FIRST DRAFT 8/2/2019

Dead Hand Vogue

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54 U. RICH. L. REV. (forthcoming 2020)

Symposium Commemorating the Fiftieth Anniversary of the Stonewall Riots:
Reflecting on the Rise and LGBTQ Activism and Rights in the Law

For decades, courts read employment anti-discrimination laws' prohibition of sex discrimination to exclude gay, lesbian, bisexual, and transgender workers' sexual orientation and gender identity discrimination claims—purportedly because the claims were not linked to employees' status as a man or a woman. And while significant doctrinal developments have afforded some gender-nonconforming persons critical workplace safeguards under sex anti-discrimination laws, many older decisions that deemed sexual orientation and transgender discrimination claims to be outside the ambit of sex discrimination still control. These decades' old precedents all suffer from the same analytical error: a failure to adhere to the principle that *anti-discrimination law does not protect groups; it protects individuals*. Because courts in the 1970s and 1980s focused on groups rather than individuals, judges were able to rely on legislative dead hand as performative analysis to keep LGBTQ people out of the law's workplace protections and reinforce gender variants' second-class status. This Article traces the anti-individualist origins of sex discrimination doctrine that has improperly kept LGBTQ workers outside of anti-discrimination protections and argues that the protective promise of anti-discrimination law is realized most fully when courts take individuals seriously.

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Introduction

This term, the Supreme Court will resolve two contentious and salient issues clouding employment discrimination law: is discrimination motivated by a person's sexual orientation or gender identity "because of sex?" The disposition of three cases before the Court will clarify Title VII's scope after a decade-long sea change in the interpretation of the super-statute,[2] as well as substantive amendments to analogue state anti-

[2] Bostock v. Clayton County Georgia, Altitude Express v. Zarda, Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission.

discrimination laws to protect gay, lesbian, bisexual, and transgender workers.

Part of that change is attributable to the Equal Employment Opportunity Commission, which ruled that discrimination against transgender workers because of their status is unlawful in 2012.[3] In 2015, the Commission determined that sexual orientation discrimination was also actionable under Title VII's existing sex discrimination framework.[4] The Court of Appeals for the Seventh Circuit was the first federal appellate court to decide that sexual orientation discrimination claims are cognizable Title VII sex discrimination actions in 2017.[5] Moreover, though transgender employees scored victories for nearly 20 years under federal law,[6] in 2018 the Court of Appeals for the Sixth Circuit, in a sweeping decision, ruled that Title VII bars an employer from discriminating against an employee because the employee is transitioning or is transgender.[7] Citing case law's trajectory, state equal opportunity agencies in Michigan and Pennsylvania issued interpretive statements of state anti-discrimination law that sexual orientation and gender identity discrimination are types of sex discrimination.[8]

Though the more inclusive reach of sex discrimination doctrine is fresh, the underlying issues percolated for decades. Since the 1970s, aggrieved workers have insisted that anti-sex discrimination laws also bar sexual orientation and gender identity discrimination. Courts dismissively rejected the initial rounds of litigation to that effect. The stiff judicial

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[3] Macy v. Holder, EEOC Appeal No. 0120120821 (April 20, 2012).
[4] Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015).
[5] Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017).
[6] *See* Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004) (permitting a transgender employee's discrimination to proceed under a theory of sex-stereotyping).
[7] EEOC v. RG & GR Harris Funeral Homes, Inc., 884 F. 3d 560 (6th Cir. 2018).
[8] Mich. Civil Rights Comm'n, Interpretative Statement 2018-1 1 (May 21, 2018) (citing federal gender stereotyping case law); Pa. Human Relations Comm'n, Guidance on Discrimination on the Basis of Sex Under the Pa. Human Relations Act 2 (Aug. 2, 2018) (acknowledging Pennsylvania law is "interpreted consistently with federal anti-discrimination law").

resistance relaxed after the Supreme Court ruled in *Price Waterhouse v. Hopkins*' that prescriptive sex-stereotyping in employment relationships is unlawful, but for almost three decades after *Price Waterhouse* courts declined to recognize that all forms of sexual orientation and gender identity are inextricable from a person's sex.

What explains these turns in the law?

The law failed to protect gay, lesbian, bisexual, and transgender employees because courts sidestepped a fundamental tenant of the law: the law *does not* protect groups; it protects *individuals*. This Article pinpoints three events that ushered in paradigmatic shifts in LGBTQ rights: the Stonewall Riots, *Price Waterhouse v. Hopkins*, and same-sex marriage litigation, and then examines the individual's place in employment discrimination doctrine over these periods. In early litigation, courts focused on groups rather than individuals and used interpretive tools, namely legislative intent. Here, courts used legislative dead hand as performative analysis to signal that gender non-conformists resided outside the respectable body politic. When the Supreme Court reasoned in *Price Waterhouse v. Hopkins* that Title VII banned prescriptive gender stereotypes, the law took an individualistic turn that aided some LGBTQ plaintiffs by requiring judges to assess the parties' factual claims. Group-centric approaches tempered *Price Waterhouse*'s full potential, however, until courts rejected the remnants of anti-individualist frameworks in the same-sex marriage litigation era.

I. Dead Hand and Queer Exceptionalism

A. The Lost "Such Individual"

A core statutory command of Title VII and similarly devised state anti-discrimination laws is that employers cannot discriminate against *individuals* because of a forbidden classification. Title VII declares that an employer cannot refuse to hire, fire, or otherwise "discriminate against any

individual … because of such individual's … sex."[9] The statutory language offers two important lessons.

First, because claims brought under section 703(a)(1) are about whether an *individual* employee suffered discrimination because of their sex, a successful claim need not show that all persons within the protected class similarly suffered. Because employment anti-discrimination law's concern is with individual fairness, practices which do not discriminate against all members of a group, or even against most of them, can still violate Title VII if they take prohibited characteristics into account. In *Phillips v. Martin Marietta Corp*., the Court permitted a claim to proceed after Martin Marietta refused to employ women with preschool-aged children.[10] The company did not wholesale reject women applicants; rather, Martin Marietta hired men with preschool aged children, but not women.[11] Similarly, plaintiffs have stated successful claims alleging violations of Title VII because they are unwed mothers,[12] women of child-bearing age,[13] older women,[14] black women,[15] biological fathers,[16] and women who did not take their husband's names.[17] Notably, courts did not reject these plaintiffs' claims because Title VII does not enumerate "unwed mothers" or "caregiving fathers" as protected groups. Instead, courts appropriately applied Title VII's protections to individual employees harmed by their employers because of sex-linked traits.

