Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?

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INTRODUCTION

Transgender persons face severe prejudice and discrimination in a wide variety of areas—from areas of public concern like employment, credit, public accommodations, and law enforcement, to more private areas such as marriage, parenting, healthcare, and inheritance.[1] The main question this Comment seeks to answer is: given everything that feminist legal theory has done to help make the legal system more amenable to the needs and rights of women,[2] what does feminism have to offer sex- and gender-nonconforming persons seeking redress

† J.D., University of California, Berkeley, School of Law, 2009. I would like to thank Professor Kathryn Abrams for her invaluable guidance and advice throughout the development of this comment. I would also like to thank Professor Angela Harris, Professor Anne Tamar-Mattis, and Jacob Richards, and the students of the Social Justice Writing Seminar for their helpful comments. I am especially indebted to Kerry Kumabe, Sarah Rich, Blaire Russell, Ben Sitter, and all the other hardworking editors of the *California Law Review* who worked on this piece.

1. PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT'L GAY AND LESBIAN TASK FORCE & NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 9–12 (2000), *available at* http://thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf (describing discrimination against transgender persons in a range of areas including education, housing, employment, healthcare, public accommodations, marriage, and immigration).

2. An example of feminist theory in action is Ruth Bader Ginsburg's work as an ACLU lawyer and later as a Supreme Court justice, which led to the invalidation of several laws and policies that treated women and men differently based on the underlying notion that women's and men's capabilities and interests are essentially different. *See infra* Part II.A. Another example of feminist theory at work in the legal realm is Catharine MacKinnon's articulation of why sexual harassment in the work place is a cognizable form of sex discrimination under Title VII. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979). In its first sexual harassment case, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court accepted MacKinnon's theory and held that sexual harassment was, in fact, an actionable form of Title VII sex discrimination.

before the law?[3] How effective a tool is feminism in the endeavor to make the legal system more responsive to the social and legal needs of persons who do not fall neatly into the categories of biological male or female?

In this Comment I am specifically concerned with transgender[4] individuals who seek redress for discrimination in the workplace under Title VII of the Civil Rights Act of 1964.[5] I have chosen to focus on Title VII in particular for several reasons. First, while transgender persons face discrimination in a variety of settings, employment discrimination is probably one of the most significant forms—the ability to earn a living affects many other areas of life, including access to housing and healthcare. Second, Title VII has proved to be a potent advocacy tool for other marginalized groups including women and racial minorities. This is due in part to Title VII's status as a federal law and in part to the explicit protection it provides for these enumerated groups. To the extent that transgender persons fall into one of the statute's protected groups, it could prove to be a very effective means of redress for trans persons as well.

This leads to my third reason for focusing on Title VII. Trans advocates have not been oblivious to Title VII's potential as a tool of trans liberation, and, in fact, have brought numerous cases under Title VII on behalf of transgender persons. However, although there has been some progress in recent years, most courts continue to define sex according to biology, and especially genitalia, and have thus been reluctant to recognize discrimination against transgender individuals as sex discrimination proscribed by Title VII. But Title VII jurisprudence has evolved before:[6] today's routine sex discrimination cases, for example, involve claims that were once rejected by judges who reasoned that they were outside of Title VII's ambit.[7] As such, making Title VII more amenable to trans needs is a matter of questioning the factual and normative

3. In this comment, I use "feminism" as an umbrella term to refer to all theories, disciplines, and advocacy dedicated to addressing sex- and gender-based oppression. I use "legal feminism" to refer to feminist theories, disciplines, and advocacy deployed specifically within the legal realm. I use "feminist legal theory" to refer specifically to feminist theories and concepts deployed within the legal realm.

4. For the purposes of this Comment, I use the words "transgender" and "trans" as umbrella terms to refer to those individuals whose identity or gender presentation does not conform to social expectations concerning their biological sex. *See, e.g.*, Paisley Currah et al., INTRODUCTION TO TRANSGENDER RIGHTS xiii, xiv (Paisley Currah et al. eds., 2006) ("[T]he term is now generally used to refer to individuals whose gender identity or expression does not conform to the social expectations for their assigned birth."); TRANSGENDER LAW CENTER, 10 TIPS FOR WORKING WITH TRANSGENDER INDIVIDUALS: A GUIDE FOR HEALTH CARE PROVIDERS (2005), *available at* http://transgenderlawcenter.org/pdf/Provider%20fact%20sheet.pdf ("The term "transgender" is used to describe people whose gender identity does not correspond to their birth-assigned sex and/or the stereotypes associated with that sex.").

5. 42 U.S.C. § 2000e-2 (2006).

6. William N. Eskridge, Jr., *Theories of Harassment "Because of Sex," in* DIRECTIONS IN SEXUAL HARASSMENT LAW 155, 155–56 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

7. *Id.* at 155.

understandings that have traditionally animated Title VII sex discrimination jurisprudence. As William Eskridge has observed, "[T]he application of any one definition or any one policy is influenced by the interpreter's factual and normative understandings."[8]

Looking at transgender discrimination cases brought under Title VII thus provides an opportunity to examine how courts approach the concepts of sex and gender[9] in interpreting the statute's prohibition of discrimination based on sex. This analysis drives my inquiry into whether or not the various schools of legal feminism can be used to make the law more responsive to the needs of transgender persons.

The central questions of this Comment take some inspiration from the anti-essentialist work of Angela Harris. Angela Harris critiques the idea that "a unitary, 'essential' women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience"[10] and argues that feminist legal theory must challenge not only the law's content, but also its tendency to privilege the abstract and unitary voice.[11] She contends that certain legal feminist theorists, such as Catharine MacKinnon, present a total, essentializing picture of "woman" that places white women's experiences at the center while marginalizing the experiences of women of color and other women who endure multiple and varying subordinations.[12] Harris also argues for an understanding of identity and community membership as constructed rather than discovered.[13] She says this understanding helps to highlight how the relationship between white women and women of color has historically been marked by oppression and domination rather than by equal status and sisterhood.[14] Harris's critique may prove useful to the project of making feminism more inclusive of the experiences of transgender individuals who, like women of color and other subordinated groups of women, have also been left at the margins of feminist

