,” whereby gays and lesbians “present [themselves] to the world as straight,” in somewhat the same way as sensory perception differs from cognitive perception. Passing turns on what others know; someone who passes does not want to be perceived (that is, thought of) as gay. To cover one’s sexuality is instead to downplay it; to help others ignore or forget what they know. Thus, covering often involves making something that is known less visible. It primarily affects visual rather than cognitive perception.

Discussing examples of coverable traits, Yoshino notes that “[e]ffeminate men and masculine women are often assumed to be homosexual, suggesting that gender and orientation are bundled in popular consciousness--to be gender atypical is to be orientation atypical and vice versa.” Yet Yoshino asserts that “[e]veryone knows the flaunting homosexual will generally get less sympathy than the discreet one.” Surveying employment and parenting cases, Yoshino argued in 2002 that “[t]he individuals whose homosexuality, even if avowed, was ‘discreet’ or ‘private’ kept their jobs or children,” while “[t] hose whose homosexuality was ‘notorious’ or ‘flagrant’ were not so fortunate.” The survey of cases in Parts II and III of this Article points to the exact opposite conclusion. In those cases, “flagrant” gays like Prowel and Rene received protection, while those, like Vickers, who were more discreet saw their cases dismissed. In recent Title VII case law, the more pizzazz the better.

The demand that “individuals act according to the stereotypes associated with their group” is a phenomenon Yoshino himself identifies and opposes; he calls it “reverse-covering.” But Yoshino writes of his sense--admittedly impressionistic--that the dominant group more routinely requires reverse covering in the sex/gender context than in the orientation or race contexts. This may be because stereotypically feminine traits are more likely to be valued as appropriate to at least some spheres of life. The stereotypically feminine attributes of nurture, empathy, intuition, and so forth, were and are valued in the domestic sphere. In contrast, there are fewer spheres in which traits stereotypically associated with homosexuals or racial minorities are valued.

Writing in 2006, Yoshino noted “only one legal context in which such reverse-covering demands have been made [of gays and lesbians]--the immigration context, in which gay asylum seekers have to prove they are ‘gay enough’ to establish a colorable fear of persecution.” This Article shows that as a descriptive matter, Yoshino's observations about reverse covering are no longer accurate in the Title VII context. His theory cannot account for courts' recent reliance on appearances and their pressure on gays to reverse cover.

Yoshino's analysis of covering thus presents a third tension with the case law described in this Article. To recall, the first was that the privileging of visibility in sexuality discrimination cases runs counter to the dominant conception of American antidiscrimination law, which valorizes blindness as a way of valuing inner worth over outer appearances. Those who endorse the dominant conception or adopt its rhetoric--and I do neither here--will be hard-pressed to justify the line (visibly) drawn in the sexuality cases.

The second tension was one of doctrine: ordinarily, appearance discrimination goes largely unprotected, since appearances are often seen as (1) superficial and (2) chosen rather than immutable. Recent victories for plaintiffs who are seen as gay--and thus have appearance discrimination claims of a sort--thereby stand out from the surrounding case law. Given courts' frequent disparagement of appearance-based claims, their recent sympathy for visible, and only visible, signs of homosexuality is baffling.
Finally, Yoshino offers a descriptive doctrinal account and a prescriptive theory both of which are in tension with the cases collected in this Article. Where Yoshino finds an assimilationist bias in antidiscrimination law, these cases show covering to be a sure path to a failure. And insofar as these cases promote reverse covering, they fail Yoshino's normative demands as well, for he sees covering and reverse covering as equal threats to individual autonomy. Just as someone who downplays his or her sexuality fails to act authentically, so too does someone who feels pressure to conform to, or even play up, behaviors stereotypically associated with one's sexuality. Reverse covering pressures are like minstrelsy in their demand that a group conform to stereotypes and thereby appear and act in ways chosen not by themselves but by a dominant group, allowed to sit back and watch.

Were it not for worries of this sort, it might be tempting to dismiss these cases' tensions with existing theory and doctrine, or to ignore the fact that no court has ever provided a reasoned explanation for drawing a line between cognitive and sensory stereotypes regarding homosexuals. After all, no matter their reasoning, courts have been granting some gay and lesbian employees protections that were previously lacking under Title VII. Protecting some workers, even on dubious grounds, might well seem preferable to forgoing protection altogether in the name of theoretical purity. Yet we might feel otherwise if the dividing line that courts have drawn around the protected subset of workers induced broader harms. Yoshino's work suggests the possibility that, by encouraging reverse covering, courts might be endangering the autonomy of those they purport to protect.

The worry is that courts are saving plaintiffs from gender stereotyping only by forcing them into even more narrow stereotypes. The following section argues that this is only one of the potential harms the courts' current line-drawing might cause, both in the workplaces that Title VII directly regulates and in society at large.

B. The Effects of Perceptibility

The Title VII dilemma described in Part I has prompted courts to search for some way to avoid equating the gender stereotyping of perceived homosexuals with sexual orientation discrimination. But even once we recognize why courts might want to stop short of fully writing sexuality into Title VII, the question remains: Why have courts drawn the particular line that they have? Why have they privileged appearances in cases brought by plaintiffs perceived as gay--and solely in those cases?

If antidiscrimination law is a “social practice that acts on other social practices,” as Robert Post argues in his “sociological account” of antidiscrimination law, then the relevant question is how the practice that has arisen in Title VII case law promises to transform the “social identities” of the gay and lesbian employees it touches. As Post writes, “[t]he sociological account does not ask whether ‘stereotypic impressions’ can be eliminated tout court, but rather how the law alters and modifies such impressions.” For Post, then, it comes as no surprise that courts are not actually busy striking out “the entire spectrum” of gender stereotyping. The challenge is to articulate the principles that guide, or should guide, what interventions courts do make into the social practice of gender stereotyping. Instead of seeking blindness, we need to look instead at the ways the law changes how we see.

The question of courts' motivation in drawing the line between visible and cognized stereotypes can thus be more usefully phrased as a question about effects. Instead of psychologizing about judges, we can instead look at the likely effects of their judgments. Phrasing the question in terms of effects rather than intentions allows us to consider further the worry raised at the end of the last section: that the line of cases discussed in Parts II and III might prove not just theoretically or doctrinally peculiar, but actually harmful in practical terms. The subsections below trace three ways in which the appearance/cognition distinction that drives courts' gay stereotyping decisions might embody, or even reinforce, the homophobia that courts presumably hoped to counteract. Courts have recently begun extending Title VII's protections to a certain portion of gay and lesbian plaintiffs, but at what cost?

1. Sidestepping disgust

Viewed against a longstanding philosophical tradition in which the intellect has routinely been ranked above the senses, courts' privileging of that which is seen over that which is thought may appear counterintuitive. It makes more sense, however, when the thing being thought concerns sex, and particularly gay sex. The so-called “ick factor” often associated with thoughts of gay sex arises “not because [people] can't imagine it, but because they can and do.” And insofar as resistance...
to equal rights for gays and lesbians may be motivated by disgust at their sexual practices, such disgust does not come from seeing effeminate body language or a butch hairstyle; it derives from the thought of what two men or two women might do in bed. Subordinating thought to vision thus allows courts, like employers and their straight workers, to avoid the disgust that these thoughts apparently provoke.

Mary Anne Case has described courts' receptivity, even twenty years ago, to claims made by gays whose partners were dead, severely disabled, or imprisoned. What those plaintiffs shared were “long-term relationships from which the sexual aspect ha[d] perforce been removed.” The opinions in Prowel and Vickers reveal a similar dynamic. Strangely, it is Prowel, the admitted homosexual, who emerges from his case's statement of facts largely desexualized. His crossed legs, clean car, and talk of culture reflect pop culture's vision of a stereotypical gay best friend --Will & Grace's Jack--rather than a fully sexual being. On the contrary, Vickers, despite never revealing his sexuality, is suggestively described as vacationing with another man in Florida, where their unseen activities are left to the imagination.

Tobias Barrington Wolff recently described the way that society, and courts in particular, have treated gay sex as something not to be talked about:

It is not merely incidental that the castigation of same-sex intimacy in Western cultural history has been accompanied by the urgent command that such intimacy never be discussed--that it was ‘a crime not fit to be named,’ ‘the very mention of which is a disgrace to human nature,’ as Blackstone and Chief Justice Burger would have it.

For Wolff, not mentioning same-sex intimacy is part of a larger effort to efface it altogether--to pretend that it does not exist.

Indeed, the very language of courts' opinions joins this effort, even in cases that provide protection to gay plaintiffs. One of employment-discrimination law's most progressive recent developments, the conclusion that sexual orientation is “irrelevant for purposes of Title VII,” itself restates the fiction that these cases have nothing to do with homosexuality. Cases like Prowel discuss winning claims in terms of gender stereotyping even when those stereotypes are inescapably coded as “gay.” Doing so allows them to sidestep the disgust engendered by thoughts of gay sex. By focusing on appearances rather than sexual behavior outside of work, courts create an appearance of their own. They make it look as if they have not used employment-discrimination law to force employers to stomach the presence of employees who provoke their disgust. The line of cases discussed in Part III makes it look as though, barring Congressional intervention, gays and lesbians will remain unprotected under Title VII; meanwhile, something else-- nonconformity with gender stereotypes--allows a few plaintiffs, who just happen to be gay, to win their cases. This, of course, is a fiction, for all the reasons already claimed. But it is a fiction that reenacts the “erasure” of gay sexuality that Wolff has described as the very “strategy around which antigay and anti-transgender policies are structured.”

2. Divorcing Title VII from broader gay rights efforts

Courts' emphasis on appearances and affect does more than sidestep potentially uncomfortable thoughts about homosexuality. It also segregates Title VII case law from broader efforts being made in the courts on behalf of gay rights.

One fact is inescapable in the cases described in Part III: courts have failed to protect what some have called “normal” gays, that is to say, those who are the most assimilationist or “straight acting.” It is striking that in Title VII cases, courts have failed to support the very subset of gays who have elsewhere made the most pressing demands on judges to move ahead of the political branches on gay rights issues. By rewarding gay litigants in Title VII cases when they differ visibly from the “normal,” courts disconnect employment-discrimination claims from broader equality arguments being made elsewhere in the law, particularly in areas like marriage and parenthood.
Consider in this connection Yoshino's description of “the public face of gay rights”: the “straight-acting” men and, I might add, the long-partnered lesbian couples often presented as plaintiffs in gay rights litigation. As Yoshino observes, “progay litigation and public relations are driven by the same imperative—present gays as identical to straights in all ways except orientation, as if conducting a controlled experiment.”

In litigation for same-sex marriage, against the Defense of Marriage Act and, previously, “Don't Ask Don't Tell,” or on behalf of adoption rights for gays and lesbians, gay individuals or couples seek equal inclusion in a mainstream institution: marriage, the military, and parenthood. Given that in each of these cases, the plaintiffs made assimilationist demands, it is hardly surprising that litigators would present plaintiffs who already look the part. At heart, these cases share the logic of the dominant conception of antidiscrimination law. They aim for an equality which is at the same time an erasure of difference. By presenting gays and lesbians who are otherwise identical to heterosexuals, these cases comprise part of a larger project to make people stop “seeing” others through the lens of sexuality.

The recent Title VII cases clearly have no place in this project. As this Article has shown, the case law under Title VII has the exact opposite effect: it encouraged employers and fellow employees to see people, literally, in terms of their sexuality. The plaintiffs who have won their gender stereotyping claims are those whose “otherness” is literally visible. They are gays and lesbians who flaunt, not ones who might be mistaken for “normal.” They are precisely not the plaintiffs of gay rights litigation in general. By recognizing and protecting appearances, courts have found a way to grant employment-discrimination claims brought by gays and lesbians without treating those claims as identity-based. Courts have protected a group united not by their sexual orientation, otherwise indistinguishable from the majorities who enjoy broader rights.

3. Creating difference

Even more troubling than these potential political effects are the pressures these cases place on workers and workplaces. By protecting appearance and affect, courts provide incentives for gay employees to flaunt. Yoshino, as we have seen, worries that this will lead to inauthenticity. But the problems run still deeper.

Critics of Yoshino, and of diversity-based theories of antidiscrimination law in general, have argued that worries about inauthenticity require some positive account of authenticity, one that does not itself rely on stereotypes about what it means to be a member of a particular group. Vicki Schultz has alleged that diversity proponents too often assume that “authentic” group differences are exogenous to the workplaces regulated by Title VII; instead, she argues, differences among groups are in many ways produced within the workplace (and, of course, other institutions as well).

According to what Schultz terms the “disruption model” of antidiscrimination law, discrimination consists of “assigning individuals to dichotomous in-groups and out-groups, and making that group status salient in a particular institutional context.” The law's goal, she argues, should be to “disrupt this process of creating differences.”

Troublingly, the approach taken by courts in the cases discussed in this Article actually contributes to, rather than disrupts, the production of difference in the workplace. By incentivizing workers to flaunt and requiring employers to attend to gay-coded appearance and affect, courts reinforce the perceived differences separating gay and straight employees. They promote a state of affairs, in fact, in which those differences are literally made visible.

* Schultz writes of practices that “assign[] notions of what it means to be a member” of a particular group and then “structur[e] material benefits and social interactions in such a way as to confirm the existence of such presumed group-based differences.” It is hard to think of a better description of what courts have done in cases like Prowel. In the perceptible stereotyping cases described in Parts II and III, courts offer a list of traits, which, if exhibited in an “observable way at work,” lead to the material benefits offered by Title VII.
The problem is not just that, in order to receive protection from stereotyping, workers have to conform to stereotypes catalogued in court opinions like Prowel. The problem is also that by encouraging this practice, courts widen the gap even further, and more visibly, between in-groups and out-groups in American workplaces.

4. Parallels to the forms of homophobia

William Eskridge has described three mutually reinforcing forms that homophobic prejudice often takes. In its hysterical guise, homophobes think of gays and lesbians as dirty people doing disgusting things. As an obsessional prejudice, homophobes fear that gays are conspiring against them, seeking advantage. In its narcissistic form, homophobes put homosexuals in the category of “‘the Other,’ a group whose differentness helps the homophobe define her or his own sexual identity.” These three forms of homophobia correspond tightly--and troublingly--to the three worries just canvassed.

First, disgust. Thoughts of unseen sexual acts not only drive homophobia in its hysterical form, but perhaps also help to explain why courts have taken such anomalous refuge in appearances in cases involving homosexuality. Even if squeamishness about gay sex does not motivate courts' reasoning in these cases, the opinions themselves continue a history in which gay sexuality is treated as unmentionable. The opinions' insistence on categorizing the claims as instances of gender stereotyping rather than sexuality simply reenacts this silencing.

Second, by privileging the subset of Title VII plaintiffs who are visibly at odds with those generally bringing assimilationist gay rights claims, courts appear responsive to worries, expressed most often in marriage debates, that gays and lesbians are conspiring for “special rights.” Separating the progress made by a certain type of gay plaintiff in employment-discrimination law from that being made elsewhere in the law allows courts to sidestep the concerns of those who see protections like those enshrined in ENDA as a stepping-stone to same-sex marriage. Doing so may minimize backlash, but insofar as ENDA-like protections are a stepping-stone to broader gay rights, courts may be hampering that movement. Moreover, the concerns of conspiracy theorists--those who see gays and lesbians as conspiring for rights--are reinforced and even embodied by the many courts that write of homosexuals trying to “bootstrap” their way into Title VII.

Finally, by incentivizing perceptible differentiation, courts contribute to the “othering” of gays and lesbians. This worry is perhaps the most troubling one of all, for it suggests that by granting a subset of gays and lesbians protection under Title VII, courts might actually be bolstering perceived differences between gay and straight workers, increasing rather than disrupting the salience of sexual orientation in the workplace, and reinforcing an us-versus-them mentality in which balkanized factions of workers compete in what is seen as a zero-sum game.

*786 Conclusion: ENDA and the Future

If the case law as it currently stands poses the threats just described, what is to be done? In one sense, this is the least interesting question of this Article, for the answer is obvious. Were the House of Representatives to join the Senate in passing ENDA or a similar law, the Title VII dilemma would dissolve, having lost its second premise: Congress's failure to explicitly protect sexual orientation. Passing ENDA would offer gay and lesbian workers protection from discrimination that the First Circuit has called a “noxious practice, deserving of censure and opprobrium,” that the Second Circuit has castigated as “morally reprehensible whenever and in whatever context it occurs,” and even the Ninth Circuit's dissenters in Rene described as “appalling and deeply disturbing.”

This Article's goal has not been to argue for ENDA, however. In fact, the preceding argument enters that debate only indirectly. The Article's aim has been instead to correct the standard story told about gay workers and Title VII to show that, in cases involving perceived homosexuality, courts have settled on a strange and unstable compromise: protecting only those who look or act sufficiently “gay” at work. This is a result that should come as a surprise to most, for it belies the conventional wisdom that sexuality claims uniformly fail under federal employment-discrimination law. Moreover, it runs counter to standard theoretical and doctrinal stories about the role of appearances within antidiscrimination law in general.
What this discussion shows is that courts, faced with the Title VII dilemma, yet uncomfortable with the treatment some gays and lesbians experience in the workplace, have crafted a largely unnoticed, de facto ENDA of their own. It is an ENDA that no imaginable Congress would pass. And as Part IV suggested, it is quite possibly an ENDA that we should not want.

What makes this Article an indirect intervention into the ongoing debate over the real ENDA is its revelation that the choice facing Congress is not, as the standard story would have it, between ENDA and a status quo in which gays and lesbians get no protection under Title VII. That description of the status quo is simply no longer true. In the federal courts today, “visible” homosexuals--those who look or act sufficiently gay in the eyes of coworkers and courts--often already do get protection.

I do not know, frankly, how this revised understanding of the status quo might affect the debate over ENDA were it better understood. Would conservatives still want to preserve the status quo under Title VII if they knew that employers can discriminate against assimilationist gays, but not ones who flaunt? Would liberals redouble or relax their efforts for full protection, knowing that some protection is already on offer, but that this might, in some ways, be worse than no protection at all? It is quite possible that the current state of the law in this area is one that no party in the debate would choose. That is an important point to realize as the choice between ENDA and the status quo continues to be debated.

This Article's argument also raises a warning about ENDA itself. ENDA proscribes employment discrimination based on “actual or perceived sexual orientation or gender identity”--where “sexual orientation” is defined as “homosexuality, heterosexuality, or bisexuality,” and “gender identity” is defined as “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth.”

These provisions make clear that, after ENDA's passage, cases like Brian Prowel's could proceed directly as sexuality discrimination claims rather than claims of gender stereotyping. Or, depending on how courts treat gender stereotyping claims after ENDA, someone like Prowel could perhaps bring an intersectional claim as an effeminate gay man. Whether courts will continue reading “sex” in Title VII expansively once sexuality and gender identity (including gender-related appearance and mannerisms) are covered elsewhere in federal law is an open question, however. Perhaps Prowel's intersectional claim would not be sex (Title VII) plus sexual orientation (ENDA), but rather sexual orientation and gender identity, both as covered under ENDA.

But what about Christopher Vickers? Were he actually gay, Vickers's claim would indisputably be covered under ENDA. But even though Vickers was thought to be gay, his actual sexuality was never revealed either at work or in court. Read straightforwardly, ENDA would seem to protect Vickers through the phrase “actual or perceived sexual orientation,” repeated thirteen times in the bill. This should be read to mean that ENDA protects employees from discrimination based on what others think their sexual orientation to be. That is to say, “perceived sexual orientation” in ENDA undoubtedly concerns thought, not vision. This is the very assumption proven wrong, however, in Vickers and the many cases like it. Current Title VII case law more often offers a literalist reading of perception instead, however bizarre the results. Were ENDA's language about “perceived sexual orientation” read literally, employees would be protected if they were gay, or if they were not gay but looked gay. Yet Vickers and others merely thought to be gay might still fall through the cracks. This may sound absurd, but it is only slightly stranger than the current state of affairs in which gay employees must look or act sufficiently gay to receive protection under Title VII. The pervasiveness of perceptibility in ENDA makes it all the more possible that courts' literal reading of perception could linger. As so often with questions of visibility, we might just have to wait and see.

Footnotes

a Acting Professor of Law, UC Davis School of Law. Many thanks to Vicki Schultz, Bill Eskridge, Judith Resnik, Courtney Joslin, Tobias Wolff, Simon Stern, Allison Tait, Bo Burt, Dennis Curtis, Fiona Doherty, Justin Collings, Farah Peterson, Kevin Lamb, Daniel Winik, Helen O'Reilly, Matt Lane, and audiences at UC Davis School of Law, Yale Law School, the 2013 Lavender Law Junior Scholars Forum, and the AALS's 2014 New Voices in Gender Studies Panel. Thanks also to Dean Kevin Johnson and the UC Davis School of Law for financial support given to this project in the summer of 2013.

1 Friedrich Schiller, Mary Stuart 43 (Peter Oswald, trans., Oberon Books Ltd. 2005) (1800).
See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (“Like other courts, we have... recognized that a gender stereotyping claim should not be used to ‘bootstrap protection for sexual orientation into Title VII.’”) (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 330 (9th Cir. 1979) (“Appellants now ask us to employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.”), overruled by Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001); Pagan v. Holder, 741 F. Supp. 2d 687, 695 (D.N.J. 2010) (“This is a hollow attempt to... recast a sexual orientation claim as a gender stereotyping claim.... The Court will not permit Plaintiff to bootstrap protection for sexual orientation into Title VII by re-packaging her sexual orientation claim as gender stereotyping.”).


See 42 U.S.C. §2000e-2(a)(1) (protecting workers from discrimination “because of... race, color, religion, sex, or national origin.”) For a discussion of courts' reluctance to view sexuality claims as sex-based claims, see infra notes 33-34 and accompanying text.

See infra Part I.

See, e.g., Edward J. Reeves & Lainie D. Decker, Before ENDA: Sexual Orientation and Gender Identity Protections in the Workplace Under Federal Law, 20 Law & Sexuality 61, 69-73 (2011) (citing several recent cases, beginning in 1989, in which federal courts held in favor of plaintiffs alleging employment discrimination based on a failure to adhere to traditional gender stereotypes); Kristin M. Bovalino, Note, How the Effeminate Man Can Maximize His Odds of Winning Title VII Litigation, 53 Syracuse L. Rev. 1117, 1118 (2003) (noting “[a] recent surge of cases” that illustrate how courts have become increasingly willing to recognize men's claims of gender stereotyping).

Cf. Hannah Arendt, The Life of the Mind 110 (Mary McCarthy ed., Harcourt, Inc. 3d ed. 1981) (1971) (“[F]rom the outset in formal philosophy, thinking has been thought of in terms of seeing....”). Arendt contrasts “the Greek vision of the true” with “the Jewish tradition of a God who is heard but not seen.” Id. at 111.

Cf. Grannis v. Ordean, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”).

Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. §§4, 9 (as passed by Senate, Nov. 7, 2013) (emphasis added) (proscribing several forms of discrimination based on “actual or perceived sexual orientation or gender identity”); cf. 18 U.S.C. §249(a)(1) (defining hate crimes as “[o] ffenses involving actual or perceived race, color, religion, or national origin”); 42 U.S.C. §12102(3) (including both “actual [and] perceived physical or mental impairment” within the Americans with Disabilities Act).


See Kenji Yoshino, Covering, 111 Yale L.J. 769, 850 (2002) (asserting that in both the civil-service employment and custody/visitation contexts, gays and lesbians who kept their homosexuality “discreet” were more likely to keep their jobs or children, compared to those whose homosexuality appeared “open” or “flagrant”); see also infra Part IV.A.3. (explaining Yoshino's covering thesis in detail).
See infra Part IV.A.1 (discussing the metaphor of a “color-blind” Constitution and antidiscrimination law’s traditional attempt to transcend visible characteristics in order to make judgments based on individual merit and intrinsic worth).

See infra Part IV.A.2 (discussing the notorious failures of Title VII challenges to grooming codes, uniform requirements, and other appearance regulations); see also Deborah L. Rhode, The Beauty Bias: The Injustice of Appearance in Life and Law 120-22 (2010) (providing a more comprehensive account of the failures of appearance claims under Title VII).

See, e.g., Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“[T]he Court has chosen to deregulate the [administration of the death penalty], replacing, it would seem, substantive constitutional requirements with mere esthetics....”); Welch v. Swasey, 214 U.S. 91, 107 (1909) (describing a Massachusetts Supreme Judicial Court decision “which [held] that the police power cannot be exercised for a merely aesthetic purpose”). Although the Supreme Court once described “[a]esthetic and environmental well-being” as “important ingredients of the quality of life in our society,” Sierra Club v. Morton, 405 U.S. 727, 734 (1972), the Court’s more recent standing cases have listed “mere esthetic interests” as the flimsiest injuries still, perhaps barely, cognizable under Article III, see, e.g., Summers v. Earth Island Inst., 555 U.S. 488, 494 (2009) (allowing for standing when a harm “affects the recreational or even the mere esthetic interests of the plaintiff”) (emphasis added)). The term “aesthetic” recurs as an insult throughout Justice Thomas’s dissent in Grutter v. Bollinger, 539 U.S. 306 (2003), in which he labeled a law school’s interest in a racially diverse student body “aesthetic” and thus “constitutionally irrelevant” and “ineffective[].” Id. at 354 n.3 (Thomas, J., concurring in part and dissenting in part).

Robert Post, Prejudicial Appearances: The Logic of American Antidiscrimination Law, 88 Calif. L. Rev. 1, 16 (2000) (emphasis omitted). Post does not endorse the “dominant conception” he describes, arguing it “do[es] not correspond to the actual shape of the law.” Id. at 23. This Article provides additional support for Post’s descriptive claim.


Kenji Yoshino, Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,” 108 Yale L.J. 485, 487 (1998) (describing “assimilationist bias” as the judiciary’s withholding of protection from groups characterized by traits that may be changed or hidden, which encourages individual members of these groups to assimilate).


579 F.3d 285 (3d Cir. 2009).

453 F.3d 757 (6th Cir. 2006).


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28 The most recent attempt is the Employment Non-Discrimination Act of 2013, S. 815.

29 The first reference to “perceived” sexual orientation appeared in 1994, in what was also the first proposed standalone law. See Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. §18(12) (1994) (defining “sexual orientation” to include “lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations”); see also Jill D. Weinberg, Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act, 44 U.S.F. L. Rev. 1, 9 n.36 (2009) (noting that all later versions of ENDA incorporated “[p]erceived sexual orientation discrimination”).


32 608 F.2d 327 (9th Cir. 1979), overruled by Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001).

33 Id. at 329-30 (footnote omitted); see also Smith v. Liberty Mut. Ins. Co., 395 F. Supp. 1098, 1101 (N.D. Ga. 1975) (“Whether or not the Congress should, by law, forbid discrimination based upon affectional or sexual preference of an applicant, it is clear that the Congress has not done so.” (internal quotation marks omitted)), aff’d, 569 F.2d 325 (5th Cir. 1978). In DeSantis, the Ninth Circuit literally conflated a sexual orientation claim with a claim of gender non-conforming appearances: decided together with DeSantis, whose plaintiff was gay, was a second case, Strailey v. Happy Times Nursery School, Inc., whose plaintiff was fired from his teaching position “because he wore a small gold ear-loop to school prior to the commencement of the school year.” DeSantis, 608 F.2d at 328. The Ninth Circuit held that “discrimination because of effeminacy, like discrimination because of homosexuality..., does not fall within the purview of Title VII.” Id. at 332. The Ninth Circuit has since overruled the latter holding in the wake of Price Waterhouse. See Nichols, 256 F.3d at 875.

34 Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (calling the law “well-settled in this circuit and in all others to have reached the question”); see, e.g., Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002) (“Title VII does not... provide for a private right of action based on sexual orientation discrimination. As such, to the extent [the plaintiff] seeks to have this court judicially amend Title VII to provide for such a cause of action, we decline to do so. It is wholly inappropriate, as well as constituting a clear violation of the separation of powers, for this court, or any other federal court, to fashion causes of action out of whole cloth, regardless of any perceived public policy benefit.”). A similar logic, ascribing to Congress's inaction on ENDA an affirmative intent not to extend Title VII's protections, has led courts, until recently, to deny claims brought by transsexual and transgender plaintiffs. Compare Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”), with Schroer v. Billington, 577 F. Supp. 2d 293, 306-07 (D.D.C. 2008) (complaining that “courts have allowed their focus on the label ‘transsexual’ to blind them to the statutory language” of Title VII), and Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995, at *11 (EEOC Apr. 20, 2012) (“[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on sex,’ and such discrimination therefore violates Title VII.”). For a discussion of the meaning of Congressional inaction, see William N. Eskridge, Jr., Interpreting Legislative Inaction, 87 Mich. L. Rev. 67 (1988).
See, e.g., Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (“Congress has continued to reject these amendments even after courts have specifically held that Title VII does not protect transsexuals from discrimination.”).


Id.

490 U.S. 228 (1989).

Id. at 231-32, 241, 250 (plurality opinion) (internal quotation marks omitted).

Id. at 234.

Id. at 235.

Id. (internal quotation marks omitted).

See id. at 231 (plurality opinion) (written by Justice Brennan and joined by Justices Marshall, Blackmun, and Stevens); id. at 258 (White, J., concurring in the judgment); id. at 261 (O'Connor, J., concurring in the judgment).

Id. at 251 (second alteration in original) (emphasis added) (quoting City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). Justices White and O'Connor concurred in the judgment, and neither of their opinions suggests any disagreement with the plurality's “entire spectrum” language. It is worth noting as well that the “entire spectrum” claim garnered a majority of the Court in Manhart, the case which was quoted by Justice Brennan's Price Waterhouse opinion and which was reaffirmed by five justices, with the words “entire spectrum” italicized, in County of Washington v. Gunther, 452 U.S. 161, 180 (1981).

In 1995, six years after Price Waterhouse, Mary Anne Case was still envisioning Title VII protections for effeminate men as a future prospect. See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 4 (1995) (arguing that Title VII language and case law “already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts,” and that “a reconceptualization of the existing law” could allow courts to enforce such protection if they applied the statute correctly); see also Katherine M. Franke, The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender, 144 U. Pa. L. Rev. 1, 96 (1995) (“Notwithstanding the direction in which Price Waterhouse seems to urge equality jurisprudence, many courts are reluctant to relinquish the conventions that femininity belongs to women and that masculinity belongs to men.”). Also in 1995, Francisco Valdes could categorically claim that “stereotype analysis never has been applied successfully to sex/gender stereotypes perceived... as implicating... sexual orientation.” Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society, 83 Calif. L. Rev. 1, 316 (1995). At the time, the leading case involving the gender stereotyping of a gay plaintiff was Dillon v. Frank, No. 90-2290, 1992 WL 5436 (6th Cir. Jan. 15, 1992), in which the plaintiff “contended that he was... not deemed ‘macho’ enough by his co-workers for a man, and that the verbal abuse [he experienced] resulted from this stereotyping.” Id. at *5. Dillon lost, as he failed to show that “his practices” would have been deemed “acceptable in a female.” Id. at *9-10.

See, e.g., Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007) (interpreting Price Waterhouse as “establishing that Title VII's reference to ‘sex’ encompasses both the biological differences between men and women and gender discriminations, i.e., discrimination based on a failure to conform to stereotypical gender norms”).

As Mary Anne Case has sharply observed, the record before the Supreme Court included nothing about Ann Hopkins's actual appearance. Case, supra note 45, at 61. Thus, its holding cannot be limited to those who violate gendered appearance norms only to the degree that Hopkins may have. As Case has written: “the Court did not find as a matter of fact that Hopkins's appearance was appropriate for her sex; it held as a matter of law that it constituted sex discrimination for her employer to require that it be so.” Id. at 49 (footnote omitted).
Price Waterhouse, 490 U.S. at 234-35 (plurality opinion) (referring to comments made by Hopkins's coworkers that she was at times “abrasive[,]” “unduly harsh,” and “impatient”).

See, e.g., Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 113 (2d Cir. 2004) (holding that “stereotyping about the qualities of mothers is a form of gender discrimination” in an employment-discrimination suit brought by a school psychologist who was fired based on her employer's belief that she, as a new mother, could not devote the necessary time and effort to her career).

See Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78-79 (1998) (holding that Title VII prohibits discrimination against both men and women and that “nothing in Title VII necessarily bars a claim of discrimination ‘because of... sex’ merely because the plaintiff and the defendant... are of the same sex”).

See generally Case, supra note 45 (“[S]hocking though it may be to some sensibilities, not only masculine women such as Hopkins, but also effeminate men, indeed even men in dresses, should already unequivocally be protected under existing law from discrimination on the basis of gender-role-transgressive behavior.”).

Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); see also Rosado v. Am. Airlines, 743 F. Supp. 2d 40, 58 (D.P.R. 2010) (noting but declining to reach the Centola court's equation of homosexuality and gender nonconformity); Silvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187, 196 (“[H]omosexuality is censured because it violates the prescriptions of gender role expectations.... Real men are and should be sexually attracted to women, and real women invite and enjoy that attraction.”); Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 Geo. L.J. 1, 25 n.96 (1992) (“Price Waterhouse... implies that the use of the stereotype that men and women should be heterosexual violates Title VII.”); Valdes, supra note 45, at 315 (“The Court's broad language [in Hopkins and Manhart] suggests that a principled and informed application of this stereotype analysis would include stereotypes that... link social gender atypicality with minority sexual orientation.”); I. Bennett Capers, Note, Sexual Orientation and Title VII, 91 Colum. L. Rev. 1158, 1183 (1991) (arguing that if a firm refuses a male employee “partnership solely because he engaged in same-sex activity, the firm would be engaging in impermissible sex stereotyping, refusing him partnership because ‘real’ men do not have sex with men”); Zachary A. Kramer, Note, The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII, 2004 U. Ill. L. Rev. 465, 492 (describing as “the ultimate gender stereotype” the belief that “a person belies his or her gender when that person seeks to engage in a sexual relationship with a person of the same sex”).

Centola, 183 F. Supp. 2d at 410. Not all courts have adopted this rationale. See, e.g., Gilbert v. Country Music Ass'n, 432 F. App'x 516, 520 (6th Cir. 2011) (“For all we know, [the plaintiff] fits every male ‘stereotype’ save one--sexual orientation--and does not suffice to obtain relief under Title VII.”).

Compared to sexual orientation cases, gender identity cases have had far more success under stereotyping theories. See, e.g., Glenn v. Brumby, 663 F.3d 1312, 1317-18 (11th Cir. 2011) (agreeing with three courts of appeals and five district courts that have held that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype”); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004) (declaring that earlier decisions denying protection to transgender employees were “eviscerated by Price Waterhouse”).

See, e.g., Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) (“[Defendant] argues persuasively that every case of sexual orientation discrimination cannot translate into a triable case of gender stereotyping discrimination, which would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII.”).

See Centola, 183 F. Supp. 2d at 410; Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (“Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”).
In this regard, ENDA would be like the Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§12101-12213 (2012)), which added protections against disability discrimination outside of Title VII, rather than the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. §2000e(k)), which clarified that, within Title VII, “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”

See Jennifer S. Hendricks, Instead of ENDA, A Course Correction on Title VII, 103 Nw. U. L. Rev. Colloquy 209, 214 (2008) (“The same fate awaits lesbian plaintiffs if ENDA is passed as a stand-alone statute rather than as a gender amendment to Title VII: if straight women and gay men have fared well, the lesbian plaintiff will lose on both ENDA and Title VII counts.... [H]aving separate statutes with separate remedial structures will make it even more important for the factfinder to isolate the claims, parse the evidence more finely, and ignore intersectionality.”). For more on intersectionality, see infra note 90.

This issue is discussed more fully infra Part V.

Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1066-67 (7th Cir. 2003) (Posner, J., concurring).

Id. at 1067. Justice Brennan's plurality opinion in Price Waterhouse provides some support for Judge Posner's position: Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be evidence that gender played a part.

Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion). However, “remarks” play a different role in a failure-to-promote case, such as Price Waterhouse, than they do in a harassment case, such as Hamm. Where such remarks may simply provide evidence of discrimination in the former, in the latter kind of case they actually constitute the harassment that, if pervasive or severe enough, Title VII prohibits. See Hamm, 332 F.3d at 1062 n.3 (suggesting that harassment that is severe enough “to alter the conditions of the victim's employment and create an abusive working environment” would constitute a Title VII violation (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986))).

Hamm, 332 F.3d at 1068.


See Cary Franklin, Inventing the “Traditional Concept” of Sex Discrimination, 125 Harv. L. Rev. 1307, 1348 (2012) (asserting that “the EEOC found in its first year that complaints of ‘loss of jobs due to marriage or pregnancy’ outnumbered any other type of sex-based complaint,” partly due to the “tenacity” of flight attendants who challenged “airline policies that terminated the employment of stewardesses when they married or reached their early thirties”).

Of course, men were also explicitly told not to apply. Pan Am, for example, had a no male flight attendant policy until 1971, when the Fifth Circuit struck it down in Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir. 1971), itself a notable gender stereotyping opinion due to its refusal to credit customers’ stereotyped preferences to justify the claim that being female was a “bona fide occupational qualification” for airline flight attendants. Id. at 386, 389; see also 42 U.S.C. §2000e-2(e) (2012) (allowing sex-based employment decisions when “sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business”).

Hamm, 332 F.3d at 1066 (Posner, J., concurring) (emphasis added).

Id. at 1067.

Id.
Id. (“Inevitably a case such as this impels the employer to try to prove that the plaintiff is a homosexual (the employer's lawyer actually said at the argument that a plaintiff's homosexuality would be a complete defense to a suit of this kind) and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individuals' sexual preferences—to what end connected with the policy of the statute I cannot begin to fathom.”). In fact, this kind of inquisition is already common in Title VII cases, but not for the reason Posner identifies. While Posner discusses the sexuality of the plaintiff, cases in which same-sex harassment is alleged often turn on the sexuality of the defendant due to the Supreme Court's holding in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), which permits such claims to succeed “if there [is] credible evidence that the harasser was homosexual.”

See infra Part IV.A.1; see also Vicki Schultz, The Sanitized Workplace, 112 Yale L.J. 2061, 2063 (2003) (analyzing and challenging “[o]ne of American society's most cherished beliefs[:] that the workplace is--or should be--asexual”).

Hamm, 332 F.3d at 1067.

Id. at 1067-68.

See infra Part IV.B.3.

See, e.g., Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 292 (3d Cir. 2009) (“There is no basis in the statutory or case law to support the notion that an effeminate heterosexual man can bring a gender stereotyping claim while an effeminate homosexual man may not.”); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063-64 (9th Cir. 2002) (en banc) (plurality opinion) (“[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action.”).

See infra Parts II-III.

Gilbert v. Country Music Ass'n, 432 F. App'x 516, 520 (6th Cir. 2011).

See supra Part II.A (discussing Prowel, 579 F.3d 285).

David Halpern makes a similar point somewhat more vividly:

No one will look at you aghast... if you dare to imply that a guy who worships divas, who loves torch songs or show tunes, who knows all of Bette Davis's best lines by heart, or who attaches supreme importance to fine points of style or interior design--no one will be horrified if you imply that such a man might, just possibly, not turn out to be completely straight. David M. Halperin, How To Be Gay 9 (2012).

Prowel, 579 F.3d at 286.

Id.

Id. at 287.

Id. (offering Prowel's description of “the ‘genuine stereotypical male’ at the plant,” which he described as “everything I wasn't”).

Id.

See id.

Id.

Id.
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87  Id. at 287-88.
88  Id. at 291-92.
89  Id. at 292.
90  See 42 U.S.C. §2000e-2(m) (2012) (making it unlawful for sex to be a “motivating factor for any employment practice, even though other factors also motivated the practice”). For a discussion of the evidentiary requirements for submitting mixed-motive analysis instructions to the jury, see Desert Palace, Inc. v. Costa, 539 U.S. 90, 98-101 (2003), in which the Court held that, to obtain a §2000e-2(m) jury instruction, “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘race, color, religion, sex, or national origin was a motivating factor for any employment practice.”’ Id. at 101.
Zachary Kramer has described claims such as those brought in Prowel as “intersectional discrimination claims.” Zachary A. Kramer, Heterosexuality and Title VII, 103 Nw. U. L. Rev. 205, 216-17 (2009) (drawing on the extensive literature regarding claims, such as those brought by black women, in which multiple Title VII categories intersect). See generally Kimberlé Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color, 43 Stan. L. Rev. 1241, 1242-44 (1991) (offering a seminal discussion of intersectionality). It is unclear, however, that intersectionality—which usually refers to two protected characteristics—is the proper description of cases that, as here, involve one protected and one unprotected characteristic.

91  See supra note 90 and accompanying text.
92  See Prowel, 579 F.3d at 292.
93  Id. at 292-93.
94  Id. at 293; see also Recent Case, Third Circuit Issues Split Decision in Case Involving Gay Man's Harassment Claims --Prowel v. Wise Business Forms, Inc., 123 Harv. L. Rev. 1027, 1034 (2010) (“[The court's] dismissal of Prowel's religious nonconformity claim suggests that it still may not allow claims in which a person cannot provide specific evidence of discrimination occurring for reasons entirely distinct from an unprotected status.”).

95  See Prowel, 579 F.3d at 287.
96  Id.
97  See supra text accompanying note 85.
98  Prowel, 579 F.3d at 292.
99  Cf. Valdes, supra note 45, at 16 (“[T]here is no such thing as discrimination ‘based’ solely or exclusively on sexual orientation. On the contrary,... discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender (or on both),” (footnote omitted)).

100 See generally id. at 14-15 (describing the conflation of gender and sexual orientation); Yoshino, supra note 13, at 844 (“Whatever the source, there is clearly an enduring conventional wisdom that gender atypicality is a marker for homosexuality.”).

101 Prowel, 579 F.3d at 287.
See Prowel, 579 F.3d at 291 (“The record demonstrates that Prowel has adduced evidence of harassment based on gender stereotypes.”); see also id. at 291-92 (listing the violated stereotypes).

Id. at 291. Given the ambiguity, described below, in the way “effeminacy” is used both to indicate something feminine and as something insufficiently masculine, it may be that Prowel walked not like a stereotypical woman, but rather like stereotypical gay man.

See id. (contrasting these traits with the traits of “the typical male at Wise”).

Id. at 287, 291.

Id. at 287.

Id. at 292.


Id. at *6 (internal quotation marks omitted).

Id.

Id.

No. 07-5970, 2008 WL 4286662 (E.D. La. Sept. 17, 2008), aff'd per curiam, 349 F. App’x 900 (5th Cir. 2009).

Id. at *9.

Id. at *10.

Id.


Id. at 718 (first alteration in original) (citations omitted).

Id. at 715.

Id. at 714, 718.

Id. at 718.

453 F.3d 757 (6th Cir. 2006).

Id. at 759.


Vickers, 453 F.3d at 759.

Id. at 764.

Id. ¶ 110.

Id. ¶ 72.

Id. ¶ 25.

Id. ¶¶ 86, 90, 112.

Id. ¶ 20.

Id. ¶¶ 91-92.

Id. ¶ 33-37.

Id. ¶¶ 56, 61, 106.

Id. ¶ 47.

Id. ¶ 67.

Id. ¶ 71.

Id. ¶ 74.


See Complaint, supra note 124, ¶ 16 (“Dixon and Mueller began making sexually based slurs and discriminating remarks and comments about Vickers, alleging that Vickers was ‘gay’ or homosexual, and questioning his masculinity.”).

Id. ¶ 19 (emphasis added).

Vickers, 453 F.3d at 763; see also supra Part I (describing the dilemma).

Vickers, 453 F.3d at 764.

See id. (asserting that Vickers's claim attempts to “bootstrap protection for sexual orientation into Title VII” (quoting Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005))).

Id.

Id. The court hedged on how exactly Vickers violated gender stereotypes. Despite its language that “all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices,” id. at 764, the court also mentioned that “Vickers... was only teased about giving, not receiving fellatio, and about receiving anal sex,” id. at 763 n.2. The intriguing suggestion here is that Vickers might have run afoul of masculine stereotypes, not just by being perceived as gay, but also by being perceived as the non-dominant partner in his sexual relationships. The Vickers court thus considered, but rejected, the distinction between passive and active sexual partners that Ian Ayres and Richard Luedeman have recently suggested as a potential way out of the Title VII dilemma. See Ayres & Luedeman, supra note 25, at 716-18 & nn.2-5.

Vickers, 453 F.3d at 763.

Id.

Id. (emphasis added by Vickers court) (quoting Dawson, 398 F.3d at 218). Dawson is discussed infra Part III.
Vickers, 453 F.3d at 763 (emphasis added).

Id. at 764 (emphasis added).

See id. at 763.

Complaint, supra note 124, ¶ 250.

See Vickers, 453 F.3d at 763.

Id. at 767 (Lawson, J., dissenting). The dissent argued that Vickers had made sufficient allegations about gender nonconformity to survive a motion to dismiss on the pleadings. Id. at 768. Even so, the dissent's description of gender nonconformity as “less-than-masculine” troublingly suggests a stereotype of its own: masculinity is greater than, not just different from, characteristics not coded as masculine.

See generally Stanley Coren, Sensation and Perception, in 1 Handbook of Psychology 100, 100-27 (Donald K. Freedheim & Irving B. Weiner eds., 2d ed. 2013).

See Noah D. Zatz, Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity, 77 Ind. L.J. 63, 111 (2002) (“The bar on enforcing sex- or race-based stereotypes applies regardless of whether the stereotype concerns behavior in or out of the workplace.”).

398 F.3d 211 (2d Cir. 2005); see Vickers, 453 F.3d at 763-64 (citing Dawson as “instructive” and stating that even though Vickers's sexuality was unknown, his claim was "precisely the kind of bootstrapping that the Dawson court warned against").

Dawson, 398 F.3d at 221.

365 F.3d 107 (2d Cir. 2004). The Dawson court ultimately distinguished Back on the basis that Dawson presented no triable issues of fact that her supervisors were concerned with gender nonconformity, or for that matter, sexuality. See Dawson, 398 F.3d at 221-23. It is notable in this regard that Dawson also lost her sexual orientation discrimination claims under state and local laws. See id. at 219, 221.

Back, 365 F.3d at 115.

Id.

Id. at 120 (alterations in original).

Id. at 115.

Dawson, 398 F.3d at 218. One district court recently, and unfortunately, transformed these “problems for an adjudicator” into a challenge facing litigants. See Maroney v. Waterbury Hosp., No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011) (“The Second Circuit has suggested that these gender stereotyping claims may be especially difficult for gay plaintiffs to bring.” (citing Dawson, 398 F.3d at 218)).

The set of cases was found using the following search string on Westlaw's “All Federal Cases” database: “title vii” & (“sex! stereo!” | “gender stereo!” | “gender noncon!”). The date range searched was April 1, 2006, to March 31, 2011. These dates were chosen based on when work on this Article began, not because they have any significance in themselves.
An additional search for the same five years' worth of gender or sex stereotyping opinions that mentioned Title IX but not Title VII did not yield any additional relevant cases.

See, e.g., Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc), rev'd, 131 S. Ct. 2541 (2011). Another important category of cases that were excluded pertained to same-sex harassment that did not involve gender stereotyping. Following Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), plaintiffs in these cases generally have to show that their harasser was motivated either by sexual desire or by hostility to the people of their gender in the workplace. The former route obviously brings up questions about homosexuality, which is why a good number of these cases showed up in this search. But, significantly, it is the harasser's sexuality, not the plaintiff's that is implicated. These post-Oncale cases are thus not among the perceived homosexual cases discussed below.


There are no Supreme Court cases in the set.


See Glenn v. Brumby, 663 F.3d 1312, 1313-14 (11th Cir. 2011); see also infra note 177 and accompanying text.

See infra Part III.B.

See infra Part III.C.

See, e.g., Glenn, 663 F.3d at 1313-14, 1321 (accepting a claim bought by a transgender plaintiff who was fired because her supervisor believed that her gender transition would be “inappropriate” and “disruptive” and would make fellow employees “uncomfortable”); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1218, 1224 (10th Cir. 2007) (rejecting a discrimination claim brought by a transgender plaintiff whose employer worried about her bathroom usage); Schroer v. Billington, 577 F. Supp. 2d 293, 300, 305 (D.D.C. 2008) (accepting a claim brought by a transgender plaintiff whose supervisor recoiled when shown a picture of what the employee would look like after transitioning).

In order to avoid conflating the discrimination faced by gay and transgender employees, I have put aside the third subset of cases--those brought by transgender plaintiffs--in order to discuss them more thoroughly in future work. However, it is worth noting that, surprisingly, the trend in transgender cases echoes the findings described below in the perceived homosexual cases. See infra Part III.B. In short, transgender plaintiffs tend to win if their discrimination stems from repulsion at their appearance; they lose if their case turns on something thought about (often obsessively) but not seen--namely, a penis in the women's bathroom. Compare Schroer, 577 F. Supp. 2d at 300, with Etsitty, 502 F.3d at 1225.

See, e.g., Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (indicating that “Vickers has declined to reveal whether or not he is, in fact, homosexual”); cf. Bovalino, supra note 8, at 1134 (“[G]ay plaintiffs bringing claims under Title VII should emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality.” (quoted disapprovingly in Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005))).
See, e.g., EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 458 (5th Cir. 2013) (en banc) (indicating that the harasser used anti-gay slurs because he considered the plaintiff insufficiently “manly,” not because he thought the plaintiff was gay).

This is different, of course, from saying that the cases do not raise questions about sexuality. In Willingham v. Regions Bank, No. 2:09-cv-02289, 2010 WL 2650727 (W.D. Tenn. July 1, 2010), for example, a private banker in Memphis was fired after she appeared wearing a bikini in Cruzin’ South, a magazine devoted to motorcycles and custom cars. Id. at *2. Though she claimed to have violated her employer’s stereotypical view that women should be conservatively dressed, id. at *3, the plaintiff also could be seen as flaunting her (hetero)sexuality. Significantly, the court relied on Vickers in granting summary judgment to the employer, reasoning that the plaintiff had not violated gender stereotypes at work. Id.

See supra notes 161-64 and accompanying text for discussion of Back v. Hastings on Hudson Union Free School District, 365 F.3d 107 (2d Cir. 2004) and cognitively perceived stereotypes concerning working mothers.

See supra Part II.A (Prowel); Part II.B. (Vickers).

See supra Part II.A-B.

See Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 287 (3d Cir. 2009); see also supra notes 81-84 (describing the characteristics that presumably made Prowel “look gay”).

Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 759 (6th Cir. 2006); see also supra text accompanying notes 124-26 (indicating that coworkers believed that Vickers, who never revealed his sexual orientation, was gay because he befriended another gay man).


An earring-wearing male, fired by the Happy Times Nursery School for his effeminacy, was among the losing plaintiffs in DeSantis v. Pacific Telephone & Telegraph Co., one of the best-known sexuality cases pre-dating Price Waterhouse. See DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 331-32 (9th Cir. 1979), overruled by Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001).


Id. at 450, 457-58.

See, e.g., Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (Pregerson, J., concurring) (noting that the plaintiff was mocked “because he walked ‘like a woman’”); Pratt v. Indian River Cent. Sch. Dist., 803 F. Supp. 2d 135, 152 (N.D.N.Y. 2011) (discussing that the plaintiff was harassed because his “expressive gestures and manner of speaking were of a nature stereotypically associated with females”).

See, e.g., Schlegelmilch v. City of Sarasota Police Dep’t, No. 8:06CV139 T27MAP, 2006 WL 2246147, at *2 (M.D. Fla. Aug. 3, 2006) (finding that the plaintiff’s allegations were sufficient to state a claim for gender discrimination under Title VII).

Id. (alteration in original).
See *Miller v. City of New York*, 177 F. App'x 195, 196 (2d Cir. 2006).

See *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033, 1035-36 (8th Cir. 2010) (reversing the district court's grant of summary judgment to the hotel, which instead sought a “Midwestern girl look”).

See *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 221-22 (D. Conn. 2006) (denying the defendant's motion for summary judgment). Riccio, a Title IX case, is a difficult opinion to unpack. The defendant claimed that the harassment was based not on gender, but on personal animosity, sexuality, or plaintiff's “nonconforming type of dress,” id. at 225, as if the latter constituted something other than gender nonconformity. The court, meanwhile, misread the holding of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998) (“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.”), and based its decision on the fact that some of the slurs used (“dyke,” “lesbian,” etc.) were gender-specific. See *Riccio*, 467 F. Supp. 2d at 226.


523 U.S. 75 (1998); see supra notes 69, 170 (describing that under *Oncale*, plaintiffs alleging same-sex harassment that did not involve gender stereotyping must show that their harasser's motivation was animosity to the plaintiff's gender or sexual desire).

See *Love*, 2008 WL 4286662 at *6-7 & n.17.

Id. at *7 (“[T]he alleged statement by [the alleged harasser] indicates she was unlike[ed] either because she was gay or because she was female, without confirming whether either of these propositions is true.”).

Id. at *9.

Id. The Fifth Circuit has since decided this issue. See *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456 (5th Cir. 2013) (en banc) (holding that sexual harassment claims, including those brought against a person of the same sex, can be established using evidence of sex stereotyping).


Id.

Compare *Boh Bros.*, 731 F.3d at 456-57 (focusing, in what the court describes as an “intent-based inquiry,” on evidence of the harasser's subjective view of the victim in order to determine whether the harassment was “because of... sex”), with *Love*, 2008 WL 4286662, at *10 (distinguishing an individual's biases from a societal stereotype).


Id. at *6.

Id. at *16.

Id. at *5, *8.

Id. at *9.

Id. at *8.
See supra text accompanying note 193 (describing a serious male plaintiff as insufficiently macho); cf. Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 287 (3d Cir. 2009) (“Prowel testified that he... was very well-groomed; wore what others would consider dressy clothes; was neat; [and] filed his nails....”).

The court in Love failed to recognize that possibility. See supra notes 113-16 and accompanying text (characterizing Love's failure to allege sexual harassment based on her male mannerisms as fatal to her claim).

Family Dollar, 2008 WL 4098723, at *17 (emphasis added).

Id. at *16.

142 F. App'x 48 (3d Cir. 2005).

See id. at 51 (Rendell, J., concurring). Judge Rendell agreed with the district court that gender stereotyping occurred. See id. (“The line between discrimination based upon gender stereotyping and that based upon sexual orientation is difficult to draw and in this case some of the complained of conduct arguably fits within both rubrics.”). He would have resolved the case in favor of the defendant solely because the harassment was not sufficiently pervasive or regular. See id.

Id. at 50 (majority opinion).


See Kay, 142 F. App'x at 51.

See id. at 50-51. In fact, Kay's brief on appeal may have sabotaged his case by distancing him more generally from certain forms of visible gender nonconformity. The brief took pains to note that Kay “dresses very conservatively and wears his hair short and in keeping with a professional businessmen. [He] has no unusual walking style or gait and does not comport himself in a manner which would attract negative attention to himself.” Brief for Appellant at 6, Kay, 142 F. App'x 48.

Brief for Appellant, supra note 221, at 8-9.

Kay, 142 F. App'x at 50.


See Prowel, 579 F.3d at 291.

119 F.3d 563 (7th Cir. 1997), vacated, 523 U.S. 1001 (1998). Though Doe was vacated in light of Oncale, courts in the Seventh Circuit consider themselves bound by what one court characterized as Doe's “second rationale, namely that ‘Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles.’” Jones v. Pac. Rail Servs., No. 00C 5776, 2001 WL 127645, at *2 (N.D. Ill. Feb. 14, 2001) (quoting Doe, 119 F.3d at 580). The district court reasoned that nothing “in the Court's decision to vacate and remand Doe for reconsideration in light of Oncale... indicate[d] that the Seventh Circuit's second rationale [was] no longer viable.” Id.; see also Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 263 n.5 (3d Cir. 2001) (“Absent an explicit statement from the Supreme Court that it is turning its back on Price Waterhouse, there is no reason to believe that the remand in City of Belleville was intended to call its gender stereotypes holding into question.”).
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227 Doe, 119 F.3d at 575; see also id. at 581 ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex.").

228 See id. at 567-68, 575-77 (focusing its analysis on gender discrimination, while at the same time noting that he was frequently harassed due to his sexuality); see also id. at 567 ("Dawe, a former Marine of imposing stature, constantly referred to H. as 'queer' and 'fag' and urged H. to 'go back to San Francisco with the rest of the queers.'... Dawe soon took to calling H. his 'bitch' and said that he was going to take him 'out to the woods' and 'get [him] up the ass.'" (alteration in original)). Though both H. and his twin brother J. were harassed, the Seventh Circuit noted that H. was the main target of the abuse. See id. at 567.

229 Id. at 593. But see id. at 601 (Manion, J., concurring in part and dissenting in part) (stating that "it is not reasonable to infer" that the plaintiff was harassed because he is "male and not female").

230 Id. at 594. But see Stacks v. Sw. Bell Yellow Pages, Inc., 27 F.3d 1316, 1326 (8th Cir. 1994) (denying the possibility of a mixed-motive harassment claim, reasoning that "[t]he analysis was designed for a challenge to 'an adverse employment decision in which both legitimate and illegitimate considerations played a part,'" and "[a]n employer could never have a legitimate reason for creating a hostile work environment." (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (plurality opinion))). For a discussion of how courts have applied the mixed-motive analysis in Title VII cases, see supra note 90 and accompanying text.

231 Doe, 119 F.3d at 593 n.27.

232 Id.

233 Id. at 592.

234 See supra notes 217-23.

235 Johnson v. Hondo, Inc., 125 F.3d 408, 413 (7th Cir. 1997) (emphasis added).

236 305 F.3d 1061 (9th Cir. 2002) (en banc).

237 Id. at 1064 (plurality opinion) (quoting the plaintiff's deposition testimony).

238 The plurality opinion, written by Judge Fletcher and joined by four others, found that Rene had properly alleged harassment because of sex because the assaults he described involved "areas of the body linked to sexuality." Id. at 1066. The dissent by Judge Hug, joined by three other judges, responded that treating all harassment with sexual content as actionable ignores Title VII's requirement that the harassment occur "because of sex." Id. at 1070, 1075, 1077 (Hug, J., dissenting). As the Supreme Court noted in Oncale, "[w]e 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." Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); see also Vicki Schultz, Reconceptualizing Sexual Harassment, 107 Yale L.J. 1683, 1686-87 (1998) ("[M]uch of the gender-based hostility and abuse that women (and some men) endure at work is neither driven by the desire for sexual relations nor even sexual in content.").

239 Rene, 305 F.3d at 1077 n.4 (Hug, J., dissenting).

240 Id. Both the dissent and the concurrences agreed that same-sex gender stereotyping would be proscribed by Title VII, as interpreted by the Ninth Circuit in Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 874-75 (9th Cir.
See Rene, 305 F.3d at 1068 (Pregerson, J., concurring); id. at 1070 (Fisher, J., concurring); id. at 1077 (Hug, J., concurring).

Id. at 1069 n.2 (Pregerson, J., concurring).

Id. at 1077 n.4 (Hug, J., dissenting).

See id. at 1069 n.2 (Pregerson, J., concurring).

Id.

Id. at 1072 (Hug, J., dissenting).

See id.; see also id. at 1064 (plurality opinion) (indicating that Rene was “openly gay”).

See supra Part II.

See supra notes 124-26 and accompanying text.

332 F.3d 1058 (7th Cir. 2003).

Id. at 1060.

Id.

Hamm likely undercut his cause by the complaints he filed with the Wisconsin Equal Rights Division. As the Seventh Circuit wrote:

In his first complaint to the ERD, [Hamm] explained, “Dean Bohringer believes that me and another individual are gay at work, he constantly refers to me and Jeff Zietlow as faggots. Dean has threatened to kill me, snap my neck for what he thinks to be true.” In a note written November 12, 1998, and appended to his deposition, Hamm links judgment of his sexuality by his peers to several of his allegations: “I am single so therefore it would more so [be] believed that I was homosexual, I have had numerous people at the plant pick on me on account of this....”

Id. at 1063 (second alteration in original).

Id.

231 F.3d 1080 (7th Cir. 2000).

Id. at 1083.

See Ayala-Sepulveda v. Mun. of San German, 661 F. Supp. 2d 130, 134, 137 (D.P.R. 2009) (finding that “the only allegation of sex stereotyping included in plaintiff’s complaint is that the defendants acted upon their perception of Plaintiff as a man who did not conform with the gender stereotypes associated with men in our society” (internal quotation marks omitted)).

See supra note 102 (indicating that rainbows symbolize gay pride).

Kalich v. AT&T Mobility, LLC, 748 F. Supp. 2d 712, 714-15 (E.D. Mich. 2010) (providing these remarks as the main support for its holding that the supervisor's “comments were targeted toward the plaintiff because [the supervisor] perceived him to be a homosexual”), aff'd, 679 F.3d 464 (6th Cir. 2012).


Id. at *5.

Id. at *20 n.13.

See id. at *22 & n.13 (holding that the plaintiff's evidence was sufficient to withstand summary judgment under Or. Rev. Stat. §659A.030(1)(a)-(b), which was amended after the alleged discrimination took place to explicitly list sexual orientation as a protected ground).

232 F.3d 33 (2d Cir. 2000).

Id. at 35. In a similarly under-described set of facts, the plaintiff in Anderson v. Napolitano, No. 09-60744-CIV, 2010 WL 431898 (S.D. Fla. Feb. 8, 2010) “alleg[ed] that the Miami Field Office's acting-Special Agent in Charge ‘learned of Anderson's sexual orientation a few days after Anderson reported for duty' and ‘immediately began to shun and isolated him within the office.’” Id. at *1.


Id. at *1.

See supra notes 216-23 (offering conjectures as to what traits led to Kay's harassment).

See, e.g., Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 259, 264 (3d Cir. 2001) (affirming summary judgment in the employer's favor because the plaintiff did not show that he was harassed because “he failed to comply with societal stereotypes”); Johnson v. Hondo, Inc., 125 F.3d 408, 410, 413-14 (7th Cir. 1997) (affirming summary judgment for the employer and distinguishing Doe on the grounds that in that case, there was no evidence that the harassment came about because of how the plaintiff “exhibited his sexuality”); Maroney v. Waterbury Hosp., No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *1-2 (D. Conn. Mar. 18, 2011) (granting a motion to dismiss against a plaintiff who did not allege that he failed to conform with accepted gender roles through his behavior or appearance); Lugo v. Shinseki, No. 06 Civ. 13187(LAK)(GWG), 2010 WL 1993065, at *10 (S.D.N.Y May 19, 2010) (“[N]o... claim exists here because there is no evidence that [the plaintiff] ‘behaved in a stereotypically feminine manner.’” (quoting Simonton, 232 F.3d at 38)); White v. Potter, No. 1:06-CV-1759-TWT, 2007 WL 1330378, at *17 n.22 (N.D. Ga. Apr. 30, 2007) (“Plaintiff has not suggested that the gay remarks were based on any sort of gender stereotypes. Instead he merely contends that he was falsely accused of being gay.” (citation omitted)).

Other cases in this subset failed because the plaintiffs made purely conclusory claims about gender stereotyping. See, e.g., Kiley v. Am. Soc'y for the Prevention of Cruelty to Animals, 296 F. App'x 107, 110 (2d Cir. 2008) (denying relief because the plaintiff made “the conclusory statement that her supervisor made assumptions about her informed by gender stereotypes of what women should look like and act” without explicating how these assumptions “resulted in an adverse employment decision”); Carter v. Town of Benson, 827 F. Supp. 2d, 700, 709-10 (W.D. La. June 7, 2010) (“[The plaintiff] has presented only a conclusory allegation and no evidence of how she was perceived by Defendants as not conforming to stereotypical images and expectations or how Defendants espoused stereotypical views.”).

Still other cases lacked sufficiently pervasive harassment or adverse employment actions to succeed under Title VII.

See, e.g., Dawson v. Bumble & Bumble, 398 F.3d 211, 221-22 (2d Cir. 2005) (holding that there was insufficient evidence that the plaintiff's lack of feminine clothing, jewelry, or body features led to adverse employment decisions); Garside v. Hillside Family of Agencies, No. 09-CV-6181-CJS, 2011 WL 32582, at *1, *14 (W.D.N.Y. Jan. 5, 2011) (contending that “one remark” is insufficient to raise a triable harassment claim); Miller v. Kellogg USA, Inc., No.
See supra note 2 and accompanying text (providing examples of cases in which courts denied relief to plaintiffs for trying to “bootstrap” sexual orientation discrimination claims under Title VII).

See Swift v. Countrywide Home Loans, Inc., 770 F. Supp. 2d 483, 485, 488 (E.D.N.Y. 2011); see also Turpin v. Good, No. 1:07-cv-1205-LJM-WGH, 2010 WL 2560421, at *3 (S.D. Ind. June 24, 2010) (holding that the plaintiffs could not “salvage” their claim by reframing it as one of gender stereotyping once they discovered that Title IX does not cover sexual orientation claims).

See supra Part II.A (discussing Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009)).

See supra notes 226-35 and accompanying text (discussing Doe v. City of Belleville, 119 F.3d 563 (7th Cir. 1997), vacated, 523 U.S. 1001 (1998)).

See supra notes 179-80, 195 and accompanying text (discussing Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033 (8th Cir. 2010)).

See supra notes 32-33, 236-47 (discussing Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002) (en banc), and Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864 (9th Cir. 2001)).

See Collins v. Cohen Pontani Lieberman & Pavane, No. 04 CV 8983(KMW)(MHD), 2008 WL 2971668, at *9 (S.D.N.Y. July 31, 2008) (denying summary judgment against the plaintiff where a law firm's managing partner advised the plaintiff that she “needed to use more ‘sugar’ with any paralegal who was uncooperative”).

See Jankousky v. N. Fork Bancorporation, Inc., No. 08 Civ. 1858(PAC), 2011 WL 1118602, at *8 (S.D.N.Y. Mar. 23, 2011) (holding that that a note in the plaintiff's file in which a bank's district manager questioned whether the plaintiff managed “on emotions,” coupled with testimony that another manager treated men more favorably than women, created legitimate factual questions and thereby precluded summary judgment).


See Milligan v. Bd. of Trs., No. 09-cv-320-JPG-CJP, 2010 WL 2649917, at *7, *14 (S.D. Ill. June 30, 2010) (granting the defendant's motion for summary judgment where the plaintiff was told that “he would make a very sexy lady [and that] he would look sexy as a girl,” finding that this evidenced a “failure to observe personal boundaries,” not discrimination because of sex), aff'd, 686 F.3d 378 (7th Cir. 2012); Dodd v. Se. Pa. Transp. Auth., No. 06-4213, 2007 WL 1866754, at *1, *5-6 (E.D. Pa. June 28, 2007) (granting the defendant's motion to dismiss the plaintiff's claims of gender discrimination under Title VII where the plaintiff, a male Rastafarian employee, was fired for wearing his hair in a ponytail, finding that employers' grooming policies generally do not constitute sex-based discrimination).

See Durkin v. Verizon N.Y., Inc., 678 F. Supp. 2d 124, 135-36, 140-41 (S.D.N.Y. 2009) (denying the defendant's motion for summary judgment on the plaintiff's hostile work environment claim because a genuine issue of material fact remained as to whether the plaintiff's female coworkers, who harassed the plaintiff regarding her breast size, did so “because of sex”).

444 F.3d 1104 (9th Cir. 2006) (en banc).

Id. at 1106-08.

Id. at 1107-08.

Id. at 1112 (“If we were to do so, we would come perilously close to holding that every grooming, apparel, or appearance requirement that an individual finds personally offensive, or in conflict with his or her own self-image, can create a triable issue of sex discrimination.”). The court did emphasize that its holding did “not preclude, as a matter of law, a claim of sex-stereotyping on the basis of dress or appearance codes,” id. at 1113; in fact, it suggested an openness to “case[s] where the dress or appearance requirement is intended to be sexually provocative, and tending to stereotype women as sex objects,” id. at 1112.

See id. at 1113 (Pregerson, J., dissenting).

Id. at 1116.

See, e.g., Michael Selmi, The Many Faces of Darlene Jespersen, 14 Duke J. Gender L. & Pol'y, 467, 479-86 (2007) (analyzing Jespersen to show that “the law is generally incapable, or unwilling, to make the fine distinctions necessary to determine the propriety of most appearance codes”). This topic is discussed more fully infra Part IV.A.2.


See id. at 127-28; see also supra note 292 and accompanying text (discussing Durkin).

See, e.g., Breiner v. Nev. Dep't of Corr., 610 F.3d 1202, 1211 (9th Cir. 2010) (female correctional workers “possess an ‘instinct’ that renders them less susceptible to manipulation by inmates”); Merritt v. Old Dominion Freight Line, Inc., 601 F.3d 289, 296-97 (4th Cir. 2010) (women cannot be truck drivers); Sassaman v. Gamache, 566 F.3d 307, 309 (2d Cir. 2009) (men have a propensity to sexually harass women).

“Descriptive stereotypes” refer to generalizing claims about how people are, such as the claim that women are bad drivers; “prescriptive stereotypes” are beliefs about how people should be, such as the belief that a woman's place is in

See supra Part III.B.2.

See cases discussed supra Part III.B.2 (involving cognitive stereotypes).

See supra Part III.B.2.

See supra notes 161-64 and accompanying text (discussing Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004), in which an employer held the stereotypical belief that a female employee could not adequately commit to a tenured position because she had children at home).


Id.

See Chadwick v. WellPoint, Inc., 561 F.3d 38, 41-42 (1st Cir. 2009).

Id. The claimed stereotype that mothers neglect their duties is descriptive. See supra note 303 (clarifying the distinction between descriptive and prescriptive stereotypes). However, there was also evidence in the record that the plaintiff's boss told her she would be happier “down the road” about the promotion not working out, presumably due to the prescriptive stereotype that mothers should devote their time to children rather than work. See Chadwick, 561 F.3d at 42.

In addition to Chadwick and Lettieri, see Maxwell v. Virtual Education Software, Inc., No. CV-09-173-RMP, 2010 WL 3120025 (E.D. Wash. Aug. 6, 2010), and Matthews v. Connecticut Light & Power Co., No. 3:05cv226(PCD), 2006 WL 2506597 (D. Conn. Aug. 29, 2006), both brought by women who alleged that their employer terminated them because of pregnancy.

See Palomares v. Second Fed. Sav. & Loan Ass'n of Chi., No. 10-cv-6124, 2011 WL 760088, at *3-4 (N.D. Ill. Feb. 25, 2011) (“Camarena’s familial status as a ‘primary caregiver’ is not a protected class under Title VII absent sexual stereotyping.”) (emphasis added). A married couple also brought a Title VII claim after receiving stereotypical comments about expected absences due to their twin babies. Adler v. S. Orangetown Cent. Sch. Dist., No. 05 Civ. 4835(SCR), 2008 WL 190585, at *1-2 (S.D.N.Y. Jan. 17, 2008). Their claim failed, however, since the adverse treatment affected both husband and wife equally. See id. at *10 (“By stating claims of discrimination on the basis of two different genders, Plaintiffs have, in effect, undercut their ability to maintain a valid sex discrimination claim for either Mr. or Mrs. Adler.”).

See supra Part II.B (detailing how the Vickers court equated sex stereotyping claims exclusively with claims about stereotypes violated in an “observable way at work”).


Id. at *1.

Id. at *1-2 (indicating that supervisors collectively reviewed the magazine and determined that the plaintiff's appearance in the magazine, which contained photos of her in a bikini next to cars and motorcycles, violated the bank's code of conduct).

See id. at *3-4.

Id. The court failed to consider an alternate ground for its decision: that the alleged prescriptive stereotype—that workers should dress conservatively—may not have had anything to do with gender at all, especially in the context of a bank, where conservative dress is generally required of men and women alike.

See id. at *7 (listing the court's reasons for granting the defendant's motion for summary judgment).

Id. at *3.

Id.

Id. at *6 (alteration in original).

Id. This is only one of several alternative holdings in Maturen. The magistrate judge also recommended dismissal because the claim was untimely filed and because the alleged harassment was not severe or pervasive. See id. at *6-7.

See id. at *6 (finding that even though the plaintiff may have demonstrated that he did not meet the manager's chauvinistic conceptions of masculinity, this was not enough to assert a claim under Vickers).

Doe v. Brimfield Grade School, 552 F. Supp. 2d 816 (C.D. Ill. 2008), perhaps offers an example under Title IX. In that case, a grade school boy's classmates perceived him as “not man enough” to stick up for himself and therefore hit him in the testicles several times over the course of a year. Id. at 819-20, 823. The court, however, did not raise questions about the plaintiff's sexuality, whether actual or as perceived by his harassers, see id. at 822-23, likely because the plaintiff was so young. See id. at 820 n.2 (indicating that the plaintiff was twelve-years old when the harassment began).


Id. at 764.

See, e.g., Chadwick v. WellPoint, Inc., 561 F.3d 38, 41-42 (1st Cir. 2009) (reversing the district court's dismissal in favor of the employer who allegedly failed to promote the plaintiff due to the “stereotype that women who are mothers... neglect their jobs in favor of their presumed childcare responsibilities”).

See supra notes 153-59 and accompanying text (discussing how women have brought successful stereotyping claims based on a cognitive perception-- namely the belief that women with children at home cannot commit to their jobs).

Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999). However noxious, the harassment at issue in Higgins did not give rise to a cognizable Title VII claim; the First Circuit said that its task was “to construe a statute[.]... not to make a moral judgment.” Id.


See supra note 16 (listing Supreme Court cases in which the Justices have characterized aesthetic interests as flimsy and barely cognizable).

See supra Table 1 (categorizing wins and losses for plaintiffs’ visible and cognized stereotyping claims involving perceived homosexuality).


Affirmative action policies and disparate impact claims provide the obvious, and important, exceptions to this assertion. Insofar as both are opposed, however, by those enamored with the ideal of color-blindness, the latter would accept the statement above as a normative matter, if not a descriptive one. The point here is merely to contrast the logic of the case law described in Parts II and III with the logic that is otherwise thought to dominate American antidiscrimination law. That said, the fact that Title VII has been interpreted and amended to allow for affirmative action and disparate impact suits--neither of which are race-neutral or color-blind--may give reason, when considered alongside the case law this Article describes, to question the descriptive accuracy of the widespread assimilationist or trait-blind understanding of federal employment-discrimination law. I thank Bill Eskridge for challenging me on this point.

Robert Post analyzes this tension at length in his discussion of a proposed “anti-lookism” ordinance in Santa Cruz, California, which “would prohibit discrimination against persons on the basis of ‘personal appearance.’” See Post, supra note 17, at 2.

See generally Rhode, supra note 15, at 99-100 (noting that “[m]ost courts regard matters of grooming as relatively insignificant concerns, partly because they reflect voluntary characteristics that victims of bias have the power to change” and that “[f]ederal judges on both sides of these issues have denounced them as trivial”).

See Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1117 (9th Cir. 2006) (en banc) (Kozinski, J., dissenting) (“Jespersen did introduce evidence that she finds it burdensome to wear makeup because doing so is inconsistent with her self-image and interferes with her job performance.”); see also supra notes 293-98 and accompanying text (describing Jespersen).

Jespersen, 444 F.3d at 1118 (Kozinski, J., dissenting) (criticizing Harrah's “decision to let go a valued, experienced employee who had gained accolades from her customers, over what, in the end, is a trivial matter”). For the majority, “the subjective reaction of a single employee” to Harrah's grooming policy was not enough to merit the law’s protection.

See generally Rhode, supra note 15, at 100-01 (indicating that “judges have been frustrated by plaintiffs who clutter up the courts with claims that high school hair styles have ‘constitutional significance’” (quoting Holsapple v. Woods, 500 F.2d 49, 52 (7th Cir. 1974) (per curiam) (Pell, J., concurring))).

Rhode, supra note 15, at 99 (arguing that, even though most courts find grooming matters insignificant, “individuals see such self-expression as central to their personal beliefs and religious, racial, or ethnic affiliations”); see also Ruthann Robson, Dressing Constitutionally: Hierarchy, Sexuality, and Democracy from Our Hairstyles to Our Shoes 81-88 (2013) (describing the reasons why private employers have near-absolute power over employees' work attire).

Rhode, supra note 15, at 99-100.

See id. at 100.

352  Id. at 231.

353  Id.

354  Id. at 232.

355  Id.

356  See supra Part II.A (discussing Prowel v. Wise Bus. Forms, 579 F.3d 285 (3d Cir. 2009)).

357  See Prowel, 579 F.3d at 287; Vickers v. Fairfield Med.Ctr., 453 F.3d 757, 763 (6th Cir. 2006); Dawson v. Bumble & Bumble, 398 F.3d 211, 218, 221 (2d Cir. 2005); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002) (en banc) (plurality opinion).

358  See generally Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2990 (2010) (“Our decisions have declined to distinguish between status and conduct in this context.”).

359  See id. (“While it is true that the law applies only to conduct, the... law is targeted at more than conduct. It is instead directed toward gay persons as a class.”) (quoting Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring in the judgment)). See generally Francisco Valdes, The Status/Conduct Distinction and Sexual Orientation: Exploring a Constitutional Conundrum, 50 Guild Prac. 65 (1993) (suggesting litigation strategies that would help sexual minorities make use of courts' former emphasis on status over conduct).

360  See Post, supra note 17, at 34 (“It seems to be important that grooming and dress codes regulate voluntary behavior, for courts tend to conceptualize employees who present themselves in ways that violate established gender grooming and dress conventions as asserting a ‘personal preference’ to flout accepted standards.”) (quoting Earwood v. Cont'l Se. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976)).

361  See Rhode, supra note 15, at 99.

362  See supra Part IV.A.2.

363  See Kenji Yoshino, The Pressure To Cover, N.Y. Times (Jan. 15, 2006), http://www.nytimes.com/2006/01/15/magazine/15gays.html?pagewanted=all&_r=0 (discussing five seminal cases in which courts have declined to protect plaintiffs from “covering” demands).

364  Id.

365  Id.

366  See Yoshino, supra note 19, at 487; Yoshino, supra note 13, at 779.


368  See supra Part IV.A.1.

369  Yoshino, supra note 13, at 837, 909 (maintaining that covering demands “appear[] to be the mildest assimilationist demand”). Yoshino inherited the term “covering” from Erving Goffman, who noted that there were three ways people who are different can assimilate: by covering (downplaying), passing (hiding), or converting (altering). See id. at 772 (citing Erving Goffman, Stigma: Notes on the Management of Spoiled Identity 50-51, 102-04 (1963)).

370  Id. at 772.

371  See id.

372  Id.
There are ways of cognitively covering, however, as when a gay employee downplays talk of her partner or her weekend activities in order to “fit in.” For examples, see id. at 845-48 (detailing different covering strategies).

Id. at 844.

Yoshino, supra note 367, at 101; accord Yoshino, supra note 13, at 850.

Yoshino, supra note 367, at 101; see also Yoshino, supra note 13, at 776 (“As time progresses, I posit that more and more discrimination against gays will take the form of covering demands, rather than taking the historical forms of categorical exclusion or ‘don't ask, don't tell.’”).

Yoshino, supra note 367, at 23.

Yoshino, supra note 13, at 910. It may also be that reverse covering is required of women not because stereotypically feminine traits are valued in domestic spheres, but rather because this exaggerates differences between men and women in the workplace, thereby reinforcing self-perceptions of masculinity prized by male workers whose dominant status is threatened by moves toward gender equality. See generally McGinley, supra note 63, at 721-25 (explaining the dominance of masculinity in the workplace and the ways in which it is perpetuated). I am grateful to Vicki Schultz for pointing this out to me.

Yoshino, supra note 367, at 93. The reference to asylum law suggests an important comparison that only underscores the strangeness of the Title VII cases described in this Article. In asylum cases, applicants generally must show that they have a well-founded fear of persecution on the basis of some protected ground. See 8 U.S.C. §§1101(a)(42), 1158(b)(1)(B) (2012). The literal visibility of one's sexuality—the extent to which refugees' behavior or appearance allows others to perceive them as gay—is relevant to their chance of being persecuted. Put simply, a flamboyant man is more likely than a stereotypically masculine one to be targeted for persecution by those looking to target homosexuals. Thus, requiring literal visibility may prove relevant to asylum law's future-looking, “well-founded fear” criterion, though it is potentially objectionable for other reasons. See Fadi Hanna, Case Comment, Punishing Masculinity in Gay Asylum Claims, 114 Yale L.J. 913, 915-16 (2005); Brian Soucek, Comment, Social Group Asylum Claims: A Second Look at the New Visibility Requirement, 29 Yale L. & Pol'y Rev. 337, 344-45 (2010). By contrast, the relevance of visibility to Title VII claims, where alleged discrimination has already occurred, is entirely unclear. Given this crucial difference, it is not possible to extrapolate from asylum—Yoshino's one example of courts making reverse covering demands on homosexuals—in order to explain the reverse covering demands currently being made in Title VII cases.

See supra Part IV.A.1.

See supra Part IV.A.2; see also Yoshino, supra note 363 (pointing out cases in which courts have allowed discrimination based on mutable characteristics but failed to allow discrimination based on immutable characteristics).

See supra note 366.

See Yoshino, supra note 367, at 191 (“I am equally opposed to demands that individuals reverse cover, because such demands are also impingements on our autonomy, and therefore on our authenticity.”).

Cf. id. at 147 (“In response to white demands that African-Americans 'act white,' some African-Americans have developed a culture of ‘acting black.’”).

Id. at 93; see also supra note 379 and accompanying text.

See Post, supra note 17, at 31 (emphasis omitted).

Id.

See id. at 36 (emphasis omitted) (“If the point of antidiscrimination law is to transform existing social practices, then courts must ask what purpose the law expects to accomplish by such transformations. The dominant conception systematically obscures this question. If the aim of the law is not in fact to strike ‘at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes,’ then what is it?”)
See id. at 31 (“In contrast to the dominant conception, the sociological account accepts the inevitability of social practices. But precisely because of this acceptance, the account requires that principles be articulated that will guide and direct the transformation of social practices.”).

389 If intent can be presumed from the natural consequences of an act, Washington v. Davis, 426 U.S. 229, 253 (1976) (Stevens, J., concurring), the question of courts’ intent in this area may prove equivalent to the question of what effect the cases I study will likely have.

390 This tradition extends, famously, from Plato, Symposium (Benjamin Jowett trans., Project Gutenberg 2008) (c. 360 B.C.E.), available at http://www.gutenberg.org/files/1600/1600.txt (praising those who, “beholding beauty with the eye of the mind,” are able “to bring forth, not images of beauty, but realities”), and Aristotle, De Anima (On the Soul), bk. II, at 155-88 (Hugh Lawson-Tancred, trans., Penguin Books 1986) (c. 350 B.C.E.) (describing the nutritive powers of plants, the perceptive powers of animals, and the power of thought possessed by humans), through René Descartes, Meditations on First Philosophy (1641), reprinted in René Descartes, Meditations on First Philosophy with Selections from the Objections and Replies 22-23 (John Cottingham, trans., 1886) (“I now know that even bodies are not strictly perceived by the senses or the faculty of imagination but by the intellect alone, and that this perception derives not from their being touched or seen but from their being understood; and in view of this I know plainly that I can achieve an easier and more evident perception of my own mind than of anything else.”). For examples of courts’ tendency to disparage appearances, see supra note 16.

391 See Michael Nava & Robert Dawidoff, Created Equal: Why Gay Rights Matter to America 5 (1994) (“The revulsion many men and women feel at the thought of sexual activity between people of their own sex remains a formidable obstacle on the path to gay rights. This revulsion, which we call the Ick Factor, equates distaste with immorality.”); see also Ariel Levy, Prodigal Son, New Yorker, June 28, 2010, http://www.newyorker.com/reporting/2010/06/28/100628fa_fact_levy (quoting former governor and presidential candidate Mike Huckabee’s argument against gay marriage: “We can get into the ick factor, but the fact is two men in a relationship, two women in a relationship, biologically, that doesn’t work the same”). This “ick factor” is not unique to heterosexuals envisioning homosexual sex. For a description and analysis of the revulsion felt by some gay men at female bodies and sexuality, see Eric Rofes, The Ick Factor: Flesh, Fluids, and Cross-Gender Revulsion, in Opposite Sex: Gay Men on Lesbians, Lesbians on Gay Men 44, 44-45 (Sara Miles & Eric Rofes eds., 1998).

392 Nava & Dawidoff, supra note 392, at 5.

393 See Martha C. Nussbaum, From Disgust to Humanity: Sexual Orientation and Constitutional Law 2 (2010) (asserting that “the politics of disgust” have lessened but not disappeared in recent years); Paul Rozin et al., Disgust, in Handbook of Emotions 757, 757 (Michael Lewis et al. eds., 3d ed. 2008) (stating that “[f]or North Americans, elicitors of disgust come from nine domains,” one of which is sexual behavior); William N. Eskridge, Jr., Body Politics: Lawrence v. Texas and the Constitution of Disgust and Contagion, 57 Fla. L. Rev. 1011, 1013-14 (2005) (advocating a rejection of a “politics that trades on appeals to disgust and contagion” to limit the rights of homosexuals).

394 See William N. Eskridge, Jr., Gaylaw: Challenging the Apartheid of the Closet 211 (1999) (“[L]ike the racist, many homophobes view objects of their hatred as dirty people whose fantasized disgusting conduct justifies imagined or acted-out violence against them.”).

395 It is worth remembering here, again, that courts do not reject cognitive-stereotyping claims when the thoughts at issue surround motherhood. See supra Part III.C.


397 Id. at 1644.

See Amin Ghaziani, The Dividends of Dissent: How Conflict and Culture Work in Lesbian and Gay Marches on Washington 201 (2008) (quoting a psychologist's description of the TV character Jack as “narcissistic, shallow, Cher-loving, boy-chasing, fashion-obsessed, showtune-singing...--a sturdy stereotype if there ever was one”).


See id.

Vickers, 453 F.3d at 762 (quoting Rene v. MGM Grand, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) (plurality opinion)).

Prowel, 579 F.3d at 292; see cases cited supra Part III.B.1.

Wolff, supra note 402, at 211, 220 (“For antagonists who find the mere thought of gay sexuality overwhelming and invasive, erasure is the only answer...”).

Of course this freighted term gets its content largely, if not exclusively, through societal stereotypes. That is the whole point. Having acknowledged this, I remove the scare quotes going forward.


See infra notes 410-13.

Yoshino, supra note 367, at 80.

Id.

See, e.g., United States v. Windsor 133 S. Ct. 2675, 2682-83 (2013) (constitutional challenge to the federal government's limitation of marriage to opposite-sex partnerships); Witt v. Dep't of the Air Force, 527 F.3d 806, 809 (9th Cir. 2008) (constitutional challenge to the military's “Don't Ask, Don't Tell” policy); Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806-07, 809 (11th Cir. 2004) (constitutional challenge to a Florida statute that prohibited gays and lesbians from adopting children).

For a description of this dominant conception, see supra Part IV.A.1.

See Yoshino, supra note 367, at 190-91.


See Vicki Schultz, Antidiscrimination Law as Disruption: The Emergence of a New Paradigm for Understanding and Addressing Discrimination 9-10 (May 2010) (unpublished manuscript) (on file with author); see also Richard Thompson Ford, Racial Culture: A Critique 4 (2005) (arguing against antidiscrimination theorists who promote a right to “cultural difference” or “identity correlated traits”).

Schultz, supra note 416, at 22.

Id. at 21.
Id. at 12.


Eskridge, supra note 395, at 211 (describing how homophobia resembles other forms of prejudice in its hysterical, obsessional, and narcissistic qualities (citing Elisabeth Young-Bruehl, The Anatomy of Prejudices 32-36, 157-58 (1996))).

Id. (stating that homophobia echoes racial prejudice in this regard).

Id. (analogizing homophobia to anti-Semitism).

Id. (correlating this form of prejudice with sexism).

See supra Part IV.B.1-3.

See supra Part IV.B.1.

See supra Part IV.B.2.

See Jonathan Goldberg-Hiller & Neal Milner, Rights as Excess: Understanding the Politics of Special Rights, 28 Law & Soc. Inquiry 1075, 1083 (2003) (describing attempts to characterize gay marriage litigation as “a blatant power grab by a powerful special interest group” (internal quotation marks omitted)).


See supra note 2 (referencing cases in which courts characterized plaintiffs as trying to “bootstrap” sexual orientation discrimination claims into Title VII’s protections).

See supra Part IV.B.3.

See generally Zatz, supra note 158 (arguing against a conception of Title VII that would see groups as locked in antagonistic relationships wherein discrimination against the other group creates advantages for one's own).

The most recent version is the Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (as passed by Senate, Nov. 7, 2013).


Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000). The Third Circuit has also chimed in. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (“Harassment on the basis of sexual orientation has no place in our society.”).

Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1078 (9th Cir. 2002) (en banc) (Hug, J., dissenting). The dissent rejected the plaintiff’s claim, stating it was not the court's role “to make a moral judgment,” but rather to construe the law as written by Congress. Id. (quoting Higgins, 194 F.3d at 259).

S. 815, §4.

Id. §3(a)(10).
440 Id. §3(a)(7).
441 See supra Part II.A (discussing Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285 (3d Cir. 2009)).
442 See supra Part II.B (discussing Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006)).
443 Or rather, a claim like his would be covered if it alleged conduct that occurred after ENDA went into effect.
444 See supra text accompanying note 126.
445 See S. 815 §§4, 9 (emphasis added).
446 In this regard, Title VII case law is not alone. For a parallel example in asylum law, see Brian Soucek, Copy-Paste Precedent, 13 J. App. Prac. & Process 153, 153-54, 158-59 (2012), and Soucek, supra note 379, which both criticize courts’ literalist understanding of persecuted groups’ so-called “social visibility” in the context of asylum law. For a further discussion of this parallel, see supra note 379.

63 AMULR 715
*61  MORE THAN YOUR AVERAGE LAWYER: DEVELOPING EXECUTIVE PRESENCE

WESTLAW LAWPRAC INDEX

INH--In-House Counsel & Corporate Law Departments

CHEAT SHEET

• Exhibit poise. Handle unexpected situations by controlling emotions and acting quickly and decisively.

• Earn influence, Convince others of the wisdom of your strategies through inspiration, rather than direct positional authority.

• Practice authenticity. Acting true to your values, personality and spirit results in a consistency that attempting to please others simply cannot.

• Cultivate connections. Build trust and inform constituents of the value you bring to the organization.

An in-house lawyer with executive presence can persuade constituencies in the organization over which the lawyer has no direct or positional authority, thereby allowing the lawyer to secure buy-in and support from the senior leadership team, the board of directors and business units. Executive presence is not based on your job title--rather it is evidenced by how a lawyer uses her personal communication style to connect with others within the organization.

*62  While some characterize executive presence as illusive and indefinable, an in-house lawyer with executive presence has exceptional interpersonal communication skills, polished boardroom presence, and is persuasive and influential. In today's “doing even more with less” environment, lawyers must possess the right combination of hard work, expertise and focus. While these traits are commonly understood and need no explanation, they are not enough to succeed. Successful lawyers have an executive presence that, while challenging to describe, differentiates merely competent lawyers from impactful business partners.

The phrase “executive presence” is often cited but frequently misunderstood. If you ask five people to define executive presence, you are likely to receive five different answers. “You know it when you see it.” The “it” factor. The “X” factor. Magnetism. Leadership. Authority. Charisma. Visibility at the right time. While “[f]irst impressions are awfully important,” said Peter Pan to the Lost Boys, 1 executive presence is much more than first impressions or ability ... it is an indefinable quality that enables a lawyer to stand out in the company and to engage internal clients.

Lawyers who are committed to developing an executive presence will not only instill confidence in their clients, but will also be well-positioned to achieve career success. For in-house counsel, executive presence is best described as creating a consistent long-lasting impression over time by the manner in which a lawyer expresses herself and engages others. While there is no broad consensus about the definition of executive presence, there are five characteristics common to lawyers who possess it.
Definition and myth

How often do lawyers hear that they are great leaders and would rise to the next level if they only had presence? Many lawyers believe that executive presence is an inherent trait that is impossible to achieve. However, while some lawyers naturally exhibit executive presence, many others have learned the skill set.

Although there is no single method to develop executive presence, there are a range of skills that a lawyer can master. A lawyer with executive presence exhibits five distinct but equally important traits. A framework for developing executive presence includes understanding, identifying and developing (i) poise, (ii) confidence, (iii) influence, (iv) authenticity and (v) connection.

Cultivating executive presence Exhibit poise

The adage “grace under fire” describes a lawyer with poise (i.e., the ability to handle an unexpected situation by reacting quickly and decisively). A lawyer exhibits poise by remaining calm, rational and in control in stressful situations. Simply stated, exhibiting poise means being able to control emotions when upsetting situations arise in the workplace.

Consistently maintaining composure is critical to an in-house lawyer’s career success. Poise enables a lawyer to disregard distracting emotions that diminish her ability to focus on creating business solutions, and it inspires others to focus on the immediate problem and move toward a solution. It goes without saying that maintaining composure in a crisis is critical.

It can be challenging to exhibit composure in high-stakes, high-pressure situations. A lawyer who controls unproductive emotions by taking a deep breath and committing to address these emotions later will be able to focus more completely on productive thought.

However, rather than controlling the emotions generated by stress, some lawyers embrace them to create an all-hands-on-deck mentality that fuels productive thought and inspires innovation. “Lawyers who are able to repurpose stress as a catalyst for problem-solving are demonstrating the leadership that senior management values,” says Myla Barefield Young, vice president and assistant general counsel of Re: Sources USA. “They contribute not only substantive solutions, but also a sense of calm that supports the wisdom of that advice.” As lawyers increasingly are expected to be strategic thought-partners, rather than simply legal advisors, their ability to develop workable solutions will position them well as business people who have legal training, rather than lawyers who practice in a business setting.

Poise is a behavior that can be learned. To make poise a habit takes time and repeated exposure to challenging situations. Similar to building a muscle, the more a lawyer practices composure in difficult situations, the more likely it will become a reflexive action that grows stronger with use.

Project self-confidence

Self-confidence is an attitude or belief in one's competencies. It is the ability to take control of a challenging, unpredictable situation, make tough decisions in a timely manner, and advocate a position to strong-willed and stressed members of the senior leadership team.

Risk management template: Professional effectiveness of an individual lawyer
<table>
<thead>
<tr>
<th>ELEMENTS OF PROFESSIONAL EFFECTIVENESS</th>
<th>PERCEIVED PERFORMANCE OF LAWYER</th>
<th>RISK TO ORGANIZATION</th>
<th>PRIORITY OF RISK [LOW/MEDIUM/HIGH]</th>
<th>ACTIONS TO ADDRESS THE RISK [ELIMINATE OR MITIGATE]</th>
<th>MEASUREMENT OF SUCCESS</th>
<th>ACTIONS TO ADDRESS UNSUCCESSFUL RESULTS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Knowledge of the law</td>
<td></td>
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<tr>
<td>Business acumen</td>
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<tr>
<td>Clear communication</td>
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<tr>
<td>Ability to work as a team member</td>
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<tr>
<td>Timeliness of response</td>
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</tbody>
</table>

**Risk management template: Executive presence**

<table>
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</tr>
</thead>
<tbody>
<tr>
<td>Executive presence</td>
<td>Does not demonstrate self-confidence in all situations</td>
<td>Legal advice is undervalued. Client consensus is not achieved.</td>
<td>High</td>
<td>Real-time feedback from colleagues and clients</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Elements of professional effectiveness</td>
<td>Perceived performance of lawyer</td>
<td>Risk to organization</td>
<td>Priority of risk [low/medium/high]</td>
<td>Actions to address the risk [eliminate or mitigate]</td>
<td>Measurement of success</td>
<td>Actions to address unsuccessful results</td>
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How often are a successful lawyer's innate intelligence, acquired skills and experiences magnified by her self-assured manner? Contrast this with a less confident lawyer who is unable to leverage her higher level of intelligence, greater skill set and richer experience.

The interplay of abilities and confidence might look like this: The lawyer with strong abilities and high confidence will exhibit executive presence and is most likely to progress to the next level in her career path.

It has been said that if a person does not believe in herself, others have no reason to do so. As an attorney attempting to persuade and advise, the substantive message may be lost on clients and colleagues who may doubt the validity of the attorneys recommendations. The strength of one's convictions will be an important catalyst to success in these interactions.

For many attorneys, self-confidence is built on a foundation of preparation, comfort with a certain amount of ambiguity, and a history of successful business and legal outcomes. For others, self-confidence comes more naturally and engenders more of the *same. As with athletes who envision success on the field, lawyers can learn to exude confidence even if they do not yet possess it.

<table>
<thead>
<tr>
<th>Abilities</th>
<th>More effective</th>
<th>Most effective</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Not effective</td>
<td>Most effective</td>
</tr>
<tr>
<td></td>
<td>Confidence</td>
<td></td>
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</tbody>
</table>

Inspirational speaker and author Esther Hicks has observed that, “worrying is using your imagination to create things you do not want.” Effective lawyers have little time to address imagined and unfounded outcomes, and instead, develop the self-confidence to repurpose the energy devoted to worry as the strength to believe in themselves.

**Earn influence**

Influence is defined by Merriam Webster's online dictionary as “the act or power of producing an effect without apparent exertion of force or direct exercise of command.” The lawyer who is able to convince others of the wisdom of her strategies and tactics is seen as an influential leader. As a lawyer rises in the organization, the ability to influence the actions of the people in her increasingly broad sphere of influence through inspiration, rather than direct positional authority, becomes more critical. Whereas a direct supervisor can request an action by a subordinate, an executive several levels above typically must rely on indirect influence or persuasion, which is more difficult to attain.

As entrepreneur and philanthropist Steve Case has said: “It's stunning to me what kind of an impact even one person can have if they have the right passion, perspective and are able to align the interest of a great team.”

Organizations reward leadership that impacts action. A successful attorney partners with the client to achieve business goals by articulating alternate courses of action and the associated risks and benefits, identifying the recommended alternative, and building the rationale for that recommendation. “‘Lawyers are inherently risk averse,’” notes M. Gayle Packer, executive vice president and chief administrative officer for Terracon Consultants, Inc. “Recognizing that there is a difference between a legal and business risk and offering solutions is key to influencing internal clients. One of the best ways to earn influence within a company is by placing yourself in the internal client's shoes and considering the risks and benefits important to them.”

The “right” advice, without more, will not advance the ball. It is not enough to be educated, intelligent and insightful. Without the ability to apply those competencies to solve problems, an executive is not able to contribute to the success of the organization.

Influence is a skill that can be developed with experience and with honest self-reflection. The lawyer can identify her influencer style. Does she collaborate to achieve buy-in? Does she base her influence on well-presented facts? Does she appeal to emotion? Does she inspire? While the office might be a convenient venue in which to develop influencer skills, consider volunteer work as another setting to create these skills.
Volunteers typically cannot be required to act in specified ways, and so the ability to persuade can be an effective tool to achieve desired action. Committee, board and operational work for a not-for-profit organization are proven ways to hone skills that can be used in other parts of a lawyer's professional and personal life. Leading a committee of individuals from varied backgrounds and with a range of personal agendas can be an excellent way to not only develop these skills, but also to observe others in action.

**Practice authenticity**

A key factor for a lawyer interested in advancing her career and demonstrating executive presence is to be authentic in her interactions with others. A lawyer who practices authenticity exhibits a genuine self with the senior leadership team, the board, colleagues and others. Acting true to her values, personality and spirit results in a consistency that attempting to please others simply cannot. A lawyer whose words and actions are in sync develops a reputation for stability valued by clients. “Be true to your work, your word and your friend,” Henry David Thoreau advises.

**Authenticity** is important, because clients and colleagues know when words and actions do not align with values. “You can spot a fake a mile away” captures the peril of presenting a façade. A lawyer's reputation is critical to her ability to develop the professional relationships and respect that enable her to shape the future by addressing the challenges that occur in the workplace in a direct and deliberate manner.

Developing authenticity is a lifelong process that begins with a lawyer identifying any gaps between her core values and actions taken in the workplace. Practice narrowing the gap by consistently aligning words and actions with values, and by determining a unique value proposition and how it benefits the client. Actively seek and respond to honest feedback from others, either informally by creating a peer team, or by retaining a coach who can identify the “brutal truths” about any misalignment between core values, words and actions. A lawyer can practice integration by analyzing whether she presents herself consistently across different situations and environments.

Lawyers not only are held to a high standard of integrity and honesty, but also are often stereotyped as people lacking these traits. “Knowing that unflattering media, client experience and untested assumptions often support these stereotypes, lawyers who are able to demonstrate alignment of their core values and actions can be more effective contributors to the success of their organizations,” says Mary Lynn Bedell, vice president, food and regulatory law, for The Hillshire Brands Company. Clients who view their lawyers as inauthentic might disregard their advice as invalid, regardless of how soundly researched, logically developed and well communicated.

Authenticity enables a lawyer to interact with clients and colleagues in a predictable manner that they value. It is the building block of the fifth trait: cultivating connections.

**Cultivate connections**

The days of a lawyer keeping her head down and working hard to attain the next level are over. While the appropriate skill set is a baseline for any lawyer working in an organization's legal department, it is no longer sufficient to come to the office and do a competent job. The successful lawyer must cultivate connections with other departments and the senior leadership team. These bonds build trust and inform constituents of the value one brings to the organization. Time spent on developing these connections and marketing one’s “brand” is an investment in one's career.

Cultivation creates opportunities to interact with senior management and to take a leading role in the company. The days of going it alone, if they ever truly existed, are gone. Today, in-house counsel maintain visibility with the senior leadership team by creating opportunities for interaction. Being top of mind allows others to consider that lawyer the “go to” person for new projects or responsibilities. “Executive presence takes time to develop,” says David G. Susler, associate general counsel, National Material L.P. “It requires building confidence with your client over time, not solely on the basis of subject matter expertise, but also on the basis of the credibility you have established with the client.”

The lawyer who maintains strong working relationships with colleagues on the audit committee, senior management, contractors, outside counsels, insurers and the human resources committee, among others, will be ideally situated to contribute to the creation and implementation of the risk management plan.
Although busy lawyers might not think they have time for cultivation, they can devote undivided attention to the person across the table by refraining from checking email, text messages, taking phone calls or playing games on mobile devices. These techniques may seem like common sense, but they can and do make a difference. Understanding what matters to the other person by actively listening, even if for a short time, means a lot in today's frenetic world.

Offering to be on a cross-functional team is a proven way to expand professional connections and to demonstrate a skill set to others in the organization. Volunteering for a high-profile assignment, such as making a presentation to the board or senior leadership team, will cultivate important connections.

The successful lawyer has the right combination of attributes that will create a professional brand, a unique identifier for which the lawyer is known. Poise, confidence, influence, authenticity and cultivating connections are five attributes that can position both the organization and the attorney for success.

The successful management of risk is critically dependent on the competencies of the in-house lawyer, who is ideally positioned to contribute to the success of an enterprise risk management plan. As a member of the organizations team, which includes the audit committee, senior management, employees, contractors, outside counsel, insurers and the human resources committee, among others, the in-house attorney typically has the expertise, experience and authority to play a leadership role in the risk management process.

The identification, assessment and communication of risk to relevant stakeholders, as well as the determination of risk tolerance and the development, implementation and measurement of the success of the risk management plan, benefit from the leadership of the in-house attorney. Knowledge of the law and its interpretation, the potential negative impacts on the organization's brand, and a deep understanding of the business and corporate goals will inform the best risk management protocols.

Managing Risk: Crafting an Enterprise Risk Management Plan

Just as a chain is only as strong as its weakest link, an enterprise risk management plan is only as effective as the people who contribute to its creation. Involving the in-house lawyer in the development of the organization's enterprise risk management plan is not enough. Although the plan will address the risks inherent in each department of the organization, does it reflect an analysis of each lawyer's effectiveness as a member of the legal department? Because the enterprise risk management plan is only as effective as the people who develop it, each lawyer can best support the plan if he has an individual professional effectiveness plan that is aligned with the organization's enterprise risk management goals and is an important component of that plan.

To develop this individual plan, an in-house lawyer can ask himself a number of questions that will address the risks that can jeopardize his effectiveness:

• How does the organization define professional effectiveness?

• What is the difference between this definition and the lawyer's perceived performance?

• What risk could this gap create for the organization?

• How significant are these risks?

• How can these risks be eliminated or mitigated?
• How can the lawyer measure and communicate the success of these actions?

• What actions need to be undertaken to address unsuccessful results?

Common elements in an individual lawyer's professional effectiveness plan are (a) knowledge of the law; (b) knowledge of the business/business acumen; (c) clear communication; (d) ability to work as a team member/collaboration; and (e) timeliness of response. Each of these elements can be characterized as a skill or expertise. Using a risk management template to analyze each of these elements is a good starting point for an individual professional effectiveness plan.

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Footnotes

a1 Kathryn K. Mlsna is the former chief legal, strategy and governance officer for the Girl Scouts of Greater Chicago and Northwest Indiana. kathryn.mlsna@gmail.com

a2 Amy D. Cline is a corporate attorney in the Chicago office of Bryan Cave LLP, where she advises companies on a variety of transactional, commercial and governance issues. amy.cline@bryancave.com


2 Esther & Jerry Hicks, “Ask and It is Given.” p. 27 (Hay House, Inc., 2004).

Henry David Thoreau, cited in Classic Quotes, Quotation #34411 (www.quotationspage.com/quote344111.html).