Second, Title VII's individual-level focus means that employers are forbidden from using trait-related stereotypes to harm an employee *even if*

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[9] 42 U.S.C. § 2000e-2(a)(1).
[10] Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).
[11] *Id*.
[12] Dolter v. Wahlert High School, 483 F. Supp. 266 (N.D. Iowa 1980).
[13] Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991).
[14] Gorzynski v. Jetblue Airways Corp., 596 F.3d 93 (2d Cir. 2010); DeAngelo v. DentalEZ, Inc., 2010 WL 3488609 (E.D. Pa. 2010); Arnett v. Aspin, 846 F. Supp. 1234 (E.D. Pa. 1994).
[15] Jeffries v. Harris County Community Action Association, 615 F.2d, 1025 (5th Cir. 1980); Berndt v. California Dept. of Corrections, 2005 WL 2596452 (N.D. Cal. 2005).
[16] Johnson v. University of Iowa, 431 F.3d 325 (8th Cir. 2005).
[17] Allen v. Lovejoy, 533 F.2d. 522 (6th Cir. 1977).

underlying assumptions are true.[18] This is the warning of *City of Los Angeles v. Manhart*, where the Supreme Court held that an employer could not make female employees contribute more to a pension fund than men because women, on average, outlive men. The Court emphasized in *Manhart* that because Title VII's "focus on the individual is unambiguous" it requires "fairness to individuals rather than fairness to classes."[19]

B. Post-Stonewall Era Sex Discrimination Claims

In the wake of an emerging civil rights movement for LGBTQ equality after Stonewall, LGBTQ workers discriminated against because of their sexual orientation or gender identity took to the courts, filing lawsuits against their former employers. However, unlike other injured workers that successfully brought claims under Title VII and state law because of discrimination targeting sex-associated traits, judges rebuffed them. Courts rejected the claims under state and federal law because LGBTQ people were not a group that legislators intended to protect in anti-discrimination laws. By refusing to look at the individual employee and focusing on groups, judges relieved themselves of the responsibility to engage in serious legal analysis and forced group labels on plaintiffs.

When federal courts first decided whether Title VII's ambit included sexual orientation or transgender discrimination claims, judges disregarded the mandate to focus on individuals, excluding LGBTQ workers from the statute's protections. The first federal ruling on whether sexual orientation discrimination is unlawful under Title VII, *Smith v. Liberty Mutual Insurance Co.*, was particularly egregious because it forced an unclaimed group label on the plaintiff to excuse sex-stereotyping.[20] Bennie Smith applied for a mail clerk position at Liberty Mutual, but was rejected because

[18] *See, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("Congress never intended to give an employer license to discriminate against some employees on the basis of . . . sex merely because [it] favorably treats other members of the employees' group.").
[19] 435 U.S. 702, 708-09 (1978).
[20] 395 F. Supp. 1098 (N.D. Ga. 1975), aff 'd, 569 F.2d 325 (5th Cir. 1978).

the mail room supervisor thought he was too effeminate.[21] After filing a charge with the EEOC, an agency investigation uncovered that Smith's effeminate demeanor was "quite pronounced" and that the hobbies Smith listed on his application, including playing musical instruments, singing, dancing, and sewing, were generally associated with women and thus implicated sex-stereotypes.[22]

What should have been a straightfoward sex-stereotyping case, arising from a claim that he was denied employment because of a social expectation that men should be masculine and not have interests in musical arts and crafting, was transformed into a sexual orientation discrimination cause by Liberty Mutual. When the parties both moved for summary judgment, Smith argued that the "sole issue" was "whether the refusal to hire an applicant based on sexual stereotypes amounts to unlawful discrimination on the basis of sex."[23] Liberty Mutual eschewed an individual-focused argument, arguing that while "the named plaintiff may or may not be homosexual . . . [h]e was suspected of being such and that is why he wasn't hired."[24] The court bought into Liberty Mutual's group framing, and reasoned that because the "intent of the Civil Rights Act" was to ensure "equal job opportunity for males and females" and not non-heterosexuals, Liberty Mutual acted well within its rights.[25]

Romona Holloway's gender identity discrimination lawsuit fared no better. Ramona Holloway's sex assigned at birth was male.[26] An accounting firm hired her in 1969 while presenting as a man, but Holloway started hormone therapy the following year.[27] In 1974, Holloway informed her employer she was undergoing sex reassignment surgery.[28] After Holloway informed her employer about her transition and her employment records

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[21] Id. at 1099.
[22] Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 Cal. L. Rev. 1, 139 (1995)
[23] *Id*. at 140.
[24] *Id*.
[25] 395 F. Supp. at 1101.
[26] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977).
[27] *Id*.
[28] *Id*.

were changed to match her new chosen name, Holloway was terminated.[29] The Ninth Circuit ruled that Title VII did not afford Holloway protection because she did not allege ontological sex discrimination:

> . . . Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex. This type of claim is not actionable under Title VII . . .[30]

Judge Alfred Goodwin, however, dissented precisely because Judge Goodwin recognized that while "Congress probably never contemplated that Title VII would apply to transsexuals," that should not dispositively "limit the right to claim discrimination to those who were born into the victim class."[31] For Judge Goodwin, "[t]he relevant fact is that she was, on the day she was fired, a purported female."[32] In contrast to the majority that relied on Congressional intent vis-a-vis transgender persons, the Goodwin dissent focused on Holloway as an individual woman claiming she was terminated because she was a woman in defiance of her employer's sex-based expectations.

The *Holloway* dissent reveals the heavy lifting group-centric analyses did to obscure the nuance of individual claims, rendering them easy to dismiss in this period. Yet, even one court that acknowledged that a person's sexual orientation is inextricably linked to their sex, but declined to rule that sexual orientation claims were congnizable under a state sex discrimination ban. The Supreme Judicial Court of Massachusetts reasoned in 1979 that "discrimination against homosexuals could be treated as a species of discrimination because of sex" because "homosexuality is also

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[29] *Id*.
[30] *Id*. at 664.
[31] *Id*. (Goodwin, J., dissenting).
[32] *Id*.

sex-linked." However, the Court stopped short of interpretating state law as prohibiting sexual orientation discrimination as sex-linked, as the court previously did for pregnancy discrimination, because of the social context in which the Massachusetts Fair Employment Practices Act was enacted. The Court, against its better instincts, posited it was appropriate to jettison sexual orientation claims from pregnancy claims, notwithstanding their similarly situated relationship to sex, because "we are [not] free to supply our own reading of the statutory language or our own view of what the policy should be."[33]

In this era courts avoided rigorous inspection of individual sex discrimination claims by invoking the dead hand of the 88th Congress and civil rights proponents in state legislatures. The courts' analyses were performative-- each papered over the substance of sex and sex-stereotyping claims by imposing a group label on the plaintiffs and then invoking legislative intent to dismiss the entire group out-of-hand.[34] If a court could dismiss the group out-of-hand, there was no need to look at the individual. This group-centric pattern repeated itself in cases brought by gay, lesbian, bisexual, and transgender workers throughout the 1970s and 1980s, with

[33] Macauley v. Massachusetts Comm'n Against Discrimination, 379 Mass. 279, 281 (1979).

[34] A notable exception to this trend was the district court decision in *Ulane v. Eastern Airlines*. Here, Judge John Grady analyzed Karen Ulane's transgender discrimination claim with a class-focused approach, but determined that presumptions about legislative intent were insufficient to overcome Title VII's textual command:

> I will say now as I said at the time I denied the motion to dismiss that, if I can borrow a phrase, there is not a shadow of a doubt that Congress never intended anything one way or the other on the question of whether the term, "sex," would include transsexuals. The matter simply was not thought of. It was not discussed. Nothing was discussed that we have any record of that would have any relevance to the question before us. But I believe that working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way. I believe that the term, "sex," literally applies to transsexuals and that it applies scientifically to transsexuals.

Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

courts, at times, going as far as lumping all LGBTQ people together to wholesale exclude sexual minorities from federal and state protections.[35] This kind group framework was routinely applied to LGBTQ workers while sex-plus discrimination doctrine, which stands for the proposition that individual maltreatment is the touchstone of employment anti-discrimination law, became more robust. That this kind of analysis was routinely— and exceptionally— applied to LGBTQ workers is unsurpising because it allowed for a kind of virtue signaling that, as disfavored group of people, LGBTQ Americans were unworthy of a super statute's protection because they were unworthy.[36]

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[35] *See, e.g.,* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) ("While we recognize distinctions among homosexuals, transvestites, and transsexuals, we believe that the same reasons for holding that the first two groups do not enjoy Title VII coverage apply with equal force to deny protection for transsexuals.");DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979), abrogated by Nichols v. Azteca Rest. Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) ("Congress has not shown any intent other than to restrict the term "sex" to its traditional meaning. Therefore, this court will not expand Title VII's application in the absence of Congressional mandate. The manifest purpose of Title VII's prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), aff'd, 570 F.2d 354 (9th Cir. 1978) ("Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered, and from this void the Court is not permitted to fashion its own judicial interdictions.");Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976) ("In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term "sex" other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged fail to state a claim of unlawful job discrimination based on sex."). Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 474 (Iowa 1983) ("[The Iowa] legislature did not consider transsexuals in adding sex as a protected class. . . . the legislature's primary concern was a desire to place women on an equal footing with men in the workplace.").

[36] The idea that gay, lesbian, and bisexual's purported exclusion from Title VII's protections was indicative of Americans' social contempt for sexual minorities was not lost on Justice Scalia, who wrote in *Lawrence v. Texas*:

> So imbued is the Court with the law profession's anti-anti-homosexual culture, that it is seemingly unaware that the attitudes of that culture are not obviously "mainstream"; that in most States what the Court calls "discrimination" against those who engage in homosexual acts

C. Protecting Self-Actualization as Political Activity

The judicial decision most protective of non-heterosexual employees' equal opportunity in the same period after Stonewall stands in contrast to the dominant anti-individualist approach. In *Gay Law Students Association v. Pacific Telephone and Telegraph Company*, the California Supreme Court extended the safeguards of the California Labor Code to gay, lesbian, and bisexual persons while rejecting the claim non-heterosexuals enjoyed anti-discrimination coverage under the California Fair Employment Practice Act.[37] The California Fair Employment Practice Act, like Title VII, enumerates protected traits that an employer cannot use in an employment decision.[38] Similar to Title VII, the California law at the time of *Gay Law Students* did not expressly include sexual orientation among the protected characteristics.[39] Notwithstanding the majority's view that the plaintiffs' sex-association argument had "some appeal," the court declined to accept the association theory because the California Legislature "did not contemplate discrimination against homosexuals."[40] Not unlike the Massachusetts Supreme Judicial Court, the California justices glossed over the admitted strengths of textual arguments posited by LGBTQ plantiffs, allowing the anti-individualist dead hand to control the case's disposition. The California high court, like federal courts before it, was stuck on a construction of state law oriented toward protecting classes, not individual traits.

In 1937, the California Legislature adopted legislation that bars employers from "[f]orbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office" or "[c]ontrolling or directing, or tending to control or direct the political

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> is perfectly legal; that proposals to ban such "discrimination" under Title VII have repeatedly been rejected by Congress.

Lawrence v. Texas, 539 U.S. 558, 602–03 (2003) (Scalia, J., dissenting).

[37] Gay Law Students Assn. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 463–64 (1979).
[38] *Id*. at 491.
[39] *Id*.
[40] *Id*. at 490.

activities or affiliations of employees."[41] Discussing the meaning of "political activities," the *Gay Law Students* majority explained that the terms reaches more than partisan electioneering, but also litigation, symbolic displays, and organizing.[42] After drawing parallels between the civil rights movement for racial equality and the "gay liberation movement," the majority recognized an employee's coming out process is meaningful political act:

> A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.[43]

The California Supreme Court crucially recognized that the act of openly self-identifying as as gay person and a member of the LGBTQ community was a deeply personal decision, an inheret act of political defiance and necessary preecondition for the advancement of LGBTQ rights. The court, unencumbered by statutorily enumerated traits, concentrated on the effect that homphobic work environments had on individuals. The distinctly individualist approach to workers' political rights contrasted with the dissenting opinion that drew a distinction between political activism and group membership-- and, for the three dissenters, only the former fell under the ambit of state labor law.[44]

During the first wave of litigation after Stonewall, LGBTQ plaintiffs were left out of the federal and state sex discrimination laws' protection.

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[41] Cal. Lab. Code § 1101 (West)
[42] 24 Cal. 3d at 487.
[43] *Id*. at 488.
[44] *Id*. at 595 P.2d 595 (Richardson, J., dissenting) (Nowhere in the complaint, from beginning to end, do plaintiffs allege that PT&T's asserted policy of discrimination is directed toward any of plaintiffs' Political activity or affiliations. Rather, plaintiffs contend, and the gravamen of their complaint is, that employment discrimination is based solely on the overt and manifest nature of their sexual orientation itself.").

Even when courts conceded the logical soundness of plaintiffs' theories that a person's sexual orientation or gender identity discrimination is inextricably linked to their sex, courts declined to recognize LGBTQ discrimination claims as a form of sex discrimination. Rather than evaluate plaintiffs as individuals, courts fell back on legislative history and perfunctory analyses to deny aggreived LGBTQ persons a workplace discrimination remedy.

II. Gymnastics of the Dead Hand Divide

The prevailing view of the 1970s and 1980s was that gender identity and sexual orientation discrimination claims were not cognizable because "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."[45] The *Ulane* court was a prototypical example of how courts in this era—without irony— used the "dearth of legislative history" as proof positive that discrimination sex-linked traits were not afforded protections if that characteristic was associated with a group identity that Congress failed to specifically address.[46]

A. *Prescriptive Stereotypes and the Individualist Turn*

When the Supreme Court decided *Price Waterhouse v. Hopkins* a few years after *Ulane*, the Court emphasized the anti-stereotyping principle embedded in Title VII:"[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[47] In the case of Ann Hopkins, for example, she was locked out of a partnership because decision-makers placed a premium on women maintaining their femininity while climbing the corporate ladder. Because Hopkins failed to walk, talk, dress, carry, and style herself in a sufficiently feminine manner for her evaluators, she was shutout of a lucrative partnership.[48]

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[45] *Ulane* at 1085.
[46] *Id*.
[47] 490 U.S., at 251
[48] *Id. at 256.*

Though the anti-stereotyping principle long-preceded it, *Price Waterhouse* explained the principle's scope. The Supreme Court in *City of L.A. Dep't of Water & Power v. Manhart*,[49] and *Arizona Governing Committee v. Norris*,[50] held that Title VII's anti-stereotyping principle bars employers from fashioning policies around sex-based assumptions even if they are generally true, precisely because they are not universally valid. Thus, *Manhart* and *Norris* stand for the proposition that employers cannot use descriptive sex stereotypes— stereotypes that erase individual differences because of generalized assumptions— to discriminate against protected workers. Courts had little trouble applying Title VII's protections for individuals that suffered discrimination because of group-based assumptions.

Price Waterhouse was a straightforward application and reaffirmation of the anti-stereotyping principle. In this sense, the decision was unremarkable because it hardly marks the genesis of Title VII's anti-stereotyping principle. Yet, *Price Waterhouse* articulated that gendered expectations cannot be used to discriminate against employees because of their personality, behavior, and appearance. Herein lies *Price Waterhouse*'s significace: it clarified that prescriptive sex-stereotyping, whereby an employer scrutinizes an employee's characteristics for gender conformity, violates the anti-stereotyping principle equally as descriptive sex stereotypes.

Price Waterhouse reinforced the basic precept that undergirded *Manhart*, *Norris*, *Martin Marietta* and other rulings that held employers liable for using myths about women's employability to discriminate: Title VII's reach is not limited to ontological discrimination, rather the Act commands employers to refrain from using any gendered stereotypes— descriptive or prescriptive— to discriminate against *individuals*. However, *Price Waterhouse* is significant because it clarified that prescriptive sex-stereotyping, whereby an employer policies an employee's behavior, demeanor, and personality for gender conformity, violates the anti-

[49] 435 U.S. 702 (1978)
[50] 463 U.S. 1073 (1983)

stereotyping principle equally as descriptive sex-stereotyping. This doctrinal moment was pivitol for LGBTQ workers whose visible gender non-conformity made them the victim of employment discrimination, however, it initiated a riff in the law with nonsensical results.

After *Price Waterhouse*, LGBTQ workers brought sex discrimination claims under Title VII with some success— notably transgender workers most benefitted from *Price Waterhouse*.[51] Still, sexual orientation discrimination claims were particularly cumbersome for judges to reason through. Adhering to outmoded anti-individualist frameworks, courts permitted plaintiffs claims to go forward only if they sufficiently pleaded enough facts that the discrimination was a result employers acting out against female workers for being too masculine or male workers for being too effeminate, rather than discrimination motivated by the employee's sexual orientation.

Price Waterhouse sex-stereotyping claims were viable for effeminate gay men or masculine lesbians, but *Price Waterhouse* did not "bootstrap protection for sexual orientation into Title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine."[52] After *Price Waterhouse*, LGB plaintiffs' employment discrimination claims were scrutinized in district courts heavily as judges struggled to parse evidence of sexual orientation discrimination with evidence offered in support of sex stereotyping.[53] The hairsplitting required by circuit courts' precedent resulted in a messy undertaking for judges who had to conduct a "lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag,"

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[51] *See, e.g.,* Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1251 (11th Cir. 2017) (holding a lesbian plaintiff with masculine traits could pursue a gender non-conformity claim under Title VII despite circuit precedent foreclosing sexual orientation discrimination claims under Title VII).

[52] Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

[53] *See*, e.g., *Maroney v. Waterbury Hosp.,* No. 3:10-CV-1415 (JCH), 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011); *see also Estate of D.B. v. Thousand Islands Cent. Sch. Dist.,* 169 F.Supp.3d 320, 332–33 (N.D.N.Y. 2016).

"gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation."[54]

In the wake of the newfound attention to Title VII's anti-stereotyping principle and the unlawfulness of using prescriptive stereotypes in employment calculations, judges created an unworkable status-conduct dichotomy in Title VII doctrine that preserved the anti-individualist underpinnings of earlier sexual orientation and gender identity discrimination cases. And like before *Price Waterhouse*, courts continued to cite the intent of Title VII's framers as a reason to exclude sexual orientation claims from the statute's reach.[55] However, in this period judges often cited not the dead hand of Congress, but the phantom hand of Congress— reasoning that since Congress failed to enact legislation introduced to expressly protect sexual orientation discrimination, the judiciary was not free to do what Congress had not.[56] The considerable

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[54] *Zarda*, 883 F.3d 100 at 121.

[55] *See* Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996) ("In the context of Title VII's legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting passage of the Act."). *See also* Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000*), overruled by Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (" . . . Congress intended the term "sex" to mean "biological male or biological female," and not one's sexuality or sexual orientation.").

[56] *See* Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation."); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) ("But we are informed by Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences."); Horton v. Midwest Geriatric Mgmt., LLC, No. 4:17CV2324 JCH, 2017 WL 6536576, at *3 (E.D. Mo. Dec. 21, 2017); Pambianchi v. Arkansas Tech Univ., No. 4:13-CV-00046-KGB, 2014 WL 11498236, at *4 (E.D. Ark. Mar. 14, 2014) ("Congress has rejected a number of proposed amendments to Title VII to prohibit discrimination on the basis of sexual orientation. The courts are not free to expand Title VII to prohibit discrimination on the basis of sexual orientation."); Mowery v. Escambia Cty. Utilities Auth., No. 3:04CV382-

calisthenics judged exercised to parse out stereotypes vis-à-vis gender norms from sexual orientation-related animus was a tortured effort to straddle legislative intent and Title VII's anti-stereotyping principle. While the years after *Price Waterhouse* signified an important shift toward the individual employee and more rigorous analyses of plaintiffs' claims, judges' underlying commitment to legislative intent worked to obscure individuality and wholesale exclude gay, lesbian, and bisexual as a group from anti-discrimination law's protections.

B. Status-Stereotype Hairsplitting and Absurd Results

One consequence of the impractical line-drawing produced by the stranglehold of anti-individualist, legislative intent-driven analysis on Title VII's sex-stereotyping doctrine is the absurd result produced in mislabeled heterosexual cases. Here, a heterosexual employee who suffers discrimination because they are falsely perceived as non-heterosexual can state a claim for sex-stereotyping, notwithstanding the fact that if they were *actually* gay, lesbian, or bisexual, courts would be more likely to dismiss claims for want of a plausible allegation of sex discrimination.[57]

Judge Richard Posner described the anomaly as "absurd," highlighting how the developed doctrine "protects effeminate men from employment discrimination, but only if they are (or are believed to be)

RS-EMT, 2006 WL 327965, at *9 (N.D. Fla. Feb. 10, 2006) ("This Court expresses no opinion on the merits of such views, for the distinction between sex and sexual orientation is not meaningless to *Congress*. In fact, Congress has specifically and repeatedly rejected legislation that would have extended Title VII to protect an individual from discrimination based on his or her sexual orientation."); Medina v. Income Support Div., No. CV 03-0533 MCA/RLP, 2004 WL 7337672, at *4 (D.N.M. June 9, 2004), *aff'd sub nom. Medina v. Income Support Div., New Mexico*, 413 F.3d 1131 (10th Cir. 2005).

[57] *See* Schmedding v. Tnemec Co., 187 F.3d 862, 864–65 (8th Cir. 1999) (permitting claim alleging discrimination because of "perceived sexual preference" to go forward as a gender stereotyping claim arising from alleged harassment that "included rumors that falsely labeled him as homosexual in an effort to debase his masculinity, not that he was harassed because he *is* homosexual or *perceived* as being a homosexual.").\

heterosexuals."[58] That raises the disturbing prospect of courts weighing evidence of a plaintiff's sexual orientation. In this vein, Judge Posner predicted that this kind of claim "impels the employer to try to prove that the plaintiff is a homosexual… [to support] a complete defense to a suit of this kind[] and the plaintiff to prove that he is a heterosexual, thus turning a Title VII case into an inquiry into individuals' sexual preferences."[59]

Consider recent litigation to this effect. Marykate Ellingsworth was employed at an insurance office where she alleged her supervisor harassed her.[60] For one year, the supervisor degraded Ellingsworth, commenting that she "dresses like a dyke" and ridiculing her intelligence.[61] The supervisor remarked to Ellingsworth's colleagues that Ellingsworth "dresses like a dyke" and has a "lesbian tattoo."[62] The supervisor forced her to show the tattoo to colleagues and repeatedly spread rumors in the office that Ellingsworth was a lesbian—and effectively so— her coworkers generally believed Ellingsworth was a lesbian.[63] Ellingsworth, however, was in fact a heterosexual in an opposite-sex marriage.[64]

Ellingsworth's employer moved to dismiss her Title VII harassment suit unsuccessfully, arguing that "all of [Ellingsworth's] claims are based upon . . . alleged comments about Ms. Ellingsworth being a lesbian or having the "characteristics" of a lesbian."[65]
Had Ms. Ellingsworth self-identified as a lesbian, her claim may well have been considerably weaker under Third Circuit precedent, but the fact that she was misidentified was manifest evidence of sex-stereotyping, as the court explained:

> To be sure, it is perhaps worse (for defendant's case) that Ms. Ferrier was mistaken in her assumption that Ms. Ellingsworth is gay. The fact that Ms. Ellingsworth is not gay simply reveals that Ms. Ferrier

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[58] Hamm v. Weyauwega Milk Prod., Inc., 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring), *overruled by* Hively v. Ivy Tech Cmty. Coll. of Indiana, 853 F.3d 339 (7th Cir. 2017).
[59] *Id.*
[60] Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546, 549 (E.D. Pa. 2017).
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Def. Mot. to Dismiss, 6, Ellingsworth v. Hartford Fire Ins. Co., No. 5:16-CV-03187-LS (E.D.Pa.).

> harbored such a strong prejudice and animus as to how women should look, dress, and act, that Ms. Ferrier actually mischaracterized another person's sexual orientation because of this prejudice. Clearly, Ms. Ferrier's animus and pre-conceived gender stereotyping played a role in her treatment of Ms. Ellingsworth. Otherwise, Ms. Ferrier presumably would not have berated Ms. Ellingsworth in front of her coworkers, called her a "dyke," and forced her to reveal her "lesbian tattoo."[66]

While the court's decision to deny the motion to dismiss was ultimately correct, the idea that Ellingsworth's claim was strengthened by her heterosexual orientation, since legislative intent purportedly cautions against recognizing sexual orientation discrimination claims under Title VII, is farcical. This analytical regime turns Title VII on its head by protecting groups, not individuals.

C. Unraveling Dead Hand Dominance

When the Supreme Court decided *Price Waterhouse*, the Court infused new life into Title VII by reaffirming employers cannot lawfully police an employee's gender for conformity with sex-based expectations. Because of the fact-specfic nature of gender non-conformity litigation like *Price Waterhouse*, the law took an important turn toward the individual and drew judges' focus away from the dead hand of a long-gone band of legislators. And, as a conseuqnece of employment anti-discrimination law's individualist turn, many LGBTQ victims of workplace discrimination had viable remedial vehicles under state and federal law to pursue.[67] However, courts tried to harmonzie Title VII's anti-stereotyping feature with its entrenched performative doctrinal group-exclusion bug, which continued to

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[66] *Ellingsworth* at 554.

[67] State courts substantially relied on *Price Waterhouse* and integrated its anti-stereotyping principle into state law. *See* Nelson v. James H. Knight DDS, P.C., 834 N.W.2d 64, 71 (Iowa 2013); Lie v. Sky Publ'g Corp.,No. 013117J, 2002 WL 31492397, at *3-4 (Mass. Super. Ct., Oct. 7, 2002); Lampley v. Mo. Comm'n on Human Rights, 570 S.W.3d 16, 24, 26-27 (Mo. 2019)(en banc); Behrmann v. Phototron Corp., 795 P.2d 1015, 1018 (N.M. 1990); Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 512, 514 (N.J. Super. Ct. App. Div. 2001); Arcuri v. Kirkland, 113 A.D.3d 912, 915 (N.Y. App. Div. 2014); Graff v. Eaton, 598 A.2d 1383, 1386 (Vt. 1991); Gray v. Morgan Stanley DW Inc.,No. 54347-4-1, 2005 WL 3462783, at *4 & n.26 (Wash. Ct. App. Dec. 19, 2005).

deny many workers the right to be treated as individuals and yielded results that were unpredictable and absurd.

III. Escaping the Grip of Anti-Individualism

The Equal Employment Opportunity Commission in 2015 ruled that sexual orientation discrimination is an actionable form of sex discrimination under Title VII.[68] Some federal courts adopted the EEOC's view full-throated relatively soon thereafter. Two years after the EEOC ruling, the Seventh Circuit became the first federal appellate court to overrturn precedent to the contrary and hold that sexual orientation discrimination claims are valid Title VII sex discrimination actions.[69] At the same time appellate courts, including the Fifth and Eleventh circuits, reaffirmed 1970s-era precedent.[70] The Second Circuit joined the Seventh Circuit the next year, deepning a split among the circuits.[71]. The decisions by the Seventh Circuit and Second Circuit, *Hively* and *Zarda*, reinvigorated Title VII's anti-stereoyping principle precisely because each court focused on the individual, not groups. These emerging juriprudential wedges in Title VII doctrine reveal how employment anti-discrimination law is more protective of workers against trait-based decision-making when the law works to safeguard the rights of individuals.

A. *Bypassing Labels for the Individual*

The Seventh Circuit and Second Circuit were first courts to overturn their own longstanding precedents foreclosing sexual orientation discrimination claims under Title VII on the theory that sexual orientation discrimination is a subset of sex discrimination. Contrary to every appellate court before,[72] the Seventh Circuit held that Title VII's sex discrimination protections extended to sexual orientation discrimination and embraced three frameworks for proving sex discrimination to

[68] Baldwin v. Dep't of Transportation, EEOC Appeal No. 0120133080 (July 15, 2015).

[69] Hively v. Ivy Tech Community College, 853 F.3d 339 (7th Cir. 2017).

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[72] *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 762 (6th Cir. 2006); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 751–52 (4th Cir. 1996); U.S. Dep't of Hous. & Urban Dev. v. Fed. Labor Relations Auth., 964 F.2d 1, 2 (D.C. Cir. 1992); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989); *Blum*, 597 F.2d at 938.

support the majority's holding: comparative analysis, sex-stereotyping, and associational discrimination. In *Zarda v. Altitude Express,* a majority of the Second Circuit sitting en banc adopted the associational discrimination theory, but the other two approaches persuaded only a plurality.

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In applying the comparative method, the plaintiff's sex is changed to isolate whether an employer making an adverse employment decision took the plaintiff's protected characteristic into consideration. Thus, if an employer mistreats a female worker because she has an intimate relationship with another woman, but the employer would not mistreat the employee if she had a substantially similar relationship with a man, the causation of that discrimination is the employee's sex.[73] Hively argued, for example that if she were a man in a relationship with a woman, she would not have been denied a promotion to a full-time position or a contract extension.[74] The Seventh Circuit held that Hively's argument "describe[d] paradigmatic sex discrimination" because if her allegations were true, Ivy Tech "disadvantage[ed] her because she is a woman."[75]

Not unrelated from the comparative method, is the associational discrimination framework. When an employees states an association discrimination claim, the employee alleges that an employer unlawfully took into account a protected trait of a person to whom they have a close relationship. Forms of associational discrimination might include, for example disparate treatment because of a family member's disability or disparate treatment because of protected traits attributed to friends or spouses. [76] In sexual orientation discrimination cases, the plain textual application of Title VII and the associational framework essentially work hand-in-hand. If an individual is discriminated against

[73] A similar application of Title VII was used in *Hall v. BSNF Railway Company*, No. C13-2160 RSM, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014), where an employer denied healthcare benefits to married same-sex couples otherwise provided to married opposite-sex couples. *Id.* at *3.The company moved to dismiss the Title VII sex discrimination claim, arguing that the thrust of the plaintiff's case was really about sexual orientation discrimination, which is not expressly proscribed by federal law. *Id*. at *2 The court denied the motion to dismiss, noting that "[p]laintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males." *Id*. at *3.

[74] *Hively* at 345.

[75] *Id*.

[76]

because of an intimate relationship with a person of the same sex, the discriminatory act takes the employee's sex into account, as well as the sex of their romantic partner. This argument line was persuasive to judges on the Seventh Circuit and Second Circuit deciding sexual orientation discrimination claims. Nowithstanding the indistinguisable analytical components of a plain application of Title VII's statutory text and an associational framework in the sexual orientation discrimination context, the associational analysis speaks to the problem with employing group-centric analyses some judges have endorsed for employment discrimination doctrine.

B. Against the Individual

Writing the dissent in *Hively*, Judge Diane Sykes proffered a point later repeaeted by other appallete judges,[77] that sex discrimination cannot include sexual orientation discrimination because anti-gay animus does not disproportionately burden men or women in the aggregate. Judge Skyes wrote:

> For the comparison to be valid as a test for the role of sex discrimination in this employment decision, the proper comparison is to ask how Ivy Tech treated qualified gay men. If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an actual case of sex discrimination. If, on the other hand, an employer hires only heterosexual men and women and rejects all homosexual applicants, then no inference of sex discrimination is possible, though we could perhaps draw an inference of sexual-orientation discrimination.[78]

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[77] *See* Wittmer v. Phillips 66 Co., 915 F.3d 328, 339 (5th Cir. 2019) (Ho, J., concurring). (arguing that *Price Waterhouse* doesn't support the proposition that stereotypes against gays, lesbians, and bisexuals is not per se unlawful because "under *Price Waterhouse*, sex stereotyping is actionable only to the extent it provides evidence of favoritism of one sex over the other."); Zarda v. Altitude Express, Inc., 883 F.3d 100, 158 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599, 203 L. Ed. 2d 754 (2019) (Lynch, J., dissenting) ("The homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex.").

[78] *Id.* at 366–67 (Sykes, J., dissenting).

The *Hively* dissenters and proponents of the dissent's reasoning fall into the same analytical trap that captured courts throughout 1970s and 1980s— by failing to appreciate the way individuals suffer from stereotypes, judges relied on group labels to a fault. The folly of the group-centric focus would create undesirable results in other sex and race discrimination claims, like discrimination against parents or individuals in interracial relationships

1. Sex-Differentiated Stereotypes and Parenthood

Consider, for example, a workplace decision-maker that hews to a view of heterosexual marriage tethered to the Victorian Era market-family divide. For this person, the home is a place of feminine virtue where a woman's "natural" inclination to care for children and a woman's "innate" drive to dedicate herself to housework thrives. The husband's role, as a masculine man, is to enter the rough world of the market— to sell his labor for wages and become the family's breadwinner. With this decision-maker's ideology of the family, there are strict, siloes of gender roles for men and women.

While considering candidates for an internal promotion, this decision-maker reviewed files and culled from the pile a mother with young children and a single father, who were otherwise qualified. The decision-maker refuses to promote these two employees because he believes women cannot be dedicated to their work and to their small children simultaneously. Thus, he has impermissibly relied on a descriptive stereotype of women to deny an employment opportunity.[79] But, he also declined to promote the man with small children— not because he does not believe that a man cannot be dedicated to a job if he has small children at home, but because he believes men should not be caregivers and wants to lean on male employees for their flexibility from familial obligations. Here too, the decision-maker made a calculation based on stereotypes.[80]

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[79] *See,* e.g., Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (reversing summary judgment on a claim arising from an employer "not accepting job applications from women with pre-school-age children" because of sex-stereotypes about family obligations).

[80] See Nevada Dep't of Human Resources v. Hibbs, 538 U.S. 721, 736 (2003) ("As this Court noted years later, "[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men" that led employers to deny parental leave to fathers."). *See generally* Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012) (describing the historical development of sex discrimination doctrine and male caregiver stereotyping).

In the aggregate, the *Hively* dissent adherents' logic might dictate that the two decisions do not reflect a disproportionately burden on men or women and are, consequently, lawful. Indeed, one could claim that the discriminatory force is directed at parents of small children generally—familial status— and not any sex-linked trait. But in this scenario, both employees have been harmed by a sex-stereotype about the role of parents and the family. While each employee has been discriminated against because of their status as a parent, the stereotypes manifested differently. So, too, is the case where an employee is discriminated against because of a sex-based expectation that men should only have relationships with women, and women should exclusively be intimate with men. Stereotypes linked to homophobia are different when applied to men versus women, but the focus on groups obscure this just as grouping the hypothetical's two employees as "parents" would hide the underlying stereotypes at play. Only when courts take the individual seriously does this relationship between the employee and stereotyping surface.

2. The Loving Analogy

The law's protection for individuals in interracial marriages is also inconsistent with the anti-individualist approach taken in the *Hively* dissent and other similarly reasoned opinions. Consider the leading case on employment anti-discrimination and interracial marriage, *Parr v. Woodmen of the World Life Insurance Company*.[81] Parr, a white man, applied to a position at an insurance agency that did not employ or sell insurance to African-Americans. The agency rejected Parr upon learning he was in an interracial marriage.[82] The district court granted the company's motion to dismiss concluding Parr was not discriminated against because of *his* race.[83] The circuit court reversed on appeal, holding that "Title VII proscribes race-conscious discriminatory practices. It would be folly for this court to hold that a plaintiff cannot state a claim under Title VII for discrimination based on an interracial marriage because, had the plaintiff been a member of the spouse's race, the plaintiff would still not have been hired."[84] In other words, simply because the employer took the applicant's race and his spouse's race.into account.

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[81] 791 F.2d 888 (11th Cir. 1986).
[82] *Id.* at 892.
[83] *Id.* at 889.
[84] *Id.* at 892.

The *Parr* rationale does not square with anti-individualist approaches to emplomentdiscrimination doctrine. Under a group-centered analysis, the employer in *Parr* did not disproprionately burden one racial group over another and should therefore have no liability. All persons, no matter their racial group, were equally harmed by a rule that barred interracial relationships among employees. The Supreme instructued that this cannot be in *Loving v. Virginia*.[85] Virginia argued in *Loving* that the Commonwealth's anti-miscegnation law did not run afoul of constitutional protections because "members of each race are punished to the same degree."[86] The Commonwealth thus represented to the court that "despite [Virginia law's] reliance on racial classifications" it failed to "constitute an invidious discrimination based upon race."[87] The Court rejected that proposition, making clear that denying a right on "account of race" is a racial classification even when the burdens of the classification fall equally on racial groups.[88]

The principle derived from *Loving* and *Parr* is that the individual matters because if group assessments are the hallmark of anti-discrimination doctrine, the more diversity of harm an entity can inflict on protected persons, the less likely the discriminatory actor will be held to account. This cannot be. Thus, the question must always be whether the individual has suffered discrimination because of a protected trait, not whether a discriminator burdens everyone equally because of a protected trait.

Conclusion

When deciding whether sexual orientation and transgender discrimination claims are cognizable sex discrimination claims under Title VII, the Supreme Court's understanding of what "because of sex means" will be tested as much as the justice's commitment to Title VII's command that employers may not discriminate against individuals. As the history of sex discrimination doctrine reveals, the law can do significant damage to the civil rights of proteted persons when a court looks over the aggreived person and imposes group labels on the individual for the effect of rendering all persons similarly situatuated to a plaintiff vulnerable and without recourse. The Supreme Court must not lose the individual amongst the crowd and reject arguments favoring the exclusion of LGBTQ people

[85] 388 U.S. 1 (1967).
[86] *Id*. at 8.
[87] *Id*.
[88] *Id.* at 12.

from Title VII's sex discrimination protections that are grounded in anti-individualist theories of discrimination.

University of Richmond Law Review
Fiftieth Anniversary of the Stonewall Riots: Reflecting on the Rise and Evolution of LGBTQ Activism and Rights in the Law

Education & Employment Law Panel

CLE Materials

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ABSTRACT

From the Mattachine Society to Megan Rapinoe: Tracing the Conformist/Visionary Divide in the LGBTQ-Rights Movement to Anticipate Future Gains

From the beginning of the LGBTQ civil rights movement, there has been an intracommunity debate concerning strategies and tactics to effect legal and social change. On one end of the spectrum, the lesbian and gay organizations of the 1950s—the Mattachine Society and the Daughters of Bilitis—advocated an assimilationist strategy that sought tolerance rather than full acceptance and integration. The tactics to affect this strategy are best described as conservative and conventional—to look and act as "straight" as possible in order to convince courts, legislatures, and the public that lesbians and gay men should be left alone rather than fired from their jobs and criminalized for their intimate conduct. On the other end of the spectrum, the protesters at the Stonewall Inn on June 27, 1969, advocated for liberation along many axes (gender, race, sexual orientation, gender identity, class). The Gay Liberation Front, inspired by the Stonewall riots and formed shortly thereafter, embodied this liberation-based strategy. Its tactics are best described as confrontational, intersectional, and anti-assimilationist. This essay will refer to these two approaches as Conformist and Visionary.

Presumably, both the Conformist and the Visionary approaches shared the general end goal of equality for LGBTQ people; what "equality" looked like to each group reflects the differences between them. The differences between their strategies and tactics can be generalized as ones of imagination and marketing. The Conformist and Visionary divide has permeated the LGBTQ community's civil rights campaign through the present day, as has the debate among scholars and advocates about the "best" approach to effect lasting change. While most scholars discuss the benefits and drawbacks of these two approaches vis-à-vis the "law" and "society" writ large, and propose that one take precedence over the other, this essay explores how this decades-long intracommunity divide—the conversation *among* activists and scholars *within* the LGBTQ community—might shape the future of the movement. Rather than attempt to settle on the "best" approach, then, this essay instead focuses on the impact of the dynamic created by the intracommunity debate vis-à-vis the "law" and "society" writ large.

This essay asks and answers the questions: What work did the Conformist and the Visionary approaches do to support the rise of LGBTQ rights in the United States? And, what work do they continue to do today, so that we may anticipate the growth and impact of LGBTQ rights on education law and employment law in the future?

The essay proceeds in three parts. Part I briefly describes the historic trajectory of the Conformist and the Visionary approaches. It sketches the scholarly debate concerning these approaches. Part II traces these approaches to two current-day LGBTQ legal issues: (1) Title VII's promise of pay equity as illustrated by the U.S. Women's National Soccer Team pay equity lawsuit and Title VII's promise of nondiscrimination as illustrated by the sexual orientation and gender identity ("SOGI") lawsuits currently pending at the U.S. Supreme Court,[1] and (2) Title IX's promise of educational equity "on the basis of sex" as illustrated by the legal battles over transgender elementary school children seeking to access sex-segregated facilities that align with their gender identity. Part III adds to the scholarly conversation about this intracommunity debate by interrogating the dynamic created by the intracommunity debate itself and its relationship with and impact on these contemporary Title VII and Title IX legal battles. This part predicts that both the Conformist and the Visionary approaches will continue to contribute to equality gains for the LGBTQ community. It attempts to telegraph the work that these approaches have done in the past to the work that they might do in the future.

OUTLINE

I. The Emergence of the Conformist and Visionary Approaches
   a. The earliest LGBT-rights groups, formed in the 1950s and known as "homophile" groups, accepted the then-prevalent medical, social, and legal positions that homosexuality was an illness/pathology.
      i. These groups will be described as "Conformist."
      ii. These homophile groups did not resist the pathologization of homosexuality, but instead embraced it to argue that they should not be punished by the law for having an illness they did not cause.
      iii. The Mattachine Society and the Daughter of Bilitis represented the Conformist approach in the 1950s and 1960s. Today, the Human Rights Campaign is often characterized as embodying the Conformist approach.
      iv. These groups advocated assimilation and tolerance rather than full acceptance. As such, they insisted that their members

[1] *See Bostock v. Clayton County, Ga.*, 723 Fed. Appx. 964 (11th Cir. 2018), *certiorari granted*, 139 S. Ct. 1599 (Apr. 22, 2019); *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018), *certiorari granted*, 139 S. Ct. 1599 (Apr. 22, 2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 884 F.3d 560 (6th Cir. 2018), *certiorari granted*, 139 S. Ct. 1599 (Apr. 22, 2019).

present themselves according to the gender norms of the day: suit and tie for men, dresses for women. Respectability was the key organizing principle.

b. Social and cultural changes in the 1960s created the social context that paved the way for the Stonewall Riots of 1969.
    i. These groups will be described as "Visionary."
    ii. The Stonewall Rioters as individuals and the Gay Liberation Front are illustrative of the Visionary approach.
    iii. These groups imagined a liberation-based lens for achieving equality, rather than one based on assimilation and respectability.
    iv. These groups stressed intersectionality as a key to liberation. They thus envisioned a social movement that included not only LGBTQ people, but people of color, workers, women, etc., so that the campaign for equality would encompass issues of race, class, gender, and the like.

c. Legal scholars have debated the pros and cons of these approaches in effecting legal change, though they have not specifically focused on the dynamic created by the intracommunity debate.
    i. Some scholars take the position that the Visionary approach is the only one to secure true equality.
    ii. Other scholars take the position that the Conformist approach is the surest way to true equality.

d. Select Sources
    i. Martin Duberman, STONEWALL: THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA (Plume 2019).
    ii. Jeremiah A. Ho, *Find Out What It Means to Me: The Politics of Respect and Dignity in Sexual Orientation Antidiscrimination*, 2017 UTAH L. REV. 463 (2017).
    iii. Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415 (2012).
    iv. Mary Ziegler, *What is Sexual Orientation?*, 106 KY. L.J. 61 (2017-2018).
    v. Aaron J. Curtis, *Conformity or Nonconformity? Designing Legal Remedies to Protect Transgender Students from Discrimination*, 53 HARV. J. ON LEGIS. 459 (2016).

II. Tracing the Conformist and Visionary Approaches to Todays' Title VII and Title IX Disputes
    a. Conformist Contours

i. From the 1950s to the present, the Conformist approach of assimilation has led to several equality gains for the LGBTQ community.
ii. For example, one can trace the suit-and-tie conservatism of the Mattachine Society to the marriage equality win in *Obergefell v. Hodges*.
iii. Similarly, the rescission of the military's "don't ask, don't tell" policy and the "corporatization" of LGBT Pride events can be traced back to the Conformist approach.
iv. There is a thread from the approach of the Mattachine Society through to the current Title VII sexual orientation cases pending before the U.S. Supreme Court; the focus on assimilation and respectability likely will be a frame that the Court adopts if it finds that Title VII includes sexual orientation protections.

b. Visionary Victories
i. From the late 1960s to the present, the Visionary approach has embraced a radical lens for LGBGQ equality.
1. The core group of original Stonewall Riot protesters were transgender people of color.
2. These radical, gender-bending, intersectionality-conscious activists envisioned equality as a world unencumbered by the gender binary and thus gender norms.
3. They also viewed equality as something to be achieved by dismantling institutions, rather than joining such institutions (i.e., marriage).
ii. Examples through the decades include formation of the groups the Gay Liberation Front, the Gay Activists Alliance, the Street Transvestites Action Revolutionaries (STAR), ACTUP, and QueerNation.
iii. There is a thread from the radical liberation approach of Stonewall and its successors to current-day Title VII and Title IX issues.
1. Soccer's Stonewall Moment.
a. The Title VII pay equity lawsuit of the U.S. Women's National soccer team is being led by the pink-haired lesbian Megan Rapinoe, an echo of the gender-bending drag queens of Stonewall.
2. Stonewall-ing Sex-Segregated School Facilities for Transgender K-12 School children.

a. The Title IX lawsuits being filed by transgender schoolchildren to use sex-segregated facilities that match their gender identity can also be traced to the radical philosophies of the Visionary approach.

c. Select Sources

i. Martin Duberman, STONEWALL: THE DEFINITIVE STORY OF THE LGBTQ RIGHTS UPRISING THAT CHANGED AMERICA (Plume 2019).

ii. Nurith Aizenman, *How To Demand A Medical Breakthrough: Lessons From The AIDS Fight*, NPR (Feb. 9, 2019, available at https://www.npr.org/sections/health-shots/2019/02/09/689924838/how-to-demand-a-medical-breakthrough-lessons-from-the-aids-fight

iii. Susan Stryker, *Queer Nation*, GLBTQ Archive (2004), available at http://www.glbtqarchive.com/ssh/queer_nation_S.pdf

iv. *Bostock v. Clayton County, Ga.*, 723 Fed. Appx. 964 (11th Cir. 2018), certiorari granted, 139 S. Ct. 1599 (Apr. 22, 2019).

v. *Zarda v. Altitude Express*, 883 F.3d 100 (2nd Cir. 2018), certiorari granted, 139 S. Ct. 1599 (Apr. 22, 2019).

vi. *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 884 F.3d 560 (6th Cir. 2018), certiorari granted, 139 S. Ct. 1599 (Apr. 22, 2019).

vii. Plaintiffs' Collective Action Complaint for Violations of the Equal Pay Act and Class Action Complaint for Violations of Title VII of the Civil Rights Act of 1964, available at https://int.nyt.com/data/documenthelper/653-us-womens-soccer-complaint/f9367608e2eaf10873f4/optimized/full.pdf#page=1

viii. *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 302 F. Supp. 3d 730 (E.D. Va. 2018).

ix. *J.A.W. v. Evansville Vanderburgh School Corporation*, -- F. Supp. 3d --, 2019 WL 2411342 (S.D. Ind., June 7, 2019).

x. Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1 (2016).

III. Telegraphing the Impact of the Conformist and Visionary Approach

a. While scholars have opined about which approach is better for LGBT equality, this essay interrogates what impact the intracommunity dynamic has had on social and legal change.

b. The intracommunity debate between the Conformist and Visionary approaches has been just that—one within the LGBTQ community itself.

c. That debate within the community, while focused on the community itself, also creates reverberations outside of the LGBTQ community;

it's this dynamic *extra*community impact and reverberation that the essay describes and discusses.

d. In short, the dynamic within the LGBTQ community spills over to the outside legal community through legal and policy actions taken by both the Conformist and Visionary approaches.
    i. The dynamic creates multiple points of entry for courts and policymakers to intervene in the LGBTQ equality project.
    ii. The dynamic presents a continuum of language, worldviews, and options for courts and policymakers. The more radical vision and philosophies of the Visionary approach may make the more assimilationist vision and philosophies of the Conformist approach seem less controversial and thus more palatable to courts and legislatures. At the same time, the more radical vision and philosophies of the Visionary approach makes possible a vision of social and legal equality likely unimaginable to many even a generation ago: institutional and legal protections for transgender schoolchildren and employees.
e. In sum, both approaches' strategies/tactics have value, depending on the goals. As a result, both should be considered as we move forward.
f. Select Sources
    i. Jessica Clarke, *They, Them, Theirs*, 132 HARV. L. REV. 894 (2019).
    ii. Clifford Rosky, *Anti-Gay Curriculum Laws*, 117 COLUM. L. REV. 1461 (2017).

Gender Stereotypes and Gender Identity in Public Schools

Dara E. Purvis

In recent years, claims brought by transgender students requesting accommodations from a public school have been framed under Title IX of the Education Amendments Act of 1972, which prohibits discrimination on the basis of sex in any educational program or activity that receives federal funding. Although the statutory language does not specifically include discrimination on the basis of gender identity, a number of advocates argued that gender identity was encompassed by the term sex, and a number of federal courts agreed. More notably, in May 2016 the Department of Education issued a Dear Colleague letter interpreting the statutory language to include discrimination on the basis of gender identity, specifically noting that Title IX thus prohibits discrimination against transgender students. Given the seeming changing tide in agency interpretation as well as an increasing number of courts agreeing, the statutory argument dominated new claims.

With the change in presidential administrations, however, came a sharp about-face in agency reading of the statute. In February 2017, the Department of Education withdrew the prior letter, and subsequently announced that the Department would no longer represent transgender students and their claims. At around the same time, then-Attorney General Sessions issued a memo that the similar statutory language forbidding employment discrimination because of sex in Title VII of the Civil Rights Act of 1964 did not apply to discrimination against transgender employees. The Trump administration agencies presented a united front that the term "sex" meant solely biological sex, and not gender identity.

Given the changing interpretation of Title IX, both statutory and constitutional arguments supporting the right of public school students to express their gender in any manner contrary to traditional gendered norms have renewed vitality. In the decades since Stonewall, students facing suspension or expulsion for nonconforming gender presentation have brought a variety of claims framing their right to express themselves. Tracing these arguments is not only helpful as a historical exercise, but also to present alternative arguments under an unsympathetic presidential administration and Supreme Court.

1. Modern foundations
    a. Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 (2006).
    b. May 2016 "Dear Colleague" letter: Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. (May 13, 2016), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
    c. February 2017 "Dear Colleague" letter: Sandra Battle & T.E. Wheeler, II, *Dear Colleague Letter*, U.S. DEP'T JUST. & U.S. DEP'T EDUC. (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf
2. Early cases: student speech and gender nonconformity
    a. Foundational student speech case: *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969).
    b. Female students wearing pants prohibited, *Johnson v. Joint School District No. 60*, 508 P.2d 547 (Id. 1973).

    c. Male students with long hair prohibited, *Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970)*; Ferrell v. Dallas Independent School District*, 392 F.2d 697 (5th Cir. 1968).
    d. Male students wearing earrings prohibited, *Hines v. Caston School Corporation*, 651 N.E.2d 330 (Ind. Ct. App. 1995).
    e. Gender nonconformity at prom, *Harper v. Edgewood Board of Education*, 655 F. Supp. 1353 (S.D. Ohio 1987).
3. Modern cases of gender nonconformity
    a. Male students with long hair, *Hayden ex rel. A.H. v. Greensburg Community School Corporation*, 743 F.3d 569 (7th Cir. 2014).
    b. Gender nonconformity at prom, *McMillen v. Itawamba County School District*, 702 F. Supp. 2d 699 (N.D. Miss. 2010).
    c. Gender nonconformity in yearbook photos, *Sturgis v. Copiah County School District*, U.S. Dist. LEXIS 105065 (S.D. Miss. 2011).
4. Transgender student claims
    a. Medicalized claim successful: *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).
    b. Free expression claim successful, *Doe ex rel. Doe v. Yunits*, WL 33162199, at *1 (Mass. Super. Oct. 11, 2000).