8. *Id.*

9. Generally "sex" refers to the designation made at birth based on a person's biology, genitals, and chromosomes. "Gender" can be broken down into gender identity and gender expression. Gender identity refers to a person's internal sense of being male, female, something other, or in between. Gender expression is an individual's characteristics and behaviors, such as appearance, dress, and mannerisms that are perceived by others as masculine or feminine. *See, e.g.*, HIV/STI EDUCATION OFFICE, CITY COLLEGE OF SAN FRANCISCO, TRANSGENDER VOICES, TRANSGENDER RIGHTS (n.d.), *available at* http://www.ccsf.edu/Departments/Health_Education_and_Community_Health_Studies/HIV/extras/tvtr.pdf; GAY-STRAIGHT ALLIANCE NETWORK, TRANSGENDER LAW CTR. & NAT'L CTR. FOR LESBIAN RIGHTS, BEYOND THE BINARY: A TOOL KIT FOR GENDER IDENTITY ACTIVISM IN SCHOOLS 5 (n.d.), *available at* http://transgenderlawcenter.org/pdf/beyond_the_binary.pdf.

10. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990) [hereinafter Harris, *Race and Essentialism*].

11. *Id.* at 585.

12. *Id.* at 588.

13. *See id.* at 612–15.

14. *Id.* at 613–14.

legal theory.[15]

To date, not many legal feminists have explicitly taken on the project of articulating a pro-transgender theory of legal feminism.[16] One author who has done so is Graham Mayeda. Mayeda has taken on the project of "articulat[ing] a feminist ethics of responsibility that can account for transgender identity."[17] Mayeda asserts that self-critique is an important part of the ethics of responsebility.[18] He asserts that "[s]ome feminist approaches do not recognize the co-existence of normativity with critique. Thus they risk making the critical standpoint an absolute, rather than realizing that the normativity of critique requires constant re-evaluation of the critical methodology itself."[19] In contrast, Mayeda's proposed ethical approach "recognizes the normative necessity of continually challenging the absolutism of a universalizing ideology, even a critical one."[20] This proposed feminist ethics of responsibility necessitates recognition of difference in order to account for transgender identity.[21] Mayeda notes that this requires the ability to see identity as contextual and relational.[22] This is necessary because transgender identity disrupts traditional feminist discourse "because it challenges the very foundations of the women's movement—the category of 'woman.'"[23] Mayeda identifies three elements that make feminist legal critique suited to the job of accounting for transgender identity:

> (1) identifying the essentialism of traditional legal analysis; (2) demonstrating the inability of the law to consistently apply its essentialist position . . . (3) confronting law makers with the potentially

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15. This article advocates *a* trans liberatory project, not *the* trans liberatory project. I recognize that the trans community is a heterogeneous one with varied opinions and interests. I also recognize that many trans persons view sex and gender as binary concepts and that many trans persons identify unequivocally as male or female and subscribe to all the fixed gender implications and roles that normatively attend to those identities. My aim here is to suggest one possible approach to a discrete legal problem, not an all-encompassing solution or framework. Along the same lines, I also recognize that there are other aspects of identity and axes of oppression that likely influence how trans persons experience discrimination, including race and socioeconomic class. However, a detailed exploration of these interactions is beyond the scope of this article.

16. *But see* Emi Koyama, *The Trans Feminist Manifesto*, *in* CATCHING A WAVE. RECLAIMING FEMINISM FOR THE 21ST CENTURY (Rory Dickey & Alison Piepmeier eds., 2003). Koyama is a self described "multi-issue social justice slut synthesizing feminist, Asian, survivor, dyke, queer, sex worker, genderqueer, and crip politics." She is not a feminist legal theorist and her manifesto does not deal directly with the legal concerns that animate this article. However, her observations prove useful in articulating and formulating the need for the project advocated here. To this end, I discuss the manifesto in more detail below. *See infra* notes 210–216 and 256, and the accompanying text.

17. Graham Mayeda, *Re-Imagining Feminist Theory: Transgender Identity, Feminism, and the Law*, 17 CAN. J. WOMEN & L. 423, 425 (2005).

18. *Id.* at 427.

19. *Id.*

20. *Id.*

21. *Id.* at 430.

22. *Id.* at 427.

23. *Id.* at 430–31.

> discriminatory impact of the unquestioned social norms incorporated into the law; and . . . (4) reconceiving the role of judges.[24]

In highlighting these elements, Mayeda "use[s] transgender identity to illustrate how an ethics of responsibility can inform social policy by demanding a voice for the transgender community."[25] Mayeda is one of only a few theorists who have tried to articulate a feminist legal theory specifically concerned with transgender advocacy.

As will be further discussed below, feminist legal theorist Katherine Franke has also sought to reconceptualize the law's approach to sex and gender in a way that would make it more responsive to transgender needs.[26] There are also other authors who have addressed the law's approach to sex, gender, and sexuality and, in so doing, have discussed the law's treatment of transgender individuals. However, many of these authors have not engaged with feminist theory in their discussion while others have dealt with transgender advocacy in a tangential or complementary fashion while dealing more centrally with another related issue.[27] In light of the legal system's failure to recognize and account for the needs of transgender persons, and in light of feminism's general commitment to exposing and destabilizing the unjust effects of normative ideas about sex and gender, the project of articulating an explicitly protransgender theory of legal feminism is rightfully one that more legal feminists should take on.

This Comment is intended as a further step in constructing a theory of legal feminism that is explicitly concerned with making the law more responsive to the needs of transgender persons. In so doing, I look at several schools of feminist legal theory to see what, if anything, they offer to the project of providing effective legal representation and advocacy for transgender plaintiffs. Is it the case, as queer legal theorist Janet Halley suggests, that feminism in its various forms is so committed to the project of advocating for

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24. *Id.* at 471.

25. *Id.*

26. *See infra notes* 29, 31–32, 217–20, 222–25, 230–33, 263–64, and 266–67 and accompanying text.

27. *See, e.g.*, Amanda S. Eno, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765 (2008) (argues that Title VII rightly should provide protection for transgender persons, but does not engage with feminist theory in making this argument); Erin E. Goodsell, *Toward Real Workplace Equality: Nonsubordination and Title VII Sex Stereotyping Jurisprudence*, 23 WIS. J.L. GENDER & SOC'Y 41, 42 (2008) (draws on feminist nonsubordination theory in arguing that any sex stereotyping that "is grounded in or perpetuates female subordination should constitute illegal sex discrimination under Title VII" but does not affirmatively argue for the inclusion of transgender persons among those protected by Title VII); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U.L. REV. 205, 209, 233–43 (2009) (uses "critical heterosexual studies" (CHS) informed by feminist and queer theory to critique the disparate treatment that courts have given to lesbian and gay Title VII plaintiffs versus heterosexual plaintiffs. The author proposes a reorientation of the law to change this disparate treatment and in doing so points to those Title VII cases where courts have held in favor of transgender plaintiffs as an example of this kind of reorientation).

women against male domination that we sometimes need to "take a break" from feminism in order to theorize effectively and responsibly about and advocate for issues related to sex, gender, and sexuality?[28] Could it be that obtaining social and legal justice for transgender persons necessitates taking such a break? Or have feminists been sufficiently concerned with how hegemonic ideas about sex and gender produce social and legal injustice to provide us with useful and effective tools for accomplishing this goal within the bounds of feminist theory?

In trying to answer these questions I examine several varieties of feminist theory to determine the extent to which they seek to trouble or question certain normative ideas concerning the immutability of sex (meaning "biological" male vs. "biological" female) and the potential their work has for disrupting how these normative ideas and assumptions affect judicial decision-making. My search leads to the conclusion that only a few feminist legal theorists have yet to explicitly propose a pro-transgender theory of legal advocacy. However, several schools of feminist legal theory offer useful conceptual as well as practical tools for imagining and constructing such interventions. Of particular importance is the work of postmodern feminist theorist Katherine Franke, which draws on postmodern theory in arguing that "equality jurisprudence must abandon its reliance upon a biological definition of sexual identity and sex discrimination and instead should adopt a more behavioral or performative conception of sex."[29] While many legal feminists have advocated the idea that gender is socially constructed, there has not been a corresponding movement to popularize the idea that sex is a social construct as well. As transfeminist author Emi Koyama suggests, effective advocacy on behalf of trans persons requires challenging the assumption that biological sex is unconstructed in addition to questioning the constructed nature of gender.[30] Franke and other anti-essentialist and postmodern theorists such as Harris and Vicki Shultz press most firmly in the direction of achieving this second goal. In fact, Franke advocates for a reconceptualization of equality jurisprudence that would "abandon . . . reliance upon biology in favor of an underlying fundamental right to determine gender independent of biological sex"[31] and therefore make the law more responsive to the needs of trans persons.[32]

In Part I.A of this Comment, I provide an overview of the Title VII sex discrimination cases that have been brought by transgender plaintiffs. This discussion shows that, while there has been some modest progression in the

28. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 10 (2006).

29. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 8 (1995) [hereinafter Franke, *Central Mistake*].

30. *See* Koyama, *supra* note 16, at 249.

31. Franke, *Central Mistake*, *supra* note 29, at 99.

32. *Id.* at 8.

courts towards recognizing transgender discrimination as sex discrimination under Title VII, most courts remain reluctant to take that step. In Part II, I look at various different schools of legal feminism—equality feminism, difference and cultural feminism, dominance feminism, and postmodern, queer, and anti-essentialist feminism—and analyze their respective legal theories to see how they might inform a transgender legal advocacy project. In Part III, I discuss in more detail how the conceptual and practical tools offered by the various schools of legal feminism might be put to use specifically on behalf of transgender plaintiffs bringing Title VII sex discrimination claims. Finally, in the Conclusion, I provide some summarizing thoughts on the results of this analytical exercise.

I
THE PROBLEM

A. An Overview of Transgender Sex Discrimination Cases

Although nothing in the text of Title VII explicitly addresses its policy goals, the legislative history of the statute strongly suggests that it was meant primarily to remedy job discrimination against oppressed minorities—in particular, people of color—that had "become ossified in the labor market."[33] Although sex is one of the several characteristics for which Title VII provides protection against discriminatory employment practices, several commentators have asserted or speculated that sex discrimination in the workplace was not a significant concern of Congress when it passed the bill.[34] In fact, it has been widely reported that Representative Howard Smith, a staunch opponent of civil rights legislation, proposed adding "sex" to the language of the bill in an effort to thwart its passage.[35] On the other hand, feminist author Jo Freeman has noted that Howard Smith had supported the Equal Rights Amendment in 1943 and has suggested that he may actually have proposed the addition of "sex" as a serious amendment to the bill despite the fact that he did so with some humor.[36]

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33. Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, LAW & CONTEMP. PROBS., Autumn 1986, at 9, 14.

34. *See* Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-Examine the Legal Underpinnings of Title VII's Ban on Discrimination "Because of" Sex*, 27 CUMB. L. REV. 231, 235–36 (1997); Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 18 (1994); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1283–84 (1991).

35. *See* CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–16 (1985).

36. Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 182–83 (1991) ("Nor should one assume that Southerners' only motive in voting to add 'sex' to Title VII was their antagonism towards civil rights. . . . Rep. Smith spoke in favor of a 'sex' amendment in 1956 and had been an ERA sponsor since 1943; when he retired in 1966, the NWP [National Woman's Party] lamented the loss of 'our Rock of Gibraltar.' Despite the humor that Smith injected into the 'Ladies Day' debate, what evidence there is, does not indicate that he had proposed his amendment as a joke.") (internal citations

Whatever may have been Representative Smith's motives, the final version of Title VII enacted in 1964 nevertheless included a prohibition of employment decisions or practices implemented "because of [an] individual's . . . sex."[37]

In addition to the inauspicious origins of the inclusion of "sex" in the statute, a series of amendments made in 1972, 1978, and 1991[38] make it difficult to identify the underlying legislative assumptions at work at any given point in Title VII's history.[39] The 1978 amendments, for example, explicitly included pregnancy discrimination within the statute's prohibition of sex discrimination[40] while the 1991 amendment overrode a number of judicial doctrines, but left intact the precedents recognizing sexual harassment as a basis for relief.[41]

Despite the inherent ambiguity in Title VII's prohibition of discrimination "based on . . . sex," the majority of courts have narrowly construed this concept to mean that the plaintiff must allege discrimination based on his or her status as male or female. As the case discussion below illustrates, these decisions usually rest on a determination that the plaintiff failed to meet the first prong of a prima facie case of sex discrimination: membership in a protected group.

For the most part, courts adjudicating these claims have found that transgender persons do not fall into an enumerated protected class based on one or both of the following rationales: (1) Congress did not envision transgender discrimination when it included sex as a protected category under Title VII; (2) the plain meaning of the word "sex" does not include transgender status or identity. Accordingly, these courts have found for the employer.

One early example of a case with such an outcome is *Voyles v. Ralph K. Davies Medical Center*.[42] In that case the plaintiff was fired shortly after she informed her supervisor that she intended to undergo sex reassignment surgery as part of her transition from male to female.[43] In dismissing her case, the court noted that the statute nowhere mentions change of sex or sexual preference, and that legislative history does not indicate congressional intent to "embrace 'transsexual' discrimination, or any permutation or combination thereof."[44] In

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omitted).

37. 42 U.S.C. § 2000e-2 (2006).

38. Eskridge, *supra* note 6, at 159.

39. *See id.*

40. *Id.*

41. *Id.*

42. 403 F. Supp. 456 (N.D. Cal. 1975).

43. *Id.* at 456.

44. *Id.* at 457. The Court expounded on the basis for its holding, explaining that "[Title VII] speaks of discrimination on the basis of one's 'sex.' No mention is made of change of sex or of sexual preference. The legislative history of as well as the case law interpreting Title VII nowhere indicate that 'sex' discrimination was meant to embrace 'transsexual' discrimination, or any permutation or combination thereof. . . . Furthermore, even the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to

another early case, *Grossman v. Bernards Township Board of Education*,[45] plaintiff Paula Grossman, an elementary school teacher, was suspended and ultimately terminated after she began transitioning from male to female.[46] The court concluded that Grossman was not discharged "because of her status as a female, but rather because of her change in sex from the male to the female gender."[47] Finding no indication within the legislative history of Title VII that Congress intended to include transsexuals within the language of the statute, the court concluded that the word "sex" must be given its plain meaning, which it failed to define.[48] As such, it held that the plaintiff had failed to make out a claim of sex discrimination under Title VII.[49]

The first federal case to reject a transgender plaintiff's Title VII sex discrimination claim was *Holloway v. Arthur Andersen & Co.*[50] In that case, the plaintiff alleged that her former employer had fired her because of her decision to undergo sex reassignment surgery.[51] The court rejected the claim, finding that the intent behind the legislation, including the 1972 amendments, was to "remedy the economic deprivation of women as a class."[52] The court therefore concluded that Congress had only the traditional definition of sex in mind and did not intend to include transsexuals within Title VII's protection.[53]

In *Sommers v. Budget Marketing, Inc.*,[54] the Eighth Circuit applied essentially the same reasoning. Finding that "the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation," the court held that the plaintiff's claim fell outside this definition.[55]

The next federal case to reject a transgender plaintiff's claim of sex discrimination under Title VII was significant because it overturned the trial court's holding in favor of the transgender plaintiff.[56] In *Ulane v. Eastern Airlines, Inc.*, the plaintiff was discharged by her employer after she returned to work following sex reassignment surgery.[57] On appeal, the Seventh Circuit

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prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. 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." *Id.*

45. No. 74–1904, 1975 U.S. Dist. LEXIS 16261 (D.N.J. Sept. 10, 1975).
46. *Id.* at *1.
47. *Id.* at *9.
48. *Id.* at *10.
49. *Id.* at *10–11.
50. 566 F. 2d 659, 663 (9th Cir. 1977).
51. *Id.* at 661.
52. *Id.* at 662.
53. *Id.* at 662–63.
54. 667 F.2d 748, 750 (8th Cir. 1982).
55. *Id.*
56. Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 839 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984) ("[W]hether plaintiff be regarded as a transsexual or as a female, she was discharged by Eastern Airlines because of her sex.").
57. *Id.* at 1082.

found that Ulane had not presented a valid case of sex discrimination because the plain meaning of "sex" as used in Title VII "implies that it is unlawful to discriminate against women because they are women and against men because they are men."[58] Accordingly, the court held the statute does not proscribe discrimination against a person having a "sexual identity disorder."[59] *Ulane* presented perhaps the most distressing articulation of the "plain meaning" rationale for denying Title VII protection to transgender plaintiffs when it stated: "[E]ven if one believes that a woman can be so easily created from what remains of a man, that does not decide this case. . . . If Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual."[60]

Holloway, *Sommers*, and *Ulane* set a legal precedent that several courts later followed. A number of cases have relied on this precedent for the proposition that discrimination based on transgender status is not sex discrimination under Title VII.[61] In 1989, however, a pivotal Supreme Court case, *Price Waterhouse v. Hopkins*,[62] expanded the interpretation of sex discrimination under Title VII to include impermissible sex stereotyping and in so doing, laid the groundwork (if unintentionally) for a new theory of inclusion of transgender plaintiffs under Title VII. In *Price Waterhouse*, plaintiff Ann Hopkins alleged that she had been passed up for a promotion to partner because her employer judged her to be insufficiently feminine in her demeanor, dress, and personality.[63] The trial record showed that Hopkins was an exceptional employee described by partners of the firm as "an outstanding professional" and by clients as "extremely competent, intelligent."[64] Despite her exemplary record, a number of partners expressed displeasure with Hopkins' demeanor, describing her as "macho" and suggesting that she could benefit from "a course at charm school."[65] One partner specifically suggested that Hopkins' use of profanity might be problematic "because it's a lady using foul language."[66] Hopkins was told that she could improve her chances of making partner by "walk[ing] more femininely, talk[ing] more femininely,

58. *Id.* at 1085.

59. *Id.*

60. *Id.* at 1087.

61. *See, e.g.*, Doe v. U.S. Postal Serv., No. 84–3296, 1985 U.S. Dist. LEXIS 18959, at *4 (D.D.C. June 12, 1985); Emanuelle v. United States Tobacco, Inc., No. 85C8165, 1987 U.S. Dist. LEXIS 9790, at *1 (N.D. Ill. Oct. 26, 1987), *aff'd* 886 F.2d 332 (7th Cir. 1989); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); Rentos v. Oce-Office Sys., No. 95 Civ. 7908, 1996 U.S. Dist. LEXIS 19060 (S.D.N.Y. Dec. 24, 1996); Oiler v. Winn-Dixie La, Inc., 2002 U.S. Dist. LEXIS 17417, at *19 (E.D. La. Sept. 16, 2002); Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634 (D. Utah June 24, 2005); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 U.S. Dist. LEXIS 57680 (N.D. Ind. Aug. 3, 2007).

62. 490 U.S. 228 (1989).

63. *Id.* at 234–35.

64. *Id.* at 234.

65. *Id.* at 235.

66. *Id.*

dress[ing] more femininely, wear[ing] makeup, hav[ing] her hair styled, and wear[ing] jewelry."[67] The Court found for Hopkins, holding that the meaning of "sex" as used in Title VII encompassed sex stereotypes.[68] The Court affirmed the legal relevance of sex stereotyping stating: "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[69] The court noted that Title VII lifts women out of the bind created by an employer who "objects to aggressiveness in women but whose positions require this trait."[70] *Price Waterhouse* signaled a significant change in the judicial approach to construing "sex" under Title VII. For the first time, the Supreme Court moved beyond a literal, "plain meaning" approach and acknowledged that Title VII implicated gender as well as sex.[71]

A decade later, some courts began to accept transsexual plaintiffs' arguments that they were protected under *Price Waterhouse*'s "sex stereotyping" theory. In *Schwenk v. Hartford*,[72] the Ninth Circuit became the first court to apply *Price Waterhouse* in a transgender case. In that case, a transsexual prisoner claimed that she had been assaulted by a prison guard in violation of the Gender Motivated Violence Act (GMVA).[73] Noting that "Congress intended proof of gender motivation under the GMVA to proceed in the same way that proof of discrimination on the basis of sex . . . is shown under Title VII,"[74] the court rejected the defendant's argument that the GMVA did not encompass transsexuals.[75] The court explained that *Price Waterhouse* overruled *Ulane*'s narrow construction of "sex" as only anatomical sex rather than gender.[76] The court stated that what was important under a *Price Waterhouse* analysis of the case was that "the perpetrator's action stemmed from the fact that he believed that the victim was a man 'who failed to act like' one."[77] The court went on to note that "under *Price Waterhouse* 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII."[78] Likewise, in *Rosa v. Park West Bank & Trust Co.*, the First Circuit held that a

67. *Id.*
68. *Id.* at 251.
69. *Id.*
70. *Id.*
71. *See* Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 153–54 (2004–05).
72. 204 F.3d 1187 (9th Cir. 2000)
73. *Id.* at 1192.
74. *Id.* at 1200–01.
75. *Id.* at 1202.
76. *Id.* at 1201–02. The court also held that "for purposes of [GMVA and Title VII], the terms 'sex' and 'gender' have become interchangeable." *Id.* at 1202.
77. *Id.* at 1202.
78. *Id.*

male plaintiff who alleged that he was denied a loan because he dressed in traditionally feminine attire could, under *Price Waterhouse*, seek redress for sex discrimination.[79] The plaintiff in this case brought suit under the Equal Credit Opportunity Act,[80] which the court interpreted by reference to Title VII sex discrimination case law.[81]

Schwenk and *Rosa* signaled the beginning of an important shift in how courts conceive of gender under federal sex-discrimination laws. But they involved claims based on statutes other than Title VII, so neither case created Title VII precedent. It was not until 2004 that a federal appeals court would decide for the first time that discrimination based on transgender status is impermissible sex stereotyping under Title VII. In *Smith v. City of Salem*, the court held that, under *Price Waterhouse*, discrimination because of failure to live up to sex stereotypes counts as sex discrimination under Title VII even as applied to transgender individuals.[82] The Sixth Circuit held that:

> By holding [in *Price Waterhouse*] that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to "sex" encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.[83]

In so holding, the court stated that nothing in *Price Waterhouse* indicates that Title VII protection from discrimination for failure to live up to sex stereotyping is conditional or that this protection should not extend to transsexuals.[84]

A year later, the Sixth Circuit confirmed its reasoning in *Smith*, holding in favor of a transgender plaintiff in *Barnes v. City of Cincinnati*.[85] In that case,

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79. 214 F.3d 213, 214–16 (1st Cir. 2000).

80. 15 U.S.C. § 1651 (2006).

81. *Rosa*, 214 F.3d at 215.

82. 378 F.3d 566, 574–75 (6th Cir. 2004).

83. *Id.* at 573.

84. *Id.* at 574–75 ("Such analyses cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual.").

85. 401 F.3d 729 (6th Cir. 2005). It is not clear why the Sixth Circuit has been such a friendly forum for transgender Title VII plaintiffs. Its approach to these cases has been repeatedly described as "progressive." *See, e.g.*, Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN'S L.J. 243, 255 (2008); Colleen C. Keaney, Comment, *Expanding the Protectional Scope of Title VII "Because of Sex" to Include Discrimination Based on Sexuality and Sexual Orientation*, 51 ST. LOUIS U. L.J. 581, 594 (2007). But descriptions of the Circuit's approach to other cases have been more varied. *See, e.g.*, Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1248 (2008) (describing the Sixth Circuit as "lack[ing] . . . a firm ideological personality" in the context of religious free exercise cases); Brandon T. Morris, Comment, *Oil, Money, and the Environment: Punitive Damages Under Due Process, Preemption, and Maritime Law in the Wake of the Exxon Valdez Litigation*, 33 TUL. MAR. L.J. 165, 200 (2008) (describing the Sixth Circuit as "restrictive" as compared to the more "liberal" Ninth Circuit in

the plaintiff, Philecia Barnes, failed the probationary period required to become a police sergeant in the Cincinnati Police Department.[86] Barnes had been living as a pre-operative male-to-female transsexual at the time and she brought suit against the City under Title VII, claiming that she did not pass probation because of illegal discrimination based on her failure to conform to sex stereotypes.[87] The jury found for Barnes at trial, and the City appealed, arguing that Barnes failed to make out a prima facie case of sex discrimination under Title VII and that the trial court erred in not granting its motions for judgment as a matter of law and to dismiss as a matter of law.[88]

Relying on *Smith*, the Sixth Circuit rejected the City's claim that Barnes was not a member of a protected class.[89] While the court stopped short of articulating exactly what class Barnes belonged to, it held that her allegations of sex stereotyping sufficed to state a prima facie claim of sex discrimination. The Sixth Circuit also held that the district court did not err in denying judgment as a matter of law because there was sufficient evidence in the record supporting Barnes' claims for a reasonable jury to find in Barnes' favor.[90] The evidence showed that a supervisor told Barnes that she was not masculine enough, while numerous supervisors and peers criticized her for lacking "command presence."[91] No other probationary sergeant had ever failed probation and Barnes was directly told that she would fail because of her lack of masculinity.[92] Based on this evidence a jury could find that the City's proffered reason for demoting Barnes was pretextual and that the real reason was unlawful discrimination.[93]

While *Smith* and *Barnes* appeared to herald a new, more hopeful era in transgender discrimination jurisprudence, that hope was tempered by a subsequent decision in which the U.S. District Court for Utah explicitly refused to follow the Sixth Circuit's lead. In *Etsitty v. Utah Transit Authority*, the defendant terminated the plaintiff, a pre-operative male-to-female transsexual, because of concern about liability from customers' and coworkers' opposition

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cases involving punitive damages in maritime law).

86. *Barnes*, 401 F.3d at 733.

87. *Id.*

88. *Id.* at 736. In order to establish a prima facie case of sex discrimination, Barnes had to demonstrate that (1) she was member of a protected class, (2) she applied and was qualified for a promotion, (3) she was considered for and denied the promotion, and (4) other employees of similar qualifications who were not members of the protected class received promotions. *Id.* at 736–37.

89. The court also found that the City's claim that Barnes failed to identify a similarly situated employee who was not subject to discriminatory treatment lacked merit. *Id.* For this discussion, I will focus on the court's treatment of the first requirement, because it more directly relates to the central subject of this article.

90. *Id.* at 738.

91. *Id.*

92. *Id.*

93. *Id.*

to plaintiff's use of female bathrooms while she retained male genitalia.[94] She brought suit under Title VII, arguing that her termination was due to her gender-nonconforming conduct.[95] The court rejected Etsitty's argument and *Smith*'s reasoning, stating that Congress had "a narrow view of sex in mind when it passed the Civil Rights Act"[96] and that *Price Waterhouse* was inapplicable because "[s]uch drastic action [as changing one's sex] cannot be fairly characterized as a mere failure to conform to stereotypes."[97] The court's analysis and holding in *Etsitty* illustrates how narrowly courts might interpret and apply *Price Waterhouse*'s "sex stereotyping" test. On appeal, the Tenth Circuit affirmed this narrow application, citing *Ulane* for the proposition that Title VII's prohibition of sex discrimination does not extend to discrimination based on transgender status.[98] The court also rejected the plaintiff's *Price Waterhouse*–based sex-stereotyping argument, finding that the defendant had met its burden by stating a nondiscriminatory reason for her termination: Etsitty intended to use women's public bathrooms on the job while still possessing male genitalia which could expose the company to liability.[99]

In *Kastl v. Maricopa Community College*,[100] which also followed the *Smith* and *Barnes* decisions, a district court found against a transgender plaintiff and, in doing so, took a narrow approach to the concept of a "protected class" under Title VII. In this case, the plaintiff was hired as an adjunct professor and began transitioning from male to female while on the job.[101] Some time after Kastl began living as a woman, some students began complaining to the college that "a man was using the women's restroom."[102] In response to this, a supervisor told Kastl that she would not be allowed to use the women's restroom until she provided proof that she had completed sex reassignment surgery.[103] A few months later, the college informed Kastl that her contract would not be renewed for the following semester because the college's full-time faculty had filled the schedule.[104]

Kastl subsequently sued the college, alleging that its requirement "that she use men's restroom facilities, and its subsequent termination of her employment for failing to work under such conditions, amounts to a constructive discharge on the basis of sex."[105] The college moved for summary

94. No. 2:04CV616DS, 2005 U.S. Dist. LEXIS 12634 at *1–2 (D. Utah June 24, 2005).
95. *Id.* at *1.
96. *Id.* at *4.
97. *Id.* at *5.
98. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007).
99. *Id.* at 1224.
100. No. CV-02-1531-PHX-SRB, 2006 U.S. Dist. LEXIS 60267 (D. Ariz. Aug. 22, 2006), *aff'd*, No. 06-16907, 2009 U.S. App. LEXIS 7833 (9th Cir. Apr. 14, 2009).
101. *Id.* at *1–*2.
102. *Id.* at *5.
103. *Id.*
104. *Id.*
105. *Id.* (quoting the complaint). In order to establish constructive discharge, the plaintiff

judgment, arguing that Kastl's claims lacked merit under Title VII[106] because she could not prove that she was a biological female and so could not meet the first element of a prima facie case: membership in a protected class.[107] The college argued that

> [a]t all times relevant to her [complaint], Plaintiff did not possess the phenotypic characteristics, or internal and external genitalia, of a biological female, that she was designated as a male at birth based upon a genital exam and that prior to her sex reassignment surgery . . . Plaintiff had normal adult male genitalia, including a penis and testicles.[108]

Based on this evidence, coupled with expert testimony that sex is determined by three criteria—phenotypic characteristics, endogenous hormonal characteristics, and chromosomal characteristics—the court granted summary judgment for the defendant, holding that Kastl "failed to met her burden of establishing a prima facie case of discrimination because she has provided no evidence that she was a biological female and member of a protected class."[109] The *Kastl* court thus based its analysis on a fixed notion of "sex" as biological status, phenotypically determined. On appeal, the Ninth Circuit affirmed the district court's decision.[110] The Ninth Circuit found that Kastl had stated a prima facie case of "gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in MCCCD's actions against her."[111] However, the court further found that the defendant met its burden by providing evidence that it banned Kastl from using the women's restroom for safety reasons and that Kastl failed to provide evidence that this action was motivated by her gender.[112]

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must show that

> the abusive working environment became so intolerable that her resignation qualified as a fitting response. An employer may defend against such a claim by showing both (1) that it had installed a readily accessible and effective policy for reporting and resolving complaints of sexual harassment, and (2) that the plaintiff unreasonably failed to avail herself of that employer-provided preventive or remedial apparatus. This affirmative defense will not be available to the employer, however, if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions.

Pennsylvania State Police v. Suders, 542 U.S. 129, 134 (2004).

106. Plaintiff also made claims under Title IX, but these are outside the scope of this discussion.

107. *Kastl*, 2006 U.S. Dist. LEXIS 60267, at *16.

108. *Id.* (quotation omitted). Note, however, that the Supreme Court has held that Title VII's protection against sex discrimination extends to men as well as women. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998) (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

109. *Kastl*, 2006 U.S. Dist. LEXIS 60267, at *20.

110. Kastl v. Maricopa County Cmty. Coll. Dist., No. 06-16907, 2009 U.S. App. LEXIS 7833, *1 (9th Cir. Apr. 14, 2009).

111. *Id.*

112. *Id.*

A recent district court case has further problematized the relationship between the holdings in *Ulane* and *Smith/Barnes*. In *Creed v. Family Express Corp.*,[113] the plaintiff, Amber Creed, was a male-to-female transgender person who began transitioning on the job. Her supervisors told her that there had been complaints about her increasingly feminine appearance and that she could no longer present herself in a feminine way at work.[114] Creed told her supervisors that she was transgender and was going through the process of gender transition.[115] When she refused to present herself in a more masculine way at work, she was terminated.[116] The court relied on *Ulane* for the proposition that "Title VII does not protect transsexuals."[117] Creed argued that *Price Waterhouse* had "eviscerated" *Ulane*, but the court disagreed.[118] The court found no direct conflict between the two cases and held that their net effect was twofold. First, *Ulane*'s central holding—"that discrimination against transsexuals because they are transsexuals isn't discrimination 'because of . . . sex'"—was still good law.[119] Second:

> [A] transgender plaintiff can state a sex stereotyping claim if the claim is that he or she has been discriminated against because of a failure to act or appear masculine or feminine enough for an employer, but such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions.[120]

Based on this analysis, the court granted the defendant's motion to dismiss in part and denied the motion in part. The court granted the motion as to Creed's allegation that she was discriminated against based on her transgender status, finding that nothing in those allegations suggested that her discharge was due to any stereotypical perceptions of a particular gender.[121] The court denied the motion to dismiss those counts that alleged discrimination based on the defendant's perception of Creed as "a man who did not conform with gender stereotypes associated with men in our society, or . . . a woman who did not conform with gender stereotypes associated with women in our society."[122] The court found that the defendant's request that Creed appear more masculine at

113. No. 3:06-CV-465RM, 2007 U.S. Dist. LEXIS 57680 (N.D. Ind. Aug. 3, 2007).

114. *Id.* at *2. According to Creed, she wore a polo shirt and slacks that Family Express provided to all its employees while on the job. *Id.* "Other aspects of her appearance, however, became more feminine over time—she sometimes wore clear nail polish and black mascara and trimmed her eyebrows. In the fall of 2005, Ms. Creed began wearing her hair in a more feminine style." *Id.* at *5.

115. *Id.*

116. *Id.*

117. *Id.* (quoting Ulane v. E. Airlines, 742 F.2d 1081, 1085 (7th Cir. 1984)).

118. *Id.*

119. *Id.* at *3.

120. *Id.* at *8 (citing Doe ex rel. Doe v. City of Belleville, Ill., 119 F.3d 563, 581 (7th Cir. 1997), *vacated and remanded on other grounds*, City of Belleville v. Doe, 523 U.S. 1001 (1998)).

121. *Id.*

122. *Id.* at *3.

work allowed for the inference that the managers subscribed to stereotypical notions of how men should dress.[123]

This case, along with *Etsitty* and *Kastl*, illustrate that while the *Price Waterhouse* "sex stereotyping" test has made some courts more receptive to Title VII discrimination claims brought by transgender plaintiffs, it has also led to the creation of something of a hierarchy among these claims. Those claims that convincingly allege sex stereotyping stand some chance of being successful (although cases like *Etsitty* caution against too much optimism regarding the influence of *Smith* and *Barnes*), but claims that allege discrimination based on transgender status without making a direct appeal to sex stereotyping occupy a more precarious position. While the *Smith/Barnes* interpretation of the *Price Waterhouse* sex-stereotyping test was a significant step in extending Title VII protection to transgender plaintiffs, even these cases stop short of offering protection to these plaintiffs based on transgender status *per se*. The approach in these cases expands the concept of "sex" beyond the solely physiological, but still requires plaintiffs to "'anchor' their claims in being either the male or female sex to show nonconformity with that sex . . . making an explicitly biologically essentialist claim that impedes intervention with the regulatory norms that produce male and female sexes in the first place."[124] *Etsitty*, *Kastl*, and *Creed* illustrate the need for judicial recognition of Title VII protection not just for gender-nonconforming behavior, but also for transgender status in its own right.

A recent case offers some hope that courts are becoming more receptive to transgender discrimination claims, including those that are not based on allegations of sex stereotyping. In *Schroer v. Billington*,[125] the District Court for the District of Columbia found in favor of a transgender plaintiff, holding that she was discriminated against both because of sex stereotypes and because she transitioned from male to female, which the court held was literally discrimination "because . . . of sex."

Diane Schroer applied for a position at the Library of Congress for which she was well-qualified.[126] At that time she was still living and presenting as a man, but had already been diagnosed with gender identity disorder and was working with specialists to develop a plan to transition from male to female.[127] She applied under her then-legal name, David, and attended the interview in traditional male attire.[128] Having outshone all the other candidates, she was

123. *Id.* at *4.

124. Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 92–93 (2008) (quoting Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender Non-conforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 484–86 (2004).

125. 577 F. Supp. 2d 293 (D.D.C. 2008).

126. *Id.* at 295.

127. *Id.*

128. *Id.*

offered the position and, at that point, she informed the Library that she planned to transition from male to female.[129] Following this revelation, the Library rescinded its offer of employment.[130]

The court found that the decision to revoke the offer was "infected by sex stereotypes."[131] The decision-maker admitted that when she saw photographs of Schroer in traditionally feminine attire, she saw a man in women's clothing, and that she made repeated reference to these photos during the conversations with other Library personnel.[132] She also testified that her difficulty understanding Schroer's desire to transition was intensified by her perception of Schroer as not only a man but a particularly masculine man due to Schroer's past experience in the Special Forces.[133] Based on this evidence, the court held that Schroer was discriminated against due to sex stereotyping.

The court went further, however, also holding that Schroer presented a valid sex discrimination claim based on the plain language of Title VII.[134] In doing so, the court avoided declaring that the term "sex" includes gender identity. It refused to give more weight either to the plaintiff's expert who testified that there are nine elements to a person's sex, including gender identity, or the defendant's expert, who testified that gender identity was "a component of 'sexuality' rather than 'sex.'"[135] The court asserted that resolving this dispute was not within its competence and was in any case unnecessary, given that the plain language of the statute dictated that the Library's treatment of Schroer was discrimination because of sex.[136]

In its analysis, the court drew an analogy between transitioning from one sex to another and converting from one religion to another. According to the court, if a person who converted from Christianity to Judaism was discriminated against by an employer who claimed no bias against Christians or Jews, but only against "converts," no one would deny that this was discrimination "because of religion."[137] Based on this analogy, the court concluded that discrimination based on a person's decision to change from one sex to another is likewise "discrimination 'because of . . . sex.'"[138] In doing so, the court explicitly rejected the construction of "sex" in *Ulane* and *Etsitty*,

129. *Id.* at 296.
130. *Id.* at 299.
131. *Id.* at 305.
132. *Id.*
133. *Id.*
134. *Id.* at 305–06.
135. *Id.* at 306. Note that sexual orientation is not the same as gender identity. A transgender man or woman may identify as gay or lesbian, heterosexual, bisexual, or queer, independently of his or her gender identity. *See generally* 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 (1995).
136. *Schroer*, 577 F. Supp. 2d at 306.
137. *Id.*
138. *Id.* at 308.

calling these cases examples of the "elevation of judge-supposed legislative intent over clear statutory text."[139] The court noted that Supreme Court decisions after *Ulane* had applied Title VII in ways that Congress could not have anticipated,[140] but went on to say that for Schroer to prevail "it [was] not necessary to draw sweeping conclusions about the reach of Title VII."[141] It held that even if those decisions that define sex in purely biological terms remain good law, the Library's refusal to hire Schroer after learning about her plans to transition from male to female was "*literally* discrimination 'because of . . . sex.'"[142]

Schroer represents a significant departure from previous Title VII jurisprudence. It is the first decision to recognize discrimination based on a person's decision to transition from one sex to another as discrimination because of sex without relying exclusively on sex stereotyping analysis. However, several aspects of the decision counsel against unbridled optimism about what it means for future transgender Title VII plaintiffs. First, although the court seemingly balanced its decision equally between the sex stereotyping argument and an interpretation of the statute as literally encompassing discrimination against people who undergo gender transition, the fact that it used both arguments could conceivably give less-friendly courts sufficient basis on which to reject a claim that does not adequately meet the sex stereotyping standard. Second, the court's decision not to hold explicitly that the term "sex" encompasses both biological characteristics and gender identity, combined with its very careful language (nowhere does the court state explicitly that transgender discrimination is included within sex discrimination under Title VII), arguably make it easier for future courts to hold that *Schroer* applies only to cases with very similar facts. Third, the court's ambivalence in repudiating *Ulane* and *Etsitty*—the opinion seems to leave open the question of whether these cases are still good law—means that these cases remain possible sources of support for future decisions holding that transgender discrimination is outside of Title VII's ambit.

The foregoing discussion demonstrates that, for the most part, judicial lawmaking has historically reflected and reinforced the bodily and the biological as incontrovertible evidence of a person's sex.[143] Nowhere is this

139. *Id.* at 307 (internal quotations omitted).

140. *See, e.g.*, Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998).

141. *Schroer*, 577 F. Supp. 2d at 307–08.

142. *Id.* at 308 (italics in original).

143. This focus on the body as the source of reliable truth concerning a person's essence, especially for issues of sexuality and gender, is exemplified in the writings of eighteenth- and nineteenth-century sexologists such as Richard von Krafft-Ebing and Havelock Ellis, who were largely responsible for popularizing and legitimizing numerous "conditions" such as homosexuality, transsexuality, and other forms of "sexual inversion." *See* SEXOLOGY UNCENSORED: THE DOCUMENTS OF SEXUAL SCIENCE 45–47, 52–57, 77–90, 91–97 (Lucy Bland & Laura Doan eds., 1998) [hereinafter SEXOLOGY UNCENSORED]; SEXOLOGY IN CULTURE 13, 15–23, 63–70 (Lucy Bland & Laura Doan eds., 1998) [hereinafter SEXOLOGY IN CULTURE]. In their

adherence to the status quo more obvious than in the line of court cases summarized in this Part, which refuse to acknowledge transgender discrimination as a valid claim under Title VII. To date, there has been no attempt by feminist legal theorists to take on an explicit project of making the law more amenable to the needs of trans persons. My contention is that, given feminism's traditional commitment to exposing and destabilizing the unjust effects of normative ideas about sex and gender, this is rightfully a feminist project. As such, I endeavor in the next Part to see what, if anything, the various schools of legal feminism have to offer to such a project.

II

WHAT DO FEMINIST LEGAL THEORIES HAVE TO OFFER TO THIS PROJECT?

Despite the doubtful state of current transgender discrimination jurisprudence outlined in Part I, perhaps trans advocates can look with some hope to feminist legal theories to bolster their arguments for expanding the definition of sex discrimination under Title VII. In this Part, I examine various schools of legal feminism to see what conceptual tools they might have to offer to the project of making the law more amenable to the needs of trans persons. To this end, I look in turn to the work of various representative legal feminists from the schools of *equality* or *sameness* feminism, *difference* and *cultural* feminism, *dominance* feminism, and *anti-essentialist, postmodern*, and *queer* feminism. I present the various schools of legal feminism in this particular order for two main reasons: (1) this order roughly represents the actual chronological development of feminist legal theory, and (2) it also represents a conceptual progression in the way that legal feminists have tackled issues related to sex and gender that is particularly useful to this discussion.

As discussed below, equality feminists started the work of unhinging sex from gendered expectations by arguing for a legal approach to sex-related issues that allows men and women the freedom to choose pursuits and interests outside of traditionally prescribed norms regarding the abