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## Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII

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## **BLURRED LINES: SEXUAL ORIENTATION AND GENDER NONCONFORMITY IN TITLE VII**

### **ABSTRACT**

*Title VII's prohibition of discrimination on the basis of sex is read broadly to include gender nonconformity. Although social scientists have documented the historic link between the homosocial performance of sexual orientation and the achievement of hegemonic masculinity within the modern workplace, courts continue to struggle with the task of defining the scope of protected gender nonconforming conduct. As many within the lesbian, gay, bisexual, and transgender community continue to demand equal access, recognition, and employment opportunity, only twenty-one states provide statutory protections for LGBT persons or their allies, and courts utilize a number of judicial limits in an attempt to readily distinguish claims based on "sex" and those based on "sexual orientation." However well-intended, such tools frustrate the legislative goals underlying Title VII and negate social science that suggests a new, fluid conceptualization of gender normativity is in order—one capable of recognizing sexual orientation's unique role in achieving and reinforcing gender.*

*Through the use of such sociological research, legal scholarship, and judicial opinions, this Comment examines the complex scope of sex and gender within Title VII jurisprudence. Nominally, this Comment proposes the use of an expansive interpretation of sex and what constitutes discrimination based on sex and discourages the imposition of court-crafted limits to the scope of conduct capable of classification as gender nonconforming. Critically, this Comment does not assert that LGBT identity, and expressive manifestations of such identity, universally fall under the purview of Title VII. Rather, this Comment suggests that social science indicates that sexuality can, and often does, play a pivotal role in the public construction and reinforcement of gender.*

*This Comment then examines the implications of alternative approaches to expanding protection for sexual minorities, including statutory expansions to class-based, federal civil rights laws and vulnerability scholarship, which advances the abolition of class-based structures as a means of protecting equal employment opportunity in the United States. It concludes that critics of an*

*expansive, and more sociologically informed examination of gender, must find solace in the Court's delegated responsibility to interpret and define the scope of discrimination prohibited under Title VII and, instead, focus criticism on the abuse of judicial biases, which mar outcomes and create inconsistencies.*

*Ultimately, this Comment recognizes the fluidity of gender as a social construction in contemporary, hegemonic society and charges the Court to fulfill its duty to examine the array of conduct, including LGBT identity, association, and outward manifestations of such identity, which may, and often do, serve as building blocks for the achievement of gender within the context of a sex-stereotyping suit.*

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## INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the workplace “because of . . . sex.”<sup>1</sup> Since its enactment, courts have struggled in applying its prohibition in the context of gender nonconformity.<sup>2</sup> While the Supreme Court has found claims of sex-based harassment and discrimination cognizable when carried out by members of the same sex,<sup>3</sup> as well as proof of a harasser’s sexual orientation sufficient to meet the statutory threshold,<sup>4</sup> courts have refused to apply Title VII in the context of discrimination “because of” sexual orientation.<sup>5</sup> Nonetheless, many circuits have noted that when “utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator.”<sup>6</sup> While the Court has recognized claims under Title VII where a female failed to present herself in a manner deemed sufficiently “feminin[e]” within the workplace,<sup>7</sup> the Court left open the question of whether gender nonconformity extends to conduct perceived to be or actually related with same-sex sexual attraction. In the absence of clarity, federal circuit courts have adopted a variety of imprecise limiting principles in an attempt to avoid unilaterally amending Title VII.<sup>8</sup>

This Comment argues that the scope of discrimination “because of . . . sex” under Title VII<sup>9</sup> should be read expansively, in light of recent Supreme Court

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<sup>1</sup> See 42 U.S.C. § 2000e-2 (2012). Title VII of the Civil Rights Act of 1964 is codified as amended in Title 42 of the U.S. Code. See 42 U.S.C. §§ 2000e to 2000e-17.

<sup>2</sup> See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006) (holding that discrimination based upon the association with a known homosexual coworker is not actionable under Title VII).

<sup>3</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“[I]t would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group.”).

<sup>4</sup> See *id.* at 80 (“The same chain of inference [of discrimination] would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual.”); see also *Vickers*, 453 F.3d at 759 (holding discrimination on the basis of association with an avowedly homosexual was not a sufficient basis for a Title VII claim of sex stereotyping discrimination).

<sup>5</sup> See, e.g., *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 520 (6th Cir. 2011) (providing that a plaintiff cannot “bootstrap protection for sexual orientation into Title VII’ under the guise of a sex-stereotyping claim”).

<sup>6</sup> See *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005); see also *Vickers*, 453 F.3d at 763 (quoting *Dawson*, 398 F.3d at 218).

<sup>7</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989); see also *id.* at 258 (“[W]hen a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision, the defendant may avoid . . . liability only by providing by a preponderance of the evidence that it would have made the same decision even if it had not taken . . . gender into account . . .”).

<sup>8</sup> See, e.g., *Oncale*, 523 U.S. at 80 (limiting application of Title VII in sex-stereotyping claims to outward mannerisms observed in the workplace).

<sup>9</sup> See 42 U.S.C. § 2000e-2 (2012).

jurisprudence,<sup>10</sup> to encompass outward manifestations of gender nonconformity. Such nonconformity should not be limited to mannerisms, gestures, or workplace demeanor but should also be read to include displays of personal identification and affiliations that fall beyond the boundaries of conventional behavior for members of a particular sex. Discrimination motivated in part by a person's gender nonconformity, although used to identify or classify a person as a sexual minority, should fall well within the scope of "but for" discrimination based on sex stereotyping. Finally, this Comment argues that such expansive interpretation of the statutory language, albeit an essential step, may inadequately serve to curb discriminatory animus based on sex, directed particularly toward gays and lesbians whose mannerisms and outward demeanor may meet societal norms surrounding gender but who nonetheless openly identify as gay, lesbian, bisexual, queer, or questioning. Accordingly, this Comment explores an innovative alternative to Title VII's class-based structure that more adequately accounts for exploited vulnerability, universal to the human condition.

First, Part I of this Comment examines the conventional approach to sex-based claims of discrimination under Title VII, paying particular attention to piecemeal expansions in its scope. It then reviews sociological interpretations of sex and gender as analytically distinct concepts and examines the impact of *Windsor* on contemporary arguments of Title VII's application to sexual minorities. Second, Part II posits an expansive interpretation, encompassing outward displays of same-sex sexual attraction and actual or perceived lesbian, gay, bisexual, and transgender (LGBT)<sup>11</sup> identity within the scope of gender nonconformity for Title VII purposes. Finally, Part III discusses the implications and prospective challenges of such an expansive interpretation. It both examines critics and the challenges faced by sexual minorities who, beyond their identification as gay or lesbian, conform to societal norms of gender in stating a claim of discrimination based on sex.

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<sup>10</sup> See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (declaring the Defense of Marriage Act's definition of marriage to be unconstitutional); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (finding backers of Proposition 8 in California, which effectively banned same-sex marriage in the State of California, lacked appellate standing).

<sup>11</sup> For purposes of this Comment, LGBT is defined broadly and represents any and all gradations of identification as a sexual minority, including gay, lesbian, bisexual, queer, questioning, genderqueer, pansexual, transgender, transsexual, or third-gender. Historically, the term represents only a limited class of sexual orientations. Here, however, the term will also encompass persons who, regardless of personal identification as a sexual minority, are associated with or conflated with nonheterosexual persons.

Part III concludes by briefly exploring a new, more efficient statutory vision that reflects contemporary vulnerability scholarship.

### I. DECONSTRUCTING GENDER: A GREAT INTERPRETIVE DIVIDE

This Part serves primarily to contrast the two major contemporary approaches to examining gender and sex: section A discusses the jurisprudential approach, which both limits the scope of and collapses together the concepts of gender and sex and section B discusses the sociological approach, treating the two as fluid, yet analytically distinct, concepts. This Part then, in section C, examines potential arguments for expanded protections for actual or perceived gender nonconforming gays and lesbians rooted in the U.S. Constitution, in light of recent Supreme Court jurisprudence.

Title VII of the Civil Rights Act of 1964 provides that it shall be an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of . . . sex,”<sup>12</sup> or “to limit, segregate, or classify his [or her] employees or applicants for employment in any way which would . . . tend to deprive any individual of employment opportunities or otherwise adversely affect [their] status as an employee, because of . . . sex.”<sup>13</sup> But what did the statute’s drafters understand “sex” to encompass? If gender could be read to fall within the scope of the term “sex,” how would it be defined? And, could expressions of sexual orientation ever fall within the boundaries of gender as a sociological construct?

#### *A. The Conventional Approach: Avoiding an Expansive Interpretation of Title VII*

Since 1989, the U.S. Supreme Court has recognized “gender” and gender expression as falling within the statutory scope of Title VII.<sup>14</sup> In *Price Waterhouse v. Hopkins*, the Court expanded the scope of “sex” dramatically, interpreting the prohibition of sex discrimination to mandate that “*gender* must

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<sup>12</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>13</sup> *Id.* § 2000e-2(a)(2). Title VII also extends its protections against discrimination because of a person’s “race, color, religion . . . or national origin. *Id.*”

<sup>14</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240, 251 (1989) (holding that sex stereotyping is a form of discrimination under Title VII).

be irrelevant to employment decisions.”<sup>15</sup> Moreover, the Court also recognized the pragmatic reality of motivating factors in workplace discrimination:

[W]e also know that Title VII meant to condemn even those decisions based on a *mixture* of legitimate and illegitimate considerations. When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was “because of” sex and the other, legitimate considerations—even if we may say later, in the context of litigation, that the decision would have been the same if gender had not been taken into account.<sup>16</sup>

However, the Court held that in the context of sex stereotyping, regardless of other factors influencing an ultimate employment decision, “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.”<sup>17</sup>

Since *Price Waterhouse*, courts have struggled to apply Title VII in a number of contexts that have worked a piecemeal expansion on the scope of sex. In 1998, the Court first applied Title VII to claims of sex-based harassment at the hands of actors of the same sex.<sup>18</sup> In *Oncale*, a male petitioner, who had alleged sexual harassment by male coworkers working on an oil platform operated by respondent in the Gulf of Mexico, challenged the Fifth Circuit’s determination that he lacked a sufficient cause of action under Title VII for harassment by male coworkers.<sup>19</sup> After recognizing that male-on-male sexual harassment in the workplace was “not the principal evil Congress was concerned with when it enacted Title VII,” the Court found no justification in the statutory language or precedent for excluding same-sex harassment claims from coverage.<sup>20</sup> Ultimately, the Court held the critical issue of Title VII is disadvantage: “whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>21</sup>

While the *Oncale* Court notably expanded coverage of Title VII’s prohibition of discrimination “because of . . . sex” to encompass conduct at the

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<sup>15</sup> *Id.* at 240 (emphasis added).

<sup>16</sup> *Id.* at 241 (emphasis added).

<sup>17</sup> *Id.* at 250.

<sup>18</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

<sup>19</sup> *Id.* at 77.

<sup>20</sup> *Id.* at 79.

<sup>21</sup> *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation mark omitted).

hands of members of the same sex, the Court noted in dicta that sexual orientation could be relevant in proving the inferential “chain” that conduct was “motivated by sexual desire.”<sup>22</sup> Although the Court made clear that “harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex,” the Court provided that use of “derogatory terms” by members of the same sex that “make it clear that the harasser is motivated by general hostility to the presence of [members of a particular sex] in the workplace” are sufficient grounds for a claim under Title VII.<sup>23</sup>

Nonetheless, Title VII is not a mere civility code. The Court noted that Title VII “does not reach *genuine but innocuous differences* in the ways men and women routinely interact with members of the same sex.”<sup>24</sup> Likewise, the Court recognized that mere horseplay is beyond the scope of the prohibition: “The prohibition on harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim’s employment.”<sup>25</sup> While sexually related conduct itself is not prohibited, the Court recognized that context is important in the application of Title VII.<sup>26</sup> Not only is “the objective severity of harassment . . . judged from the perspective of a *reasonable person* in the plaintiff’s position,” in the context of same-sex harassment, “the social context” in which the behavior occurs must be carefully considered.<sup>27</sup>

That discrimination solely on the basis of “sexual orientation” is not actionable under Title VII is settled.<sup>28</sup> In *Rene v. MGM Grand Hotel, Inc.*, the Ninth Circuit reaffirmed the generally accepted principle that Title VII does not recognize claims based solely on sexual orientation, providing (perhaps erroneously) that “sexual orientation is irrelevant for purposes of Title VII.”<sup>29</sup>

However, the Supreme Court has yet to clearly draw a hard line between a claim of discrimination based on sex and a claim of discrimination based on

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<sup>22</sup> *See id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 81 (emphasis added).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (emphasis added); *see also id.* (“A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office.”).

<sup>28</sup> *See, e.g.,* *Gilbert v. Country Music Ass’n*, 432 F. App’x 516, 519 (6th Cir. 2011).

<sup>29</sup> *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc).

sexual orientation in the context of sex stereotyping. In 2006, in *Vickers v. Fairfield Medical Center*, the Sixth Circuit considered the question of whether a person “subject to daily instances of harassment” in the form of slurs, “frequent derogatory comments regarding . . . sexual preferences,” “vulgar gestures,” physical harassment, and “simulated sex,” could bring forth a Title VII claim after befriending an openly gay coworker.<sup>30</sup> The plaintiff, Vickers, relied on the “theory of sex stereotyping adopted by the Supreme Court in *Price Waterhouse* to support both his sex discrimination and sexual harassment claims.”<sup>31</sup> The trial court granted the defendant’s motion for judgment on the pleadings, finding that Title VII does not protect individuals from discrimination based on sexual orientation or “being perceived as homosexual.”<sup>32</sup> On appeal, the Sixth Circuit affirmed, reasoning that the theory of sex stereotyping was “not broad enough to encompass” discrimination in response to behaviors which were neither “observed at work” nor “affect[ed] . . . job performance.”<sup>33</sup> Ultimately, the court held the Title VII claims failed because the plaintiff had not “allege[d] that he did not conform to traditional gender [norms] in any *observable* way.”<sup>34</sup>

Although the Sixth Circuit acknowledged its own precedent that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination”<sup>35</sup> and recognized that “individuals who are perceived as or who identify as homosexuals are not barred from bringing a claim for sex discrimination under Title VII,”<sup>36</sup> the *Vickers* court suggested mere association with openly homosexual peers or organizations could not constitute such “gender non-conforming behavior.”<sup>37</sup>

Nevertheless, the court failed to consider any real possibility that such affiliation or association could, indeed, violate any substantive societal gender norm. Moreover, the court left open the question of how such a principle would be applied in a case where the plaintiff was openly gay, lesbian, bisexual, queer, or questioning.<sup>38</sup> In *Vickers*, the plaintiff did not disclose

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<sup>30</sup> *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759 (6th Cir. 2006).

<sup>31</sup> *Id.* at 762 (internal citations omitted).

<sup>32</sup> *Id.* at 761.

<sup>33</sup> *Id.* at 763.

<sup>34</sup> *Id.* at 764 (emphasis added).

<sup>35</sup> *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

<sup>36</sup> *Vickers*, 453 F.3d at 762.

<sup>37</sup> *Id.* at 763.

<sup>38</sup> *See id.* at 763–64 (citing *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)). The Sixth Circuit recognized the problem of applying Title VII in the context of an openly gay plaintiff, providing that

whether he was, in fact, homosexual; yet, the court found his allegation constituted a prohibited attempt to “bootstrap protection for sexual orientation into Title VII.”<sup>39</sup>

However, Judge David M. Lawson argued in a dissent for adopting a broader conceptualization of gender normativity. Lawson critiqued the majority for limiting the scope of *Price Waterhouse* to only those “behavior[s] and appearances that manifest themselves in the workplace.”<sup>40</sup> In Judge Lawson’s view, the majority opinion dismissed “private sexual conduct, beliefs, or practices that an employee might adopt or display elsewhere,” as incongruent with any “outward workplace manifestation of less-than-masculine gender characteristics.”<sup>41</sup> Paying special attention to the context of mixed-motive claims, where “a fact finder could infer that sex (and not simply homosexuality) played a role in the employment decision,” the dissent argued that “drawing the line” should not occur at the mere pleading stage in such contexts.<sup>42</sup>

Finding Vickers’s conduct of befriending an admitted homosexual sufficient to establish his perceived failure to conform with contextual gender norms, Judge Lawson provided that such facts “provide a basis for the inference that [Vickers] was perceived as effeminate and therefore unworthy” of being tolerated in the workplace.<sup>43</sup> Judge Lawson’s dissent expressly sympathizes with an interpretation of Title VII capable of finding that associations with avowedly gay and lesbian persons can constitute behavior “not masculine enough or feminine enough” to be tolerated in the workplace context.<sup>44</sup> While the complaint in *Vickers* was “replete with allegations that the plaintiff *also* was harassed because of his perceived homosexuality,” Judge Lawson posited that mere homosexuality could not serve to disqualify relief under Title VII.<sup>45</sup>

Many scholars have argued that the term “sexual orientation” need not be included in the language of Title VII for an allegation wholly based on sexual

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“stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” *Id.* (quoting *Dawson*, 398 F.3d at 218).

<sup>39</sup> *Id.* at 764 (quoting *Dawson*, 398 F.3d at 218).

<sup>40</sup> *Id.* at 767 (Lawson, J., dissenting). Judge Lawson, a District Judge for the Eastern District of Michigan, sat on the panel by designation.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 769.

<sup>44</sup> *Id.* at 766.

<sup>45</sup> *Id.* at 770 (emphasis added).

preference to successfully overcome motions for summary judgment at trial.<sup>46</sup> L. Camile Hébert, in *Transforming Transsexual and Transgender Rights*, argued that “the term ‘sex’ should be defined more broadly than courts have seen fit to do with respect to sexual minorities” to expand protections based *not solely* on biological status, but also based on gender-linked traits including contextual associations with avowedly LGBT organizations.<sup>47</sup> While the overwhelming trend among lower courts is to recognize a claim of sex discrimination based on a lack of conformity to gender norms, such as a male plaintiff’s effeminacy<sup>48</sup> or a female’s tomboyish appearance,<sup>49</sup> lower courts remain largely confused about where to draw the line between claims based on orientation and those based on gender nonconformity.<sup>50</sup>

In contrast to the lack of reception to mixed-motive claims of discrimination based on sex where lesbian, gay, and bisexual identification may be implicated, courts are traditionally more receptive to claims of sex-based harassment or discrimination against transsexual or transgender persons.<sup>51</sup> Notably, other plaintiffs have sought redress outside the scope of Title VII, looking to theories on the basis of privacy rights, due process, free speech, and equal protection for recourse.<sup>52</sup> Conspicuously in *Lawrence v. Texas*, the Supreme Court held the application of a Texas statute that criminalized sodomy, when engaged in by persons of the same-sex, to two avowedly gay persons for sexual conduct within the confines of their private

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<sup>46</sup> See, e.g., Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713 (2010) (arguing that Title VII’s prohibition on discrimination based on sex should protect gays and lesbians from discrimination and provide reasonable accommodations).

<sup>47</sup> L. Camile Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 589–90 (2009).

<sup>48</sup> See *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009) (reversing summary judgment for the defendant–employer because the plaintiff–employee’s “gender stereotyping claim” was cognizable even though “it [was] possible that the harassment . . . was because of his sexual orientation, not his effeminacy”).

<sup>49</sup> See, e.g., *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1041–43 (8th Cir. 2010) (concluding that the plaintiff presented “sufficient evidence to make out a prima facie case” of sex discrimination where the record established an employer discriminated against women because they did not wear dresses or makeup).

<sup>50</sup> See, e.g., *supra* notes 30–45 (discussing *Vickers*).

<sup>51</sup> See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“[S]ex discrimination includes discrimination against transgender persons because of *their* failure to comply with stereotypical gender norms.” (emphasis added)); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (finding cognizable the Title VII claim of a transsexual who alleged that she was the victim of discrimination due to her failure to conduct herself in conformity with her employer’s sex stereotypes of how a man should behave).

<sup>52</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that the private sexual practices of two gay men, prosecuted under a Texas statute that criminalized persons of the same sex from engaging in sodomy, were entitled to respect).

home violated their rights to equal protection and due process.<sup>53</sup> According to the majority opinion, the Due Process Clause of the Fourteenth Amendment protected the rights of gays to engage in intimate conduct within their homes without suffering criminal sanctions.<sup>54</sup> Some gays and lesbians have based their claims successfully on various state constitutions. In *Gay Law Students Ass'n v. Pacific Telephone & Telegraph Co.*, the Supreme Court of California held that an employment discrimination claim is cognizable under the Equal Protection Clause of the California constitution.<sup>55</sup> Finally, due in part to the lack of Supreme Court jurisprudence on the topic, and in the interest of providing clarity in regards to discrimination faced by sexual minorities, many states have adopted civil rights legislation expressly covering sexual orientation.<sup>56</sup>

However, critics of statutory expansion have challenged the viability of including sexual orientation as a protected class due to its fluid nature, definitional obstacles, and similar evidentiary questions of establishing a claim.<sup>57</sup> In the absence of federal employment nondiscrimination protection for gays and lesbians,<sup>58</sup> and as sexual minorities increasingly form public coalitions within the workplace,<sup>59</sup> courts are left to grapple with the

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<sup>53</sup> *Id.* at 578–79 (“[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship, even when not intended to produce offspring, are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment.” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

<sup>54</sup> *Id.* at 567 (“The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals.”).

<sup>55</sup> 595 P.2d 592, 602 (Cal. 1979).

<sup>56</sup> See Ian Ayres & Jennifer Gerarda Brown, *Mark(et)ing Nondiscrimination: Privatizing ENDA with a Certification Mark*, 104 MICH. L. REV. 1639, 1671 n.98 (2006) (“According to the National Gay and Lesbian Task Force, 47% of the U.S. population lives in jurisdictions that have adopted nondiscrimination laws.”).

<sup>57</sup> Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646 (2001); see also, e.g., Edward Stein, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in FORMS OF DESIRE: SEXUAL ORIENTATION AND THE SOCIAL CONSTRUCTIONIST CONTROVERSY 325, 326 (Edward Stein ed., 1990) (“Essentialists think that being a heterosexual or homosexual is like having a certain blood type . . . .”); Jonathan Pickhardt, Note, *Choose or Lose: Embracing Theories of Choice in Gay Rights Litigation Strategies*, 73 N.Y.U. L. REV. 921, 942 (1998) (“Arguments for suspect classification status for sexual orientation based on immutability have been almost completely rejected.”).

<sup>58</sup> See generally *Employment Non-Discrimination Act*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/laws-and-legislation/federal-legislation/employment-non-discrimination-act> (last updated Dec. 18, 2014) (providing that the Employment Non-Discrimination Act would mark a dramatic expansion of protections for gays and lesbians at the federal level).

<sup>59</sup> See Nathan Cullen, *Out at Work: Diversity in the Pharmaceutical and Biotechnology Industries*, MINORITYNURSE (Mar. 30, 2013), <http://minoritynurse.com/out-at-work-diversity-in-the-pharmaceutical-and-biotechnology-industries/> (“[T]he workforce diversity [companies] they embrace not only encompasses race, gender and disability status, but also has been expanded to include lesbian, gay, bisexual and transgender (LGBT) employees.”).

conventional process of defining the scope of gender nonconformity. Just where courts draw the line between discrimination based on sex and sexual orientation remains a blurry exercise of judicial discretion.

*B. The Sociological Approach: Achieving Masculinity Through Sexuality*

This section explores the sociological approach to examining gender in a contemporary context as a means of, ultimately, supporting a more sociologically informed interpretation of sex, and what constitutes discrimination based on sex, within Title VII jurisprudence. Sociological scholarship provides much insight into how laypersons working in American industry view and work collectively to construct gender norms. Here, this Comment surveys the work of notable sociologists, examines the sociological consensus regarding the distinction between sex and gender, and uses sociological science to shed light on the role sexual orientation plays in the societal construction of gender in modern hegemonic contexts.

Sociologists' definition of sex differs from the modern jurisprudential definition under Title VII. Historically, sociologists draw sharp distinctions between concepts of sex and gender, largely relegating sex to notions of genetic predispositions and phenotypic trends in human biology.<sup>60</sup> While many argue that sex, like gender, falls on a spectrum that recognizes wide biological variation, most also recognize the predominance of two sex categories and utilize terms "male" and "female" in discussing biological differences between human sex organs.<sup>61</sup> Moreover, Cecilia L. Ridgeway and Shelley J. Correll, in *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, argue that people use relative "cultural beliefs about gender" as the "rules" of evaluating others and classifying them into sexual categories: "The process that links gender beliefs and social relational contexts is automatic sex categorization. Sex categorization is the sociocognitive process by which we label another as male or female. As we sex categorize

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<sup>60</sup> See, e.g., 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, 10 (1995) (positing that "[a]s most feminist theorists use the terminology, 'sex' refers to the anatomical and physiological distinctions between men and women; 'gender,' by contrast, is used to refer to the cultural overlay" on these distinctions); Penelope Eckert, *The Whole Woman: Sex and Gender Differences in Variation*, 1 LANGUAGE VARIATION & CHANGE 245, 246 (1989) ("[S]ex is a biological category that serves as a fundamental basis for the differentiation of roles, norms, and expectations . . . that constitute gender, the social construction of sex.").

<sup>61</sup> Eckert, *supra* note 60, at 245 ("Sociolinguists generally treat sex in terms of oppositional categories (male/female) . . .").

another, by implication, we sex categorize ourselves as either similar or different from that other.”<sup>62</sup>

Furthermore, while “physical sex differences” are presumed to be the dividing characteristics used in the process of sex classification, “in everyday social relational contexts, we sex categorize others based on appearance and behavioral cues (e.g., dress, hairstyles, voice tone) that are culturally presumed to stand for physical sex differences.”<sup>63</sup> Thus, in the view of many sociologists, the process of sex classification depends, in large part, on “widely shared cultural beliefs about sex/gender” that are used selectively to “construct [one’s] appearance” in such a way as to be deemed to “belong[] to the sex category [one] claim[s] for [oneself].”<sup>64</sup>

To many social scientists, gender beliefs—although relative to the context of any individual—“are always implicitly available to shape individuals’ evaluations and behavior.”<sup>65</sup> While there is “no pattern of masculinity found everywhere,”<sup>66</sup> in many contexts and cultures, behavioral cues signifying sex (and gender) classifications include and, in part, depend on outward expressions of sexuality, nominally heterosexuality. R.W. Connell, in *Teaching the Boys: New Research on Masculinity, and Gender Strategies for Schools*, examines the role gender expression plays for young men in the context of primary education.<sup>67</sup> According to Connell, in most cultural contexts “hegemonic masculinity” controls the parameters of gender expression for males seeking to identify as men.<sup>68</sup> While other forms of masculinity may exist “alongside,” hegemonic masculinity “signifies a position of cultural authority and leadership” and “is an expression of the privilege men *collectively* have over women.”<sup>69</sup> Such privilege is maintained collectively through adherence to behavioral norms:

The gender structures of a society define particular patterns of conduct as “masculine” and others as “feminine.” At one level, these

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<sup>62</sup> Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC’Y 510, 514 (2004).

<sup>63</sup> *Id.* at 515.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> R.W. Connell, *Teaching the Boys: New Research on Masculinity, and Gender Strategies for Schools*, 98 TCHRS C. REC. 206, 208 (1996).

<sup>67</sup> *Id.* at 213 (“[G]ender is embedded in the institutional arrangements through which a school functions . . .”).

<sup>68</sup> *Id.* at 209 (emphasis omitted).

<sup>69</sup> *Id.*

patterns characterize individuals. Thus we say that a particular man (or woman) is masculine, or behaves in a masculine way. But these patterns also exist at the collective level. Masculinities are defined and sustained in institutions, such as corporations, armies, governments—or schools.<sup>70</sup>

Masculinity is an active process supported collectively as a result of conscious choices on the part of actors.<sup>71</sup> “Ethnomethodological research has shown that we ‘do gender’ in everyday life,” from how we engage in conversations to our criminal conduct in an attempt to “produce what [we] believe to be appropriate masculinities.”<sup>72</sup>

In many contexts, including Western primary educational settings, heterosexuality itself plays an important role in sustaining hegemonic masculinity and, as a result, concepts of gender roles for men and women.<sup>73</sup> In Connell’s study of the primary school context, he writes “[a] heterosexual construction of masculine and feminine as opposites (as in ‘the opposite sex,’ ‘opposites attract’) runs through a great deal of the school’s . . . culture and curriculum.”<sup>74</sup> Although the homosexual experience is generally “blanked out” from the official curriculum, informal forms of “hostility” work to reinforce “powerful ideolog[ies] of gender difference” and “put pressure on boys [and girls] to conform to it.”<sup>75</sup>

### *C. The Impact of Windsor: New Calls for Equality*

This section explores recent Supreme Court jurisprudence as a means of supporting the use and defense of an expansive interpretation of what constitutes discrimination based on sex that recognizes sexuality as a pivotal form of gender expression within the contemporary workplace. Although the Supreme Court has recognized the right of gays and lesbians, at least within the confines of the private home, to engage in sexual conduct based on constitutionally protected liberty, the Court has yet to firmly ground protections for sexual minorities in either Equal Protection or Due Process jurisprudence.<sup>76</sup>

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 210 (“[M]asculinities come into existence as people act.”).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 216.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *See* *Lawrence v. Texas*, 539 U.S. 558 (2003).

However, much has yet to be said as to the impact of the Court's decision in *United States v. Windsor*.<sup>77</sup> In striking down Section 3 of the Defense of Marriage Act<sup>78</sup> (DOMA) and its sweeping prohibition on recognizing same-sex unions for all federal purposes, the Court struggled to establish the constitutional foundation for its reasoning.<sup>79</sup> While the Court recognized its history of deference to states with respect to issues of domestic relations, recognizing "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the 'protection of offspring, property interests, and the enforcement of marital responsibilities,'"<sup>80</sup> the Court ultimately grounded its decision in the Due Process Clause of the Fifth Amendment.<sup>81</sup> Paying respect to the class of persons New York State sought to protect, the Court emphasized the "over 1,000 federal statutes and a myriad of federal regulations" from which DOMA denied New York's same-sex couples access.<sup>82</sup> Justice Kennedy, writing for the majority, found as follows:

The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity. By seeking to displace this protection and treating those persons as living in marriages less respected than others, the federal statute is in violation of the Fifth Amendment.<sup>83</sup>

Notably, the Court left open the possibility of higher scrutiny for sexual minorities as a suspect class under the Equal Protection Clause of the Fourteenth Amendment, finding "[t]he Constitution's guarantee of equality 'must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot' justify disparate treatment of that group."<sup>84</sup> The Court thus failed to establish sexual minorities as such a suspect class, subject to higher scrutiny, or provide guidance as to how to apply Equal Protection analysis to gays and lesbians. Importantly, however, the Court

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<sup>77</sup> 133 S. Ct. 2675 (2013).

<sup>78</sup> Pub. L. No. 104-199, § 3, 110 Stat. 2419 (1996) (codified as 1 U.S.C. § 7 (2012)), *invalidated by* *United States v. Windsor*, 133 S. Ct. 2675 (2013).

<sup>79</sup> *See Windsor*, 133 S. Ct. at 2693 (suggesting gays and lesbians, or persons subject to discrimination "of an unusual character," deserve a form of heightened scrutiny (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996))) (internal quotation marks omitted).

<sup>80</sup> *Id.* at 2691 (quoting *Williams v. North Carolina*, 317 U.S. 287, 298 (1942)).

<sup>81</sup> *Id.* at 2693–96.

<sup>82</sup> *Id.* at 2688.

<sup>83</sup> *Id.* at 2696.

<sup>84</sup> *Id.* at 2693 (quoting *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–35 (1973)).

added—for the first time—that “[i]n determining whether a law is motivated by an improper animus or purpose, ‘discriminations of an unusual character’ especially require *careful consideration*.”<sup>85</sup> In light of the Court’s ambiguous language in *Windsor*, LGBT litigants undoubtedly may find success in grounding future claims of workplace discrimination and harassment in both Equal Protection and Due Process jurisprudence.

## II. AN INTERPRETIVE SOLUTION

This Part attempts to provide a concrete solution to the interpretive disconnect between current sociological and jurisprudential approaches to examining gender within a Title VII context. First, section A offers an expansive interpretation of “sex,” which not only encompasses biological distinctions and outward expression of gendered dress but also sexual orientation, associations with LGBT persons, or perceived sexual identity in modern workplaces where hegemonic masculinity sets the standard for the achievement of gender. Second, section B both examines failed attempts to expand protections for sexual minorities through the legislative process and questions the feasibility of such statutory proposals in light of current, broad interpretations of sex.

### A. *A Brave New World: Expansive Interpretations in an Era of Equal Justice*

This section first explores the contrast between jurisprudential interpretations of what constitutes discrimination based on “sex” within Title VII’s class-based scheme and the sociological realities surrounding the construction of gender as a means of personal and homosocial expression. Second, this section proposes a new, expansive interpretation of what constitutes discrimination based on sex that includes conduct, although avowedly homosexual in nature, which fails to conform to hegemonic notions of gender and identity. Finally, this section confronts the concerns of critics and examines the benefits to judicial efficiency and workplace equity that result from interpretively expanding Title VII’s protections.

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<sup>85</sup> *Id.* at 2693 (emphasis added) (quoting *Romer v. Evans*, 517 U.S. 620, 633 (1996)); *see, e.g.*, *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (permitting the Boy Scouts of America’s exclusion of a gay individual as an assistant scoutmaster based *only* upon its First Amendment freedoms of expressive association); *Romer*, 517 U.S. at 634 (“If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (quoting *Moreno*, 413 U.S. at 534) (internal quotation marks omitted)).

Given the growing body of jurisprudence recognizing the constitutional rights of sexual minorities<sup>86</sup> and the expansive body of sociological evidence emphasizing sexuality's role in social constructions of gender,<sup>87</sup> the time is ripe for courts to read Title VII expansively to more accurately protect individuals discriminated against "because of" gender nonconformity. In his work, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, Michael Kimmel notes that conceptions of gender lack universal equality and should be examined within the context in which they manifest themselves.<sup>88</sup> "All masculinities are not created equal; or rather, we are all *created* equal, but any hypothetical equality evaporates quickly because our definitions of masculinity are not equally valued in our society."<sup>89</sup> Pulling from Erving Goffman's conception of "hegemonic" masculinity, Kimmel notes that, traditionally, there has been only "one complete, unblushing male" seeking to achieve manhood:

a young, married, white, urban, northern heterosexual, Protestant father of college education, fully employed, of good complexion, weight and height, and a recent record in sports. Every American male tends to look out upon the world from this perspective. . . . Any male who fails to qualify in any one of these ways is likely to view himself . . . as unworthy, incomplete, and inferior.<sup>90</sup>

Ultimately, Kimmel views hegemonic masculinity as a three-tiered process within the modern American context: (1) the "flight from the feminine" (not being a woman),<sup>91</sup> (2) the "*homosocial* enactment,"<sup>92</sup> and (3) the embodiment of homophobia—the "central organizing principle of our cultural definition of manhood."<sup>93</sup> Homophobia, according to Kimmel, "is more than an irrational

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<sup>86</sup> See, e.g., *supra* Part I.C.

<sup>87</sup> See Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THEORIZING MASCULINITIES* 119 (Harry Brod & Michael Kaufman eds., 1994).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 124.

<sup>90</sup> *Id.* at 125 (quoting ERVING GOFFMAN, *SITGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 128 (1963)).

<sup>91</sup> *Id.* at 126–28 (noting the first step in achieving masculinity has "[h]istorically" been "the flight from women," which has severe consequences for young boys: first, the pushing away of ones "real mother, and with her the traits of nurturance, compassion, and tenderness she may have embodied;" second, the suppression of "those traits in himself;" and third, learning "to devalue all women in . . . society").

<sup>92</sup> *Id.* at 128–29 (finding that because "[o]ther men watch us, rank us, [and] grant our acceptance into the realm of manhood," men "perform heroic feats" and "take enormous risks" in an attempt to seek the approval of other men).

<sup>93</sup> *Id.* at 131.

fear of” homosexuals or conduct that may “be perceived as gay.”<sup>94</sup> Rather, it is the manifestation of a fear that “other men” will “emasculate” or “reveal to . . . the world that [such males] do not measure up.”<sup>95</sup> This fear of being viewed by others “as a sissy,” the equating of all things homosexual with femininity, and the “humiliation” of being afraid, “leads to silence” in the face of demonstrations of violence toward sexual minorities.<sup>96</sup>

In fact, because “efforts to maintain a manly front cover everything [men] do,” and because “[e]very mannerism . . . contains a coded gender[ed] language,”<sup>97</sup> people use gendered codes to “know” whether a person, nominally a male, is homosexual.<sup>98</sup> As a result, “[h]omophobia and sexism go hand in hand,” as heterosexual (and closeted homosexual) men adopt “negative rules about behavior”—they never “dress that way,” “talk or walk that way,” or “show their feelings or get emotional”—and “exaggerat[e] all the traditional rules of masculinity, including sexual predation with women.”<sup>99</sup> Thus, according to Kimmel, sex-based discrimination and harassment, the very tradition and conduct Title VII seeks to upend, stems in part from hegemonic masculinity and homophobia.<sup>100</sup> Women and gay men are sociologically linked; they “become the ‘other’ against which heterosexual men project their identities.”<sup>101</sup> Likewise, lesbians threaten concepts of hegemonic masculinity by filling and blocking heterosexual males from their traditionally held role: the objects of a female’s intimate and sexual affection.<sup>102</sup> If Kimmel’s work is worthy of credence, in a modern context that incorporates such hegemonic constructions of gender and social customs, overtly and avowedly homosexual

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*; see also *id.* at 134 (“Gay men have historically played the role of the consummate sissy in the American popular mind because homosexuality is seen as an inversion of normal gender development.”). In his work, Kimmel focuses on the man’s experience in an attempt to highlight hegemony’s focus on man’s dominance, and resultant privilege gained, over woman in the construction of gender norms. See *id.*

<sup>97</sup> *Id.* at 132.

<sup>98</sup> *Id.* at 132–33. Kimmel notes many female subjects, when asked how to identify a man as homosexual, point to a man “show[ing] his feelings,” acting “a certain way,” and “really car[ing] about [women].” *Id.*

<sup>99</sup> *Id.* at 133.

<sup>100</sup> See *id.* (“Homophobia is intimately interwoven with both sexism and racism.”). The fear that others might perceive men as homosexual “propels men to enact all manner of exaggerated masculine behaviors and attitudes to make sure no one could possibly get the wrong idea.” *Id.*

<sup>101</sup> See *id.* at 134.

<sup>102</sup> See James Joseph Dean, *Heterosexual Masculinities, Anti-Homophobias, and Shifts in Hegemonic Masculinities: The Identity Practices of Black and White Heterosexual Men*, 54 Soc. Q. 534, 546 (2013) (noting although animus is stronger toward gay men than toward lesbians, in many cases where lesbianism is tolerated, it “is coupled with a homophobic practice that views lesbians as sexual objects for straight men”).

conduct and expression must fall squarely within the scope of Title VII's "sex."

"Sex," in no uncertain terms, must be read expansively. Given existing jurisprudence, prohibiting discrimination on the basis of sex should (or rather, does) encompass and protect against, among other things, the following: discrimination based on biological and phenotypic characteristics;<sup>103</sup> outward and expressive mannerisms (whether exhibited within the workplace or not) that fail to meet expectations of gendered behavior; associations and allegiances with known openly gay, lesbian, bisexual, transgender, queer, or questioning persons; assertive conduct (such as wearing an armband signifying support for LGBT persons); and actual or perceived LGBT identity itself, in those situations wherein a court determines hegemonic masculinity sets the standard for the achievement of gender. Of course, this burden would fall—as it does with any Title VII claim of discrimination—on the plaintiff, who must be given the opportunity to present the relevant data and social science to establish the pervasiveness of hegemonic conceptualizations and expectations of gender. Likewise, while courts, including the Eleventh Circuit, have more readily welcomed claims by transgender plaintiffs based solely on their "transgender" identity into Title VII's fold,<sup>104</sup> gay, lesbian, and bisexual plaintiffs (whether actual, perceived, or linked through associations) should not be precluded from a judicial opinion recognizing homosexuality as a marker of femininity (or failure to achieve gender norms) for men—and masculinity for women—in hegemonic contexts.

Critics of expansive, albeit more realistic, interpretations of what constitutes discrimination on the basis of sex point to a number of flawed notions for support: the lack of "sexual orientation" as a protected class within the Act; the lack of necessity for expansive interpretations, given state and local antidiscrimination laws that have provided "51 percent of gay workers

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<sup>103</sup> See, e.g., *Kastl v. Maricopa Cnty. Comm. Coll. Dist.*, No. Civ.02-15331PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004) ("[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.").

<sup>104</sup> See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[S]ex discrimination includes discrimination against transgender persons because of *their* failure to comply with stereotypical gender norms." (emphasis added)). Although the *Glenn* court held an employer's termination of a transgender person's employment based on the view "a male in women's clothing is 'unnatural'" was discrimination based on sex, it left open the relationship of sexual orientation with gender norms. *Id.* at 1314.

with protection against discrimination;”<sup>105</sup> alternatively, to the potential for a “flood” of litigation, should courts broaden Title VII’s scope;<sup>106</sup> and the pragmatic problems of defining the class or identifying conduct or symbolism avowedly homosexual in nature.<sup>107</sup> Such challengers overstate their position, failing to respect the purposes of Title VII,<sup>108</sup> the role gender plays in identity expression for gays and lesbians, and the significance placed on sexuality as a marker of gender nonconformity. Moreover, although difficult fact-specific inquiries into the bases of discrimination may be dramatically difficult in cases involving actual or perceived LGBT plaintiffs, such inquiry cannot excuse courts from the duty to uphold Title VII’s prohibition on workplace discrimination based on gender nonconformity—regardless of the particular nonconforming conduct alleged.

Such criticisms expressly fail on five counts. First, utilizing the substantive canon of statutory construction of avoiding absurd results, many courts have found statutes encompass activity and entities beyond the scope of an enumerated list or class of persons to evade a result clearly contrary to Congress’s intent.<sup>109</sup> The extensive legislative history and public debate

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<sup>105</sup> JEROME HUNT, CTR. FOR AM. PROGRESS ACTION FUND, A STATE-BY-STATE EXAMINATION OF NONDISCRIMINATION LAWS AND POLICIES: STATE NONDISCRIMINATION POLICIES FILL THE VOID BUT FEDERAL PROTECTIONS ARE STILL NEEDED 15 (2012), [http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state\\_nondiscrimination.pdf](http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf).

<sup>106</sup> *Id.* at 15–16 (noting there is neither a threat of a “flood” nor “drought” of litigation because “the rate of complaints on the basis of sexual orientation is in line with those on the basis of sex and race” (internal quotation marks omitted)).

<sup>107</sup> *See Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257–58 (1st Cir. 1999) (finding the slurs, mockery regarding the plaintiff’s same-sex sexual conduct, and use of “high-pitched voices” and “stereotypically feminine” gestures were not actionable because the plaintiff failed to articulate a discrimination claim “based on sex”). *But see Centola v. Potter*, 183 F. Supp. 2d 403, 409–10 (D. Mass. 2002) (holding plaintiffs need not claim discrimination based on sex “alone or that sexual orientation played no part in his [or her] treatment” because, if he or she can show he or she was discriminated against because of sex “as a result of sex stereotyping, the fact that he was also discriminated against on the basis of his sexual orientation has no legal significance”).

<sup>108</sup> *See Schroer v. Billington*, 424 F. Supp. 2d 203, 208 (D.D.C. 2006) (“[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.” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)) (internal quotation marks omitted)).

<sup>109</sup> *See, e.g., Church of the Holy Trinity v. United States*, 143 U.S. 457, 459 (1892) (finding, in many contexts, a court is not bound by the plain meaning of a statute because “a thing may be within the letter of the statute and yet not within the statute, because [it is] not within its spirit”). Looking to “the whole legislation, or [to] the circumstances surrounding its enactment, or of the absurd results which follow” from interpreting statutory language in a certain way is “not the substitution of the will of the judge for that of the legislator.” *Id.*; *see also Brogan v. United States*, 522 U.S. 398, 403 (1998) (holding a petitioner’s requested limitation on the scope of a statute invalid because “it is not, and cannot be, [the Court’s] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is

surrounding the passage of the Civil Rights Act of 1964, coupled with nearly fifty years of its application in federal courts, suggest the Act's protected classes were carefully considered and strategically limited. However, given the judiciary's Article III duty to apply law to specific and, perhaps, unforeseen scenarios,<sup>110</sup> and overwhelming social science recognizing heterosexuality as an essential pillar of achieving gender in modern contexts,<sup>111</sup> it is well within the Court's constitutional power (and, indeed, duty) to view avowedly homosexual expression and association as falling within its conception of gender nonconformity in sex-stereotyping discrimination claims under Title VII. Thus, the mere fact that "sexual orientation" was not written into the Act in 1964, or as amended on subsequent occasions, should not bar the most expansive reading of "sex" possible—one that fathoms situations wherein an employee's sexual orientation itself could prevent the achievement of societal gendered expectations.

Second, many scholars have shown state and local antidiscrimination laws, while valuable assets in curbing severe and pervasive conduct against sexual minorities, are often misapplied and leave roughly half of LGBT workers nationwide without recourse.<sup>112</sup> Currently, only twenty-one states include protections for gays and lesbians facing workplace animus.<sup>113</sup>

Third, concerns regarding any hypothetical rush to the courthouse also fail to hold water. Nan D. Hunter, in *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, examined early studies on the use of state and local

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possible to identify that evil from something other than the text of the statute itself"). *But see* Robbins v. Chronister, 435 F.3d 1238, 1241 (10th Cir. 2006) (noting the burden required under the absurdity doctrine is high, and "[i]t is not enough to show . . . the result is contrary to what Congress . . . desired"). Courts apply the doctrine "only when it would have been unthinkable for Congress to have intended the result commanded by the words of the statute," where "the result would be 'so bizarre that Congress could not have intended it.'" *Id.* (quoting Demarest v. Manspeaker, 498 U.S. 184, 190–91 (1992)).

<sup>110</sup> See, e.g., William B. Rubenstein, *We Are Family: A Reflection on the Search for Legal Recognition of Lesbian and Gay Relationships*, 8 J.L. & POL. 89, 90–93 (1991) (recognizing the success of the gay rights movement in finding protections through dynamic statutory interpretation); Heidi A. Sorensen, Note, *A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination*, 81 GEO. L.J. 2105, 2108–09 (1993) (noting "dynamic statutory interpretation recognizes that language and legislative history may both be unclear" and "asks what the statute should mean in relationship to contemporary society").

<sup>111</sup> Kimmel, *supra* note 87, at 124–25.

<sup>112</sup> See Nan D. Hunter, *Sexuality and Civil Rights: Re-Imagining Anti-Discrimination Laws*, 17 N.Y.L. SCH. J. HUM. RTS. 565, 572 (2000) (recognizing state and local antidiscrimination laws are ineffective for a number of reasons, including lack of "public awareness," "the nature of the administrative process," and the complex web of interrelating protections).

<sup>113</sup> See *Employment Non-Discrimination Act*, *supra* note 58.

antidiscrimination laws protecting sexual minorities.<sup>114</sup> Pointing to two comprehensive studies conducted by the then-named General Accounting Office, at the request of Senator James M. Jeffords,<sup>115</sup> Hunter noted, “Both reports found that the absolute number of complaints of sexual orientation filed in each state was small, ranging from a low of two per year in smaller states to a high of 173 during one year in California.”<sup>116</sup> Although the studies revealed considerable variation among states, “possible demographic factors, major differences in enforcement regimes,” and “the structure of state and local antidiscrimination laws, as compared to federal law” may work to explain any differences in statistical reporting of claims based on race and those based on sexual orientation.<sup>117</sup> Thus, given the preponderance of evidence suggesting, at most, a minimal variation in the rates of complaint by members of various protected classes within state and local laws, claims that broadening the scope of sex-stereotyping discrimination would dramatically frustrate judicial efficiency need not deter such a dynamic interpretation.

The fourth reason such criticism of a broad interpretation of what constitutes discrimination on the basis of sex fails is that challenges in class definition, although significant, are ultimately surmountable. At the outset, it is important to acknowledge that the fact-specific task of identifying particular contexts in which sexual nonconformity exposes “members of one sex . . . to disadvantageous terms or conditions of employment to which members of the other sex are not exposed”<sup>118</sup> or in defining the class of persons who qualify as a sexual minority, who fail to meet societal norms of gendered behavior, can present unique obstacles. However, some suggest related concerns are exaggerated in the debate revolving around LGBT rights. Approaching the challenges of identifying and classifying LGBT persons within the context of Equal Protection analysis, in *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask Don’t Tell,”* Kenji Yoshino

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<sup>114</sup> Hunter, *supra* note 112, at 570–72.

<sup>115</sup> U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-00-27R, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS SINCE 1997 (2000), *available at* <http://www.gao.gov/assets/100/90269.pdf>; U.S. GEN. ACCOUNTING OFFICE, GAO/OGC-98-7R, SEXUAL-ORIENTATION-BASED EMPLOYMENT DISCRIMINATION: STATES’ EXPERIENCE WITH STATUTORY PROHIBITIONS (1997), *available at* <http://www.gao.gov/assets/90/87121.pdf>. The Office’s name was changed to the Government Accountability Office in 2004. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8, 118 Stat. 811, 814.

<sup>116</sup> Hunter, *supra* note 112, at 570.

<sup>117</sup> *Id.* at 571.

<sup>118</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation mark omitted).

argues that courts have erroneously placed heightened significance and privilege in the hands of “talismanic classifications,” like race, which “ostensibly mark individuals with immutable and visible traits.”<sup>119</sup> In determining whether a group is entitled to heightened scrutiny, the Court has employed a set of nonessential factors, including “the history of discrimination suffered by the group, the group’s political powerlessness, and the immutability and visibility of the characteristic defining the group.”<sup>120</sup> While Yoshino seems to cabin his argument to individuals who identify as a sexual minority, distinct from sex-based classifications, he pinpoints legitimate challenges in identifying sexual minorities and (in this case) LGBT-related conduct or associations that, in a given workplace, may constitute gender nonconformity protected under Title VII’s “sex.”<sup>121</sup>

Yoshino counters critics of expanding protections for sexual minorities and seems to suggest sexuality need not be limited to mere mannerisms or performance of sexual acts, arguing emphasis on visibility and immutability work an “assimilationist bias” on indistinct classes of persons.<sup>122</sup> Arguing that courts have failed to accurately recognize “social visibility,” which “designates perceptibility of non-physical traits,” Yoshino notes that “[w]hether a trait is visible will thus depend not only on the trait, but also on the ‘decoding capacity of the audience,’ which in turn will depend on the *social context*.”<sup>123</sup> Failure to recognize the realities of workplace gender norms (which oftentimes include public maintenance of heterosexuality) or conduct beyond mannerisms and dress “freez[es] out”<sup>124</sup> a substantial segment of gender nonconforming employees and encourages “converting, passing, and covering.”<sup>125</sup>

Moreover, such a challenge rings hollow because visibility and immutability, where proper, are used in controversies surrounding the borders of the class of persons itself. Here, this Comment does not argue for an expansion of “sex” to include “sexual orientation” in *all* contexts. Indeed, the

<sup>119</sup> 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).

<sup>120</sup> *Id.* at 489.

<sup>121</sup> *See id.* at 502–03.

<sup>122</sup> *Id.* at 490 (“Through these factors, the jurisprudence creates an incentive for indistinct groups to assimilate into the political mainstream when faced with burdensome legislation.”).

<sup>123</sup> *Id.* at 497–98 (emphasis added) (footnote omitted) (quoting GOFFMAN, *supra* note 90, at 51); *see also id.* at 498 (“Visibility, like immutability, is therefore always socially determined.”).

<sup>124</sup> *Id.* at 499.

<sup>125</sup> *Id.* at 500 (“Converting bias means that a group is asked to change the trait that defines it. . . . Passing means that a group is forced to hide its identity. . . . Covering means that a group is permitted to both retain and articulate its identity as long as it mutes the difference between itself and the mainstream.”).

focus should remain on situations and contexts where identification as gay or lesbian, or even allegiances with avowedly LGBT persons or organizations, may constitute protected gender nonconforming conduct. Certainly, an openly gay employee subject to an adverse employment action at an LGBT nightclub cannot claim that, within this context, he or she failed to conform to workplace gender expectations due to his or her sexual preferences. However, as in any sex-stereotyping case, courts must examine “how society perceives the individual” to determine the bases of adverse treatment.<sup>126</sup> Likewise, this Comment posits that—for the sake of protecting all persons subject to unlawful discrimination on the basis of gender nonconformity—courts take off the blinders of visibility from Equal Protection analysis and adopt a realistic scope of gender nonconforming conduct (i.e., take into account sexuality’s role as a marker of difference in most contexts).

Finally, critics of an expansive interpretation fail to dispel overwhelming evidence suggesting judicial freedom to identify gays and lesbians, or conduct affiliated with the LGBT community, as gender nonconforming, would expedite the judiciary’s task of defining the scope of Title VII. District courts have exemplified this struggle to draw a line between discrimination because of sex and that based solely on sexual orientation in the absence of clarity.<sup>127</sup> For example, in hostile environment sexual harassment claims involving same-sex harassers, courts expend much energy ensuring harassment is related to sex, rather than sexual orientation.<sup>128</sup> In *Sardinia v. Dellwood Foods, Inc.*, where an employee alleged supervisors would grab his genitals or buttocks and refer to him by using slurs, the court found the harassment claim actionable under Title VII, noting nothing in Title VII itself limits its protection to “heterosexual harassment.”<sup>129</sup>

However, in sex-stereotyping cases, many courts have limited plaintiffs’ ability to bring a Title VII claim on the basis of gender nonconformity. In *Oiler v. Winn-Dixie Louisiana, Inc.*, the district court held that “wearing female

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<sup>126</sup> *Schroer v. Billington*, 424 F. Supp. 2d 203, 211 (D.D.C. 2006).

<sup>127</sup> *See id.* at 210 (“To the extent that Title VII . . . prohibits sex stereotyping alone, it does so to allow women . . . to express their individual female identities without being punished for being ‘macho,’ or for men to express their individual male identities without reprisal for being perceived as effeminate. In other words, it creates space for people of both sexes to express their sexual identity in nonconforming ways.”).

<sup>128</sup> *See Peric v. Bd. of Trs. of the Univ. of Ill.*, No. 96 C 2354, 1997 WL 112819, at \*5 (N.D. Ill. Mar. 10, 1997) (drawing a distinction between harassment based on identification as gay or lesbian with identification as a man or woman).

<sup>129</sup> *Sardinia v. Dellwood Foods, Inc.*, No. 94 Civ. 5458 (LAP), 1995 WL 640502, at \*5 (S.D.N.Y. Nov. 1, 1995).

clothing and accessories” was not protected, gender nonconforming conduct under Title VII because it occurred while “not at work.”<sup>130</sup> Moreover, the district court dismissed the plaintiff’s claim of discrimination because he failed to show any similarly situated woman “was a crossdresser.”<sup>131</sup>

Such a burden of proof misses the point of Title VII’s prohibition on sex stereotyping, too quickly dismissing the unique, contextual significance of wearing a dress within both male and female homosocial relations.<sup>132</sup> Other district courts take a more lenient approach, refusing to bar a Title VII claim of discrimination based on sexual orientation so long as sex is also articulated as a basis.<sup>133</sup> Finally, some courts refuse to recognize sex-stereotyping arguments when the “homosexuality of a harasser provides an inference of sexual desire for a victim of the same sex.”<sup>134</sup> Ultimately, until the Court definitively erases the line so as to encompass the reality that homosexual identity often fails gender expectations, lower courts will continue to create and navigate through their uncertain mirage of self-imposed limitations.

### *B. Examining Alternative Approaches: A Statutory Fix?*

In the wake of such uncertainty for LGBT claimants seeking recompense through the judicial process, many have argued, instead, for Congressional reforms.<sup>135</sup> First, this section examines the history of legislative failures to

<sup>130</sup> *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*1 (E.D. La. Sept. 16, 2002); *see also id.* at \*7 (“[I]n order for a plaintiff to show disparate treatment, she must demonstrate that the misconduct for which she was discharged was nearly identical to that engaged in by a[n] employee [not within her protected class] whom [the company] retained.” (alterations in original) (quoting *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 221 (5th Cir. 2001) (internal quotation marks omitted)).

<sup>131</sup> *Id.* at \*8.

<sup>132</sup> *See* Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541, 2547 (1994) (“[D]ress and appearance expectations subordinate women to men. For example, women’s dress and appearance demands are much more complex than men’s, involving . . . more time and effort to assemble . . . Women’s standards are harder to attain than men’s and matter more.”). A female engaging in the exact conduct alleged would likely remain employed due to the lessened burden of adopting and greater social acceptance of men’s attire in hegemonic work environments.

<sup>133</sup> *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002).

<sup>134</sup> *Ellsworth v. Pot Luck Enters., Inc.*, 624 F. Supp. 2d 868, 877 (M.D. Tenn. 2009).

<sup>135</sup> *See, e.g.*, MOVEMENT ADVANCEMENT PROJECT, HUMAN RIGHTS CAMPAIGN & CTR. FOR AM. PROGRESS, *A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS* 95, 110 (2013), <https://www.lgbtmap.org/file/a-broken-bargain-full-report.pdf> (providing support for the notion that antiquated and discriminatory laws make it harder for LGBT workers to provide for themselves and their families while suggesting “federal law . . . drives most of the inequities”); Press Release, *Out & Equal Workplace Advocates, Post-DOMA, Significantly More Lesbian and Gay Adults Wish to Avoid Jobs in States where Marriage Equality is Absent* (Oct. 24, 2013), *available at*

enact an Employment Non-Discrimination Act (ENDA) to protect LGBT persons from workplace discrimination. Second, this section examines the actions and political struggles faced by the 113th Congress in enacting such legislation. Finally, this section asks, given the broad and seemingly expanding scope of what is considered to be sexual discrimination in Title VII jurisprudence since *Price Waterhouse*,<sup>136</sup> what distinguishes the proposed legislation with current judicial interpretations of Title VII.

In 1998, President Bill Clinton issued Executive Order 13,087, “prohibiting discrimination based on sexual orientation in the federal civilian workforce.”<sup>137</sup> This, however, followed DOMA, which President Clinton signed into law in 1996,<sup>138</sup> the same year that the first floor vote on a proposed ENDA bill was rejected by a vote of fifty to forty-nine in the Senate.<sup>139</sup> Perhaps acting on the momentum of this and four subsequent ENDA bills that each saw their demise in committee or on the floor of Congress,<sup>140</sup> in 2007, Representatives Barney Frank, Chris Shays, Tammy Baldwin, and Deborah Pryce, with numerous other cosponsors, introduced H.R. 2015,<sup>141</sup> which included for the first time “gender identity” and “sexual orientation” within the scope of federal employment protections.<sup>142</sup> Although the bill’s cosponsors had hoped to sweep transgendered, gay, and lesbian plaintiffs into the fold of federal civil rights statutory law unambiguously, the House Education and Labor Committee opted for and favorably reported<sup>143</sup> a version of the bill that included only

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<http://www.harrisinteractive.com/vault/2013%20Out%20Equal%20Workplace%20Survey%20Release%2010-24-2013.pdf> (reporting that a Harris Poll commissioned by a nonprofit organization found that “nearly eight of ten (76%) adults wrongly think it is currently illegal, under federal law, for an employer to fire someone because they are gay, lesbian, bisexual or transgender”).

<sup>136</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989).

<sup>137</sup> See Jackie Gardina, *Executive Orders: Term-Limited Victories*, HUFFPOST GAY VOICES (Sept. 22, 2014, 5:59 AM EDT), [http://www.huffingtonpost.com/jackie-gardina/executive-orders-termlimi\\_b\\_5604023.html](http://www.huffingtonpost.com/jackie-gardina/executive-orders-termlimi_b_5604023.html); see also Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

<sup>138</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

<sup>139</sup> *Employment Non-Discrimination Act: Legislative Timeline*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline> (last visited Feb. 6, 2015) [hereinafter *ENDA: Legislative Timeline*].

<sup>140</sup> *Id.* (exempting discrimination in the armed services).

<sup>141</sup> Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong.

<sup>142</sup> *Id.* § 4(a).

<sup>143</sup> H.R. REP. NO. 110-406, pt. 1, at 10 (2007) (confirming the bill prohibits discrimination, by employers of fifteen or more persons, “on the basis of actual or perceived sexual orientation”). The Report acknowledged Title VII and noted the bill would “ensure that in the same tradition of this country’s civil rights laws, the fundamental principles of fairness and equality at work w[ould] be protected regardless of an individual’s sexual orientation.” *Id.* at 11.

sexual orientation.<sup>144</sup> While the House version of the bill passed by a vote of 235 to 184, the Senate failed to take a formal vote, and the bill ultimately died.<sup>145</sup>

In 2009, Representative Frank acted again, proposing the expansive H.R. 3017,<sup>146</sup> which once again included a ban on workplace discrimination based on both “gender identity” and “sexual orientation.”<sup>147</sup> And, although Senator Jeff Merkley introduced a comparable ENDA bill in August 2009, with bipartisan support in the Senate,<sup>148</sup> neither bill received committee approval.<sup>149</sup> Since these initial forays into expanding employment protections for LGBT persons expressly through the legislative process, four additional bills have been proposed with only one receiving a formal vote on the floor of Senate in 2013.<sup>150</sup>

The latest such set of proposals, H.R. 1755 and S. 815, were proposed on April 25, 2013, and garnered 206 cosponsors in the House and fifty-six cosponsors in the Senate.<sup>151</sup> After the Senate Health, Education, Labor, and Pensions Committee favorably reported its bill,<sup>152</sup> and after more than two decades of fighting to pass employment protections for gays and lesbians, the Senate approved its first bill by a 64–32 vote on November 7, 2013.<sup>153</sup> The House refused to vote on its own version of ENDA, effectively killing the legislation, and hopes for its passage remain dim in the 114th Congress given

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<sup>144</sup> Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong.

<sup>145</sup> *ENDA: Legislative Timeline*, *supra* note 139.

<sup>146</sup> Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong.

<sup>147</sup> *Id.* § 4(a).

<sup>148</sup> See Press Release, Merkley, Collins, Kennedy, Snowe Introduce Legislation to End Workplace Discrimination, Sen. Jeff Merkley (Aug. 5, 2009), available at <http://www.merkley.senate.gov/news/press-releases/merkley-collins-kennedy-snowe-introduce-legislation-to-end-workplace-discrimination>.

<sup>149</sup> See *ENDA: Legislative Timeline*, *supra* note 139 (asserting comparable ENDA bills were introduced in both 2011 and 2013).

<sup>150</sup> *Id.*

<sup>151</sup> See *Cosponsors: H.R.1755—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/1755/cosponsors>; *Cosponsors: S.815—113th Congress (2013-2014)*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/senate-bill/815/cosponsors> (last visited Feb. 6, 2015).

<sup>152</sup> See S. REP. NO. 113-105, at 5, 11 (2013) (providing that the Committee on Health, Education, Labor, and Pensions adopted the bill, as amended, by a 15–7 vote, clarifying that “disparate impact claims [were] not allowed under the Act; that a plaintiff [could not] recover for the same offense under both title VII and ENDA; that it is sufficient for an employer to post an amended notice regarding antidiscrimination policy; . . . and that in mixed motive cases, an employee only need establish that discrimination was a ‘motivating factor’ for the adverse action”).

<sup>153</sup> Jeremy W. Peters, *Senate Approves Ban on Antigay Bias in Workplace*, N.Y. TIMES, Nov. 7, 2013, <http://www.nytimes.com/2013/11/08/us/politics/senate-moves-to-final-vote-on-workplace-gay-bias-ban.html>.

its growing conservative coalition<sup>154</sup> and close resemblance to the 113th Congress, which many scholars have suggested to be the most defunct and incapable of political compromise since the American Civil War.<sup>155</sup> Critics of the latest Senate bill have argued it infringes on religious liberties by carving out an all-too-narrow exemption for religious employers and institutions.<sup>156</sup> Conversely, many LGBT-activist groups claim the bill failed to go far enough to protect all workers, especially those employed by religious-affiliated institutions that serve the public or provide entire regions with industry and financial security.<sup>157</sup> In light of sociological research and judicial precedent, this Comment now explores the bill itself. Specifically, this section focuses on explicit protections for claims based on “sexual orientation” and highlights the wide and uncharted analytical overlap between expansive interpretations of what is considered discrimination on the basis of sex in Title VII and the uncertain scope of hypothetical claims under ENDA.

The text of the Senate bill itself essentially would grant the same protections already enjoyed by workers bringing claims based on race, color, religion, national origin, and sex:

It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual,

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<sup>154</sup> E.g., Chris Johnson, *House Panel Rejects Last-Ditch Effort to Pass ENDA*, WASH. BLADE (Dec. 3, 2014), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/> (“Last year, the Senate passed a version of ENDA on a bipartisan basis by a 64–32 vote, but the House never brought up the measure for a vote and is set to adjourn by Dec. 11. It’s unlikely the bill will come up when Congress reconvenes for the 114th Congress given major election wins by Republican on Election Day.”).

<sup>155</sup> See Scott Neuman, *Congress Really Is as Bad as You Think, Scholars Say*, NPR (Dec. 27, 2011, 2:14 PM ET), <http://www.npr.org/2011/12/27/144319863/congress-really-is-as-bad-as-you-think-scholars-say> (suggesting many historians, including Daniel Feller, a professor of U.S. history at the University of Tennessee, believe “today’s Congress is the least effective since before the Civil War”).

<sup>156</sup> See Shaun Kenney, *Politifact on ENDA: “If You Like Your Religious Freedom, You Can Keep Your Religious Freedom,”* REDSTATE (Dec. 17, 2013, 2:04 PM), <http://www.redstate.com/svkenney/2013/12/17/politifact-on-enda-if-you-like-your-religious-freedom-you-can-keep-your-religious-freedom/> (suggesting that many conservative organizations, including the Family Research Council, believe ENDA’s “exemption fails to protect individual Christians, Jews, Muslims and others who have objections to certain sexual behaviors from making employment decisions consistent with their faith”).

<sup>157</sup> See Gregory R. Nevins, *ENDA’s Religious Loophole*, LAMDA LEGAL BLOG (Nov. 7, 2013), [http://www.lambdalegal.org/blog/20131107\\_enda-religious-loophole](http://www.lambdalegal.org/blog/20131107_enda-religious-loophole) (asserting the bill’s exemption would allow a “religiously affiliated hospital, social welfare agency or private school . . . to refuse employment or fire a nurse, janitor or social worker because the person is lesbian, gay, bisexual or transgender,” which suggests “LGBT discrimination is not as bad as other types of discrimination that we don’t let employers get away with”).

because of such individual's actual or perceived sexual orientation or gender identity; or (2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation or gender identity.<sup>158</sup>

Unlike Title VII, however, the Senate bill provides that claimants basing their claims on sexual orientation or gender identity would be unable to establish liability based on a theory of disparate impact,<sup>159</sup> dramatically limiting the scope of protections to either intentional individual disparate treatment or systemic disparate treatment claims. In either case, the Senate bill would require plaintiffs to establish—either through statistics, anecdotes, or a factual prima facie case—intentional discrimination on the part of an employer or agent.<sup>160</sup>

Like Title VII, and judicial precedent on Title VII's standard of proof,<sup>161</sup> the Senate bill provides both a mixed motive standard of proof<sup>162</sup> and a prohibition on retaliation.<sup>163</sup> Moreover, in what would seem an apparent effort to appease critics and those seeking to preserve religious liberty in the workforce, the Senate bill also adopts Title VII's religious exemption for "religious employer[s]."<sup>164</sup> Thus, contrary to LGBT-rights activists' hopes,<sup>165</sup>

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<sup>158</sup> Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(a).

<sup>159</sup> See *id.* § 4(g) ("Only disparate treatment claims may be brought under this Act.").

<sup>160</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–04 (1973) (providing a three-step framework for establishing disparate treatment discrimination: the prima facie case, an employer's opportunity to articulate a legitimate nondiscriminatory reason for the action taken, and an opportunity for the claimant to show the proffered reason is pretext for intentional discrimination on the basis of the protected class); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (establishing the disparate impact standard of proof under Title VII where intent is not an essential element of the claim).

<sup>161</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (confirming that "when a plaintiff in a Title VII case proves that her gender played a motivating part in an employment decision," liability is established).

<sup>162</sup> See S. 815 § 4(h) ("Except as otherwise provided, an unlawful employment practice is established when the complaining party demonstrates that sexual orientation or gender identity was a motivating factor for any employment practice, even though other factors also motivated the practice.").

<sup>163</sup> *Id.* § 5.

<sup>164</sup> *Id.* § 6(a).

<sup>165</sup> See *Weakened ENDA Means Less Protection for Everyone*, LAMDA LEGAL, (Oct. 4, 2007), [http://www.lambdalegal.org/news/ny\\_20071004\\_weekened-enda-means-less-protection](http://www.lambdalegal.org/news/ny_20071004_weekened-enda-means-less-protection) ("The blanket exemption for religious employers is broader than the exemptions on other civil rights laws and leaves many workers with no legal protections."). *But see* Peters, *supra* note 153 (noting that Sen. Dan Coats of Indiana, an opponent of the bill, claimed "religious freedoms were at risk, despite the bill's broad exemption for religious institutions").

S. 815 would allow “a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII” to take an employee’s sexual orientation or gender identity into account in making any employment-related decision.<sup>166</sup> Finally, the Senate bill exempts the “relationship between the United States and members of the Armed Forces” from the definition of “employment,”<sup>167</sup> and exempts the following from the purview of the act:

reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as apply for the gender to which the employee has transitioned or is transitioning.<sup>168</sup>

However, few scholars have yet to consider the bill’s definition of the protected class itself and what implications its definition has on jurisprudential readings of the term “sex” in Title VII. Section 3(a)(7) of the bill defines “gender identity” as the “gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth,”<sup>169</sup> and Section 3(a)(10) defines “sexual orientation” to mean “homosexuality, heterosexuality, or bisexuality.”<sup>170</sup> The bill provides some clarity on associational claims, much like those found in *Vickers*, where a plaintiff was discriminated against merely based on his expressed association and friendship with a known gay coworker.<sup>171</sup> Section 4(e), if enacted, would protect against actions “taken against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual *associates* or has *associated*.”<sup>172</sup>

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<sup>166</sup> S. 815 § 6(a). The bill, unlike Title VII, provides that “[a] religious employer’s exemption . . . shall not result in any action by a Federal agency, or any State or local agency that receives Federal funding” to penalize adverse employment decisions taken, providing arguably broader immunity for exempt organizations than under Title VII. *Id.* § 6(b).

<sup>167</sup> *Id.* § 7(a).

<sup>168</sup> *Id.* § 8(a).

<sup>169</sup> *Id.* § 3(a)(7).

<sup>170</sup> *Id.* § 3(a)(10) (limiting sexuality to three distinct classifications rather than recognizing a spectrum of sexual identity).

<sup>171</sup> *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006) (holding discrimination on the basis of association with an avowed homosexual was not a sufficient basis for a Title VII claim of sex stereotyping discrimination).

<sup>172</sup> S. 815 § 4(e) (emphasis added).

However, in defining the class of persons via three analytically distinct labels of personal sexual preference,<sup>173</sup> requiring the identification of an actually or perceived homosexual “person” with whom a claimant has formed a relationship to succeed on an associational claim,<sup>174</sup> and failing to clearly define the scope of “other gender-related characteristics of an individual,”<sup>175</sup> the bill leaves much unanswered. Would ENDA merely provide claimants facing sex-stereotyping discrimination a second avenue of redress without altering existing jurisprudence recognizing discrimination based on gender nonconforming conduct? Would ENDA require a claimant self-identify as homosexual to successfully bring a claim based on sexual orientation when he or she expresses affinity for abstract groups, organizations, or perspectives that welcome and affirm homosexuality? Does ENDA not also protect heterosexuals whose “mannerisms” fail to meet gendered norms of workplace conduct? And, if the scope of ENDA is, in fact, distinct from Title VII, what metric does either statute leave the judiciary in drawing this quasi-transparent line? Perhaps, ENDA—well intended as it may be—would frustrate and darken the hues of gray already plaguing a bench, lethargic to draw lines or make fact-intensive determinations regarding sociological norms of behavior.

The bill’s prospective solutions are ineffectual, vague, and—where discernable—limited in scope. At first glance, the Senate bill’s “actual or perceived” language would seem to expand the scope of workplace protections beyond Title VII for those discriminated against because of gender nonconforming conduct—including supporting abstract gay rights in a hegemonic work environment—irrespective of one’s own sexual preference.<sup>176</sup> Moreover, while “other gender-related characteristics” seems to directly overlap with the Court’s interpretation of “sex” in Title VII, which includes gender nonconforming conduct that falls short of stereotypes of gender performance, it could be argued that S. 815 focuses principally on “identity.”<sup>177</sup> Even Section 4(e), which would seemingly sweep a broad class of persons under its purview by prohibiting mere associational discrimination,

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<sup>173</sup> See, e.g., *id.* § 3(10) (limiting “sexual orientation” to homosexuality, heterosexuality, and bisexuality); Vivienne C. Cass, *Homosexual Identity: A Concept in Need of Definition*, J. HOMOSEXUALITY, Apr. 1984, at 105, 107 (“The most noticeable feature of the literature on homosexual identity is an almost universal lack of definition of the term ‘identity’ as it relates to the homosexual. . . . [H]undreds of scientific articles . . . refer to homosexual identity without explaining what is meant by the concept.” (internal citations omitted)).

<sup>174</sup> S. 815 § 4(e).

<sup>175</sup> *Id.* § 3(a)(7).

<sup>176</sup> *Id.* § 4(a)(1).

<sup>177</sup> *Id.* § 3(a)(7).

would require a showing that any action taken was “based on the actual or perceived sexual orientation or a gender identity of a *person* with whom the [plaintiff] associates.”<sup>178</sup>

Nonetheless, the bill’s definition of “gender identity” would seem to directly protect conduct already safeguarded under Title VII.<sup>179</sup> While its textual definition first protects “gender-related identity,” Section 3(a)(7) also includes “appearance” and “mannerisms” and “other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth”<sup>180</sup> within the class. However, while this would seem to move the bill’s focus further from biological definitions of sex, Section 3(a)(7) fails to consider (or provide guidance regarding how to navigate through) its analytical overlap with the Court’s expansive interpretation of Title VII. Ultimately, the bill provides no clarity on what characteristics count and how the judiciary should make a determination between characteristics and conduct protected under either legislation in sex-stereotyping claims.<sup>181</sup>

In fact, even federal courts of appeals that have unambiguously struck down claims motivated in part by sexual orientation as gender-nonconforming conduct under Title VII have suggested “outward workplace manifestation of less-than-masculine gender characteristics,” including dress and mannerisms, fall well within the scope of Title VII.<sup>182</sup> Thus, if passed into law, and without a precise roadmap of how to distinguish sex-stereotyping claims under Title VII and claims based on gender identity under the current ENDA bill, courts would be left with a mirage of complex class definitions. More importantly, claimants, specifically persons subject to adverse employment actions because of outwards expressions of abstract support for gays and lesbians, would be left unsure as to where to look in their pursuit of justice.

Certainly statutory solutions should be explored further and perfected in time. Yet, as an initial, critical step toward immediately and fully addressing workplace animus directed at those who fail to achieve societal notions of

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<sup>178</sup> *Id.* § 4(e) (emphasis added).

<sup>179</sup> *Id.* § 3(a)(7).

<sup>180</sup> *Id.* The bill’s inclusion of gender identity, without distinguishing gender-nonconforming conduct protected under Title VII, fails to clarify the judicial fact-finding process.

<sup>181</sup> *Id.*

<sup>182</sup> *See, e.g.,* *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 767 (6th Cir. 2006) (Lawson, J., dissenting) (suggesting the court recognize claims motivated in part by sexual orientation as gender-nonconforming conduct but limit its scope to “outward workplace manifestation of less-than-masculine gender characteristics”).

gender, an expansive interpretation—informed by social science and cognizant of sexuality’s role in this process—serves to expedite this bright future.

### III. LEANING INTO REALITY: CRITIQUES AND PROSPECTIVE CHALLENGES

This Part proceeds in two sections. First, section A counters potential critics of an expansive judicial interpretation of discrimination on the basis of sex who question the practical application of such an interpretation, given the diversity of gender expression within the LGBT community, the fear of judicial ossification, and the potential for overzealous judicial activism and bias. Second, section B addresses and briefly explores contemporary vulnerability scholarship that supports both the wholesale abandonment of class-based structures and the creation of a new regime which, in order to more adequately protect the dignity of each employee, recognizes the universal vulnerability of the human experience.

#### *A. The Gender-Conformity Problem*

This section first examines the practical challenges of utilizing an expansive interpretation of “sex” in Title VII jurisprudence. Second, this section explores potential criticisms that call for the use of judicially imposed limitations to gender-nonconforming conduct for the sake of judicial efficiency. Third, this section confronts the potential critique that such expansive interpretation would empower judicial activism and bias by enlarging the realm of judicial discretion under Title VII. Finally, this section explores Title VII itself, surveying the delegation of responsibility to federal courts to interpret and enforce its key provisions, including the scope of unlawful discrimination, paying special attention to the unique challenge posed by persons whose gender-nonconforming behavior transcends outward manner or dress.

While an expansive interpretation of sex, and gender-nonconforming conduct, would more accurately embody contemporary social science<sup>183</sup> on the construction of gender in hegemonic work environments and address “the history and persistent, widespread pattern of discrimination . . . by private sector employers and local, State, and Federal employers,”<sup>184</sup> it would not come without practical challenges in its judicial use. Gender, as this Comment

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<sup>183</sup> See Kimmel, *supra* note 87, at 133 (noting that, in many hegemonic work environments, masculinity is achieved by not being a woman and demonstrating one’s heterosexuality).

<sup>184</sup> S. 815 § 2(1).

has shown, is a fluid sociological concept, sensitive to context and perception.<sup>185</sup> What fails to conform to societal expectations of gendered behavior in one setting will inevitably coincide in another.<sup>186</sup> Moreover, since *Price Waterhouse*, the judiciary has played the essential function of examining fact and defining the boundary of such protected nonconforming conduct.<sup>187</sup> This Comment has argued for an expansive and more sociologically informed use of this role, and must address potential critics, suspicious of judicial activism<sup>188</sup> and fearful of an ill-informed and arguably biased judiciary defining the boundaries of gendered expectations.<sup>189</sup>

First, drawing a judicial line in the sand between protected gender-nonconforming conduct and expression outside the scope of Title VII<sup>190</sup> is an unworkable, insensitive solution in a contemporary employment context that forecloses legitimate claims and negates societal change. Limiting actionable claims to nonconforming dress or expression within the workplace would craft a fixed judicial definition of gender that both fails to recognize the range of conduct used in contemporary contexts to achieve and reinforce gender identity and excludes the recognition of adjustment in societal definitions of gender over time. While inflexible rules and judicially imposed

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<sup>185</sup> See Kimmel, *supra* note 87, at 124 (asserting that conceptions of gender lack universal equality and vary across cultures and contexts).

<sup>186</sup> See *id.*

<sup>187</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) (establishing liability where discrimination resulted from an employer's perception of an employee's failure to conform to gender stereotypes).

<sup>188</sup> See, e.g., Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1289–92 (1982) (noting that since Justice Stone's famous footnote four in *United States v. Carolene Products Co.*—which asserted that there may be a “narrower scope of operation of the presumption of constitutionality” when legislation or action seems to affect Constitutional rights of “discrete and insular minorities” otherwise incapable of resorting to the “political processes”—the Court has often extended “the scope of judicial review” where minority group interests are vulnerable to “perversions [of] the majoritarian process” (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152–53 n.4 (1938))); Ernest A. Young, *Judicial Activism and Conservative Politics*, 73 U. COLO. L. REV. 1139, 1139–40 (2002) (asserting that many critics have accused the Court's “five conservative justices” of “usurp[ing] the power to govern by striking down or weakening federal and state laws” and having “somehow overstepped its institutional role”). Critics of judicial activism focus their attention on “the judiciary's institutional role rather than the merits of particular decisions,” yet recognize “activism” is hard to define and identify. Young, *supra*, at 1141.

<sup>189</sup> See Judith M. Billings & Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender*, 67 S. CAL. L. REV. 739, 741 (1994) (“Gender bias in the courts interferes with the very objectiveness, fairness, and impartiality that are critical to the judicial process . . .”). Although the judiciary has been reluctant to recognize gender bias as “an issue,” the “Ninth Circuit Report on Gender Bias in the Courts . . . demonstrate[s] that gender bias exists in federal courts, and that steps must be taken within the federal system to eliminate [it].” *Id.* at 741, 743.

<sup>190</sup> See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 767 (6th Cir. 2006) (Lawson, J., dissenting).

limitations on gendered conduct may work to clarify and expedite the process of examining facts in claims of workplace discrimination, recognizing the most expansive interpretation would anticipate and recognize the fluidity of gender as a sociological concept.

In fact, failure to recognize the reality of gender fluidity in contemporary society exemplifies such conservative judicial activism that many argue “involve[s] a refusal by the court deciding a particular case to defer to other sorts of authority at the expense of its own independent judgment.”<sup>191</sup> While it may be argued that broadening the scope of conduct potentially protected under Title VII may lead, contrarily, to forms of judicial activism based on liberal judicial biases, use of an expansive interpretation—at the very least—ensures claims will not be dismissed due to preexisting judicial sentiments on gendered conduct.

Second, federal courts have an unequivocal duty to examine all relevant facts and factors in a Title VII sex-stereotyping suit. While many scholars would argue that expanding the scope of conduct protected under Title VII would result in greater judicial discretion to exhibit “gender bias,”<sup>192</sup> such critiques or judicial improprieties cannot excuse the judiciary’s duty to examine the facts surrounding each claim of workplace discrimination to determine if adverse action resulted from or was motivated in part by conduct that failed to meet gender norms of the particular work environment. Indeed, courts have long fulfilled the role of determining preliminary questions of fact and are capable of determining—based on evidence—the gendered expectations of each work environment. While Congress often delegates significant interpretive authority to administrative agencies in the administering of civil rights statutes, “the ultimate authority for interpreting and enforcing their terms is vested in the federal courts.”<sup>193</sup> Empowering the judiciary to define and examine the scope of statutorily ambiguous terms like “sex” allows “Congress to take credit for addressing general problems [like workplace discrimination] without confronting the details that divide legislators and their supporters.”<sup>194</sup> Moreover, while some may argue that courts suffer from a lack of expertise in determining and defining the scope of sociological concepts like gender, others argue that “judges possess a

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<sup>191</sup> Young, *supra* note 188, at 1145.

<sup>192</sup> Billings & Murray, *supra* note 189, at 741.

<sup>193</sup> Margaret H. Lemos, *The Consequences of Congress’s Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 371 (2010).

<sup>194</sup> *See id.* at 372.

*distinctive* form of expertise as a result of their experience resolving legal disputes.”<sup>195</sup>

In 1964, when Congress enacted Title VII, “Congress faced powerful pressure to combat . . . discrimination, but cross-cutting divisions in both [political] parties made action difficult.”<sup>196</sup> In such contexts, many scholars have recognized the Congressional tendency “to paint with a broad brush, leaving significant questions to be worked out by a delegate.”<sup>197</sup>

Third, given the federal court’s statutory mandate to flesh out the scope of actionable discrimination, criticism of an expansive interpretation misplaces its focus and ignores the ubiquity of judicial bias. In Title VII, Congress essentially “hollowed out the enforcement authority” of the Equal Employment Opportunity Commission (EEOC), divvying up such authority “among the EEOC, the federal courts, and the Department of Justice.”<sup>198</sup> Under Title VII, “[t]he EEOC was given authority to process and investigate claims and to seek ‘informal’ conciliation with employers when it found reasonable cause to believe discrimination had occurred.”<sup>199</sup> Ultimately, primary enforcement power was vested “in the federal courts,” and “Congress delegated to the EEOC the power to create procedural rules” while leaving interpretive authority over “[s]ubstantive issues” such as “the critical details of what constitutes prohibited ‘discrimination’” to the courts.<sup>200</sup> Thus, critics of judicial bias need not challenge a more sociologically informed examination of gender norms but should instead focus their attentions toward the underlying culprit itself: judicial bias.

Finally, LGBT persons whose outward mannerisms and dress conform with societal norms may, unintentionally, be left out of the fold of protection when their expressive conduct or associations with avowedly homosexual persons or organizations fail to coalesce with expected conduct where courts adopt judicial limits on the scope of gender under Title VII. While recent decisions by the EEOC seem to favor an expansive interpretation of what constitutes

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<sup>195</sup> *Id.* at 377 (emphasis added).

<sup>196</sup> *Id.* at 382.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 384 (quoting Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 96 AM. POL. SCI. REV. 697, 707 (2002)).

<sup>199</sup> *Id.* (quoting 42 U.S.C. § 2000e-5 (2012)).

<sup>200</sup> *Id.* at 384–85.

sexual discrimination in the context of claims by transgender employees,<sup>201</sup> finding that “discriminating . . . on the basis of gender identity [is] indeed considered discriminatory under Title VII because it penalizes [transgendered workers] for failing to conform to gender stereotypes,” such decisions are merely persuasive as they are “only binding [on] federal employers.”<sup>202</sup> Moreover, while the EEOC’s interpretations “tend to influence the courts,” the EEOC and courts alike have been reluctant to recognize conduct—including LGBT identity or affinity with LGBT organizations—that is not readily visible to others within the work environment.<sup>203</sup> Consequently, what would seem to clarify the boundary of gender—for example, a rule limiting protected gendered conduct to mannerisms or dress within the workplace—would, in fact, reify the all-too-impossible judicial challenge of drawing a border around societal norms of gender.

### *B. A Call to Action: Reenvisioning Civil Rights in the Wake of ENDA*

This section, first, briefly examines the contemporary class-based statutory regime’s failure to adequately prevent discrimination and adequately protect equality of opportunity in a modern work environment. Second, this section explores the alternative concept of vulnerability, which argues for a reconceptualization of civil rights protections that recognizes the particular social locations and structural disadvantage of persons who cannot be readily encompassed by an insular and discrete class. Third, this section asks whether class-based structures inadequately serve the intent of Congress in rooting out workplace discrimination. Finally, this section reaffirms the call for the Court to embody—as an initial step—a more sociologically informed interpretation of sex.

Even if ENDA is eventually passed and ushers in an era of explicit workplace protections against discrimination on the basis of “sexual

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<sup>201</sup> For example, an April 2012 EEOC decision, finding for Mia Macy—a former male police detective who was denied employment with the Bureau of Alcohol, Tobacco, and Firearms after she told the agency about her plans to change her gender—held, “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on . . . sex,’ and such discrimination therefore violates Title VII.” *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*1, \*11 (E.E.O.C. Apr. 20, 2012).

<sup>202</sup> Tara Siegel Bernard, *Fired for Being Gay? Protections Are Piecemeal*, N.Y. TIMES, June 1, 2013, at B1, available at <http://www.nytimes.com/2013/06/01/your-money/protections-for-gays-in-workplace-are-piecemeal.html>.

<sup>203</sup> *See id.* (providing the interpretive expansion to protect transgender and LGBT persons has been “slow and expensive” with “no guarantees”).

orientation” and “gender identity,” coverage, as previously explored,<sup>204</sup> remains unclear.<sup>205</sup> Moreover, before concluding, it is important to recognize a considerable body of scholarship that encourages an altogether unique approach to protecting civil rights. For example, Martha Albertson Fineman, in *The Vulnerable Subject and the Responsive State*, argues that “[b]ecause identities have been the focus of major civil rights struggles in American society,” and because “characteristics such as gender, race, and religion define which groups are those primarily protected by our equality laws,” class-based systems do not serve to root out “discrimination in general” but “only discrimination based on those designated distinguishing characteristics.”<sup>206</sup> Such structures, which Fineman contends are grossly inadequate for preserving equal employment opportunity for all, have “set up a perverse dynamic that often results in pitting one protected group against another,” serve to corrode alliances across marginalized groups, and fail to address inequality or groups who have yet to demonstrate the accumulation of a “sufficiently lengthy history” of animus.<sup>207</sup>

Certainly, Congress need not anticipate all evils in drafting civil rights legislation and is free to amend and clarify as it sees fit. However, as history and both the 1978 and 1991 amendments to Title VII reveal,<sup>208</sup> class-based regimes can and have left certain groups unprotected. As critics of class-based regimes argue, in the United States, where “no constitutional guarantee to basic social goods, such as housing, education, or healthcare” exists, discrimination doctrine plays an important contemporary role for groups seeking protection

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<sup>204</sup> See *supra* notes 169–81 and accompanying text.

<sup>205</sup> See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(7), (10).

<sup>206</sup> Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 252 (2010).

<sup>207</sup> *Id.* at 253.

<sup>208</sup> See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of Title 42 of the U.S. Code) (extending Title VII to include American and American-controlled employers operating abroad, as well as codifying the prohibition against disparate impact discrimination and the “business necessity” and “job related” defenses to Title VII liability); Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)) (“The 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; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . .”). That Congress has repeatedly expanded the scope of Title VII evidences the potential need to explode the class-based structure altogether.

from the state, couching notions “that America provides for real equal access and opportunity.”<sup>209</sup>

While this Comment does not address, in depth, alternatives to Title VII’s class-based framework, in examining the feasibility and implications of a new and expansive interpretation of what constitutes discrimination based on sex, Fineman’s concept of “vulnerability” sheds light on important facets of current civil rights legislation that work to frustrate Title VII’s purpose of providing equal employment opportunity for all.<sup>210</sup> According to Fineman, vulnerability is posited as “the characteristic that positions us in relation to each other as human beings . . . suggest[ing] a relationship of responsibility between state and individual.”<sup>211</sup> Ultimately, vulnerability scholarship posits that civil rights laws that purport to ensure “true equality of opportunity” impose an “obligation on the state to ensure that access to the societal institutions that distribute social goods, such as wealth, health, employment, or security, is generally open to all.”<sup>212</sup> Perhaps, as such scholars suggest, there is something more fundamental, altogether distinct from class definition, line-drawing, and group identity, which Title VII and similar civil rights laws have failed to identify and safeguard: the vulnerable and valued human condition of the employee.

While more scholarship can and should reimagine the way Congress combats workplace discrimination, an expansive and more sociologically informed interpretation of Title VII’s terms<sup>213</sup> serves as a critical first step toward protecting individuals<sup>214</sup> “caught in systems of disadvantage that are

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<sup>209</sup> Fineman, *supra* note 206, at 254. According to Fineman, “one of the most troubling aspects of the [current] identity approach to equality is that it narrowly focuses equality claims and takes only a limited view of what should constitute governmental responsibility in regard to social justice.” *Id.*

<sup>210</sup> *Id.* at 254–55. Autonomy “cannot be attained without an underlying provision of substantial assistance, subsidy, and support from society and its institutions, which give individuals the resources they need to . . . make choices.” *Id.* at 260. Moreover, in Western liberal democracies, equality is “conceptualized . . . through a social contract.” *Id.* at 262–63. The premise of “a universal vulnerable subject forms the foundation for the assertion that human vulnerability must be at the heart of our ideas of social and state responsibility” and recognizes the “ever-present possibility of harm, injury, and misfortune” in the employee. *Id.* at 267. Finally, Fineman’s concept of vulnerability is “particular,” recognizing ones individual location “within webs of economic and institutional relationships.” *Id.* at 268–69.

<sup>211</sup> *Id.* at 255.

<sup>212</sup> *Id.* at 256.

<sup>213</sup> For example, an interpretation that refuses to categorically declassify certain forms of conduct as gender related, recognizing the performativity of heterosexuality required in hegemonic contexts to achieve masculinity.

<sup>214</sup> For example, heterosexual or homosexual persons whose expressive conduct or associations with avowedly homosexual organizations fail to conform to societal norms of masculinity.

almost impossible to transcend” or confined to a discrete class of persons.<sup>215</sup> Likewise, while such an expansive view does not negate differences in individual ability or initiative, it does call into question the responsive state’s historic failure<sup>216</sup> to adequately account for the imbalance of resources, recognition,<sup>217</sup> and what Fineman coins “resilience” to “address and confront misfortune” within the workplace.<sup>218</sup>

## CONCLUSION

The status quo leaves many LGBT and nonconforming persons incapable of recourse and recognition, without a new and expansive judicial interpretation of sex. When King Henry VIII ascended to the English throne in 1485, sex and gender already played an important role in social ordering and monarchical rule.<sup>219</sup> Young English monarchs felt the ubiquitous pressure to procreate, produce a fertile line of heirs to the throne, and—more importantly—to ensure the crown someday found its way to the head of a prince.<sup>220</sup> Historians have not only documented this perverse preference for male heirs by European monarchs but have highlighted the complex role

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<sup>215</sup> Fineman, *supra* note 206, at 257.

<sup>216</sup> The current class-based framework attempts to limit discrimination claims based on sex to a narrow class of conduct and protects only those persons who fall well within the enumerated classes. Contrary to Congress’s purported intent of curbing workplace discrimination and animus, “[a] person can be fired from employment on a whim, for any reason whatsoever, . . . so long as it is not the result of discrimination based on [a protected class].” *Id.* at 252.

<sup>217</sup> In enacting Title VII, the state “set aside some groups considered disadvantaged within the larger society.” *Id.* at 266. Fineman utilizes a concept of vulnerability “detached from specific subgroups, using it to define the very meaning of what it means to be human,” avoiding “an air of victimhood, deprivation, dependency, or pathology” that class-based structures often carry for members of such enumerated groups. *Id.*

<sup>218</sup> *Id.* at 269 (emphasis omitted).

<sup>219</sup> See GARTHINE WALKER, *CRIME, GENDER AND SOCIAL ORDER IN EARLY MODERN ENGLAND* 3–4 (2003) (“[A]ssumptions (largely unacknowledged) about gender often appear to be based on little other than our own culture’s stereotypes, which may or may not be pertinent to the early modern period. . . . A few behaviours for which women were disproportionately prosecuted relative to men are labeled as peculiarly ‘feminine’, such as witchcraft, infanticide and scolding.”). Historians of the period recognize both that gender requires examination of “the individual subject as well as social organization and to articulate the nature of their interrelationships,” and that in Tudor England, the notion “of the household as little commonwealth conflated personal and public authority in a patriarchal and Christian vision in which the rule of husbands, fathers, magistrates, ecclesiastics and monarchs each legitimated that of the others.” *Id.* at 8–9 (quoting Joan W. Scott, *Gender: A Useful Category of Historical Analysis*, 91 AM. HIST. REV. 1053, 1067 (1986)).

<sup>220</sup> See Natalie Mears, *Courts, Courtiers, and Culture in Tudor England*, 46 HIST. J. 703, 716 (2003) (providing that, in Tudor society, “women were [seen as] unfit to rule by Biblical and natural law” and even Queen Elizabeth I was largely believed to be “gender disqualified . . . from claiming the throne through inheritance”).

gender played in both notions of monogamy, chastity, and class.<sup>221</sup> In fact, Henry VIII was known to adorn attire—although appropriate for well-to-do Tudor men—that many, today, would view as well beyond the acceptable boundaries of gendered dress: “fur[s],” elaborate “knee- or ankle-length gown[s],” and “hose.”<sup>222</sup> However, perhaps more importantly, under Henry’s reign, English society was transformed by his ostentatious nonconformity with religious and gender norms.<sup>223</sup>

Before his reign, divorce and extramarital affairs were both prohibited and viewed with disdain; men did not find value in a modern humanist education; and, the Pope—along with the Catholic Church—determined the boundaries of appropriate conduct for Kings.<sup>224</sup> Yet, when Pope Clement VII did not immediately grant his requested annulment from Catherine of Aragon,<sup>225</sup> Henry took matters into his own hands, refuting papal supremacy, establishing the Church of England and his role as “supreme head of the Church,” issuing in a number of statutes that clarified and distanced the relationship between England and the Pope, and sanctioning the divorce from his wife, Catherine.<sup>226</sup>

Yet, LGBT and non-LGBT workers in the United States today who—either through outward expression, identification, association, or assertive (and nonassertive) conduct affiliated with LGBT identity—fail to conform with societal expectations of how men or women should behave, lack Henry’s key advantages: resources, recognition, and the capacity to rectify the law itself.

While societal expectations of gendered conduct have dramatically changed since Henry’s reformation, legal conceptions remain slow to catch up.<sup>227</sup> What society expects of its men and women has undoubtedly changed; yet, the

<sup>221</sup> See *id.* at 717–18 (positing that “women did not have the central political role assumed by men” and that political counsel was “defined by men, in printed discourses and letters between those involved in governance, as a male activity”). Mears suggests the royal “court” played an important role in defining the scope of acceptable conduct and, indeed, arranging marriages between social elite. *Id.* at 719.

<sup>222</sup> MARIA HAYWARD, RICH APPAREL: CLOTHING AND THE LAW IN HENRY VIII’S ENGLAND 115 (2009).

<sup>223</sup> See ETHAN H. SHAGAN, POPULAR POLITICS AND THE ENGLISH REFORMATION 29 (2003) (positing that Henry VIII ushered in a “fundamental restructuring of power within the realm” following the annulment of his marriage to Catherine of Aragon).

<sup>224</sup> See *id.* at 29–33.

<sup>225</sup> Henry VIII wished to secure an annulment from Catherine of Aragon for having failed to both produce a male heir to the throne and secure the Tudor dynasty. See *id.* at 29.

<sup>226</sup> *Id.* at 29–30.

<sup>227</sup> See Case, *supra* note 60, at 17 (“Courts toss around the words ‘gender,’ ‘masculine,’ ‘feminine,’ and ‘sex-stereotyping’ . . . in sex discrimination cases. But they do not always use these terms consistently or self-consciously . . . Courts often conflate gender with sex and particularly with sexual orientation, often without . . . being aware that they are doing so.”).

performative nature of gender remains steadfast.<sup>228</sup> Men today, as in 1485, achieve masculinity through the public interplay of conduct, associations, markers of identity, and professed beliefs that his community values or conversely fears.<sup>229</sup> Men perform, and indeed work to police their own relationship with a hegemonic world, built upon notions of sexism and dominance over women.<sup>230</sup> The boundaries of gender, however subtle, are known, encompassing nearly every social interaction in contemporary life. From the time newborns are photographed—in pink or blue—gender and its role in our hegemonic social order begins its work.<sup>231</sup> Likewise, while gender is a valued and fluid social construction for many (indeed sexuality, in part, relies on preferences for gender performance),<sup>232</sup> modern American law mirrors the sociologically inaccurate and majoritarian conflation between sex—the biologically limited—and gender—the socially constructed.<sup>233</sup>

When Congress prohibited workplace discrimination on the basis of sex, it sought to ensure equal employment opportunities for women, who suffered (and continue to suffer) significant disparities in hiring and compensation compared with men.<sup>234</sup> But, sex, as we have come to know, means much more.

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<sup>228</sup> See Kimmel, *supra* note 87, at 129 (noting that “[m]asculinity is a *homosocial* enactment,” in which men “test [them]selves” and “perform heroic feats” because they want “other men to grant [them their] manhood”).

<sup>229</sup> *Id.* at 132. Kimmel asserts that “[a]s adolescents, we learn that our peers are a kind of gender police, constantly threatening to unmask us, as feminine,” and young men are “constantly riding those gender boundaries, checking the fences we have constructed on the perimeter, making sure nothing . . . feminine might show through.” *Id.*

<sup>230</sup> *Id.* at 133–34 (noting homophobia is “intimately interwoven with . . . sexism” and one “centerpiece[] of . . . exaggerated masculinity is putting women down”).

<sup>231</sup> See Case, *supra* note 60, at 20–31 (arguing that every aspect of our lives from toys to attire, even jobs, are assigned a relationship to gender).

<sup>232</sup> Kimmel notes that notions of gender change with time and, like contemporary gay men, throughout history, “various groups have represented the sissy, the non-men against whom American men played out their definitions of manhood,” including black slaves, Native Americans, and European immigrants. Kimmel, *supra* note 87, at 134. But see Case, *supra* note 60, at 3 (suggesting the pressures on men and women to conform to gender expectations may be “differential,” because “[w]anting to be masculine is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success”).

<sup>233</sup> See Case, *supra* note 60, at 9–10 (suggesting Justice Ruth Bader Ginsburg’s approach in the litigation of sex discrimination during the 1970s “stands as both a hindrance and inspiration,” because although she “point[ed] out that laws based on stereotypical assumptions about the sexes hurt both men and women who violate these assumptions,” she was “in large part responsible for the fact that the words ‘sex’ and ‘gender’ are now used interchangeably in the law, creating . . . an unfortunate terminological gap”). Case argues that gender should be associated with adjectives like “dominant” or “ambitious,” presumably leaving open the possibility acting “gay” could fall under gender. See *id.* at 12.

<sup>234</sup> *Id.* at 48 (“Congress[s] intent to forbid employers to take gender [i.e., sex] into account in making employment decisions appears on the face of the statute . . . .” (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–40 (1989))).

Title VII does not care about the “sex” of the plaintiff or discriminatory actor;<sup>235</sup> discrimination on the basis of sex has come to include discrimination on the basis of pregnancy;<sup>236</sup> and, most importantly, discrimination on the basis of sex encompasses discrimination on the basis of gender.<sup>237</sup> With what would seem like a logical, and indeed minor, step, the Court in *Price Waterhouse* extended the scope of workplace protections for a wide range of gender-nonconforming conduct, on which courts are still seeking clarity and direction. Social science would seem to provide such direction. While some argue social science has been grossly abused by the judiciary,<sup>238</sup> when the Court defines the scope of congressional protections to include such sociological concepts, it is imperative to recognize its value—and indeed utility.

Federal agencies, lower courts, and—most importantly—workers seeking to capitalize on idealistic promises of equal access and opportunity to work in the United States have and continue to struggle to draw a line in the sand or categorize conduct as within (and beyond) the scope of “gender.”<sup>239</sup> Title VII grants exclusive interpretive authority to the federal courts to flesh out the scope of discrimination, and, in part, the judiciary has fulfilled its responsibility. This Comment has advocated for an expansive interpretation of

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<sup>235</sup> See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (concluding that it is “unwise to presume” those “of one definable group will not discriminate against members” (quoting *Castaneda v. Partida*, 430 U.S. 482, 499 (1977))).

<sup>236</sup> Pregnancy Discrimination Act, Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (codified at 42 U.S.C. § 2000e(k) (2012)); see also *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 191 (1991) (finding that a policy barring employees “capable of bearing children” from jobs exposed to lead was actionable discrimination based on sex).

<sup>237</sup> See *Price Waterhouse*, 490 U.S. at 258 (holding a plaintiff has an actionable claim when he or she “proves that her gender played a motivating part in an employment decision”); see also *Case*, *supra* note 60, at 4 (“[A]t least under Title VII, the existing statutory language and doctrinal categories, if correctly applied, already provide the necessary protection to both effeminate men and feminine women, as well as their masculine counterparts.”).

<sup>238</sup> See Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID* 3, 4 (Jack M. Balkin ed., 2001) (suggesting even “defenders of the result” of landmark civil rights cases like *Brown v. Board of Education*, which desegregated educational institutions formerly segregated based on race, have argued the Court’s “use of social science to demonstrate the harm . . . imposed on black children was unconvincing”).

<sup>239</sup> See *Schroer v. Billington*, 424 F. Supp. 2d 203, 210 (D.D.C. 2006) (“To the extent that Title VII . . . prohibits sex stereotyping alone, it does so to allow women . . . to express their individual female identities without being punished for being ‘macho,’ or for men to express their individual male identities without reprisal for being perceived as effeminate. In other words, it creates space for people of both sexes to express their sexual identity in nonconforming ways.”). But see *Lewis v. Heartland Inns of Am., LLC*, 591 F.3d 1033, 1039 (8th Cir. 2010) (looking to discrimination based upon dress or physical appearance in examining the boundary of actionable claims under Title VII’s definition of sex).

discrimination based on sex and gender that serves, in an era of increasing gender fluidity, equality initiatives for LGBT persons, and openness, to recognize contemporary notions surrounding gender. Ultimately, without the judicial gumption and freedom to recognize the broad scope of conduct and identity itself that can, and often does, work to reify gender in contemporary workplaces, the judiciary will continue to fail Title VII's central mission—blind to the social realities of hegemonic masculinity and its potent capacity to both safeguard equal opportunity and fully combat unlawful discrimination.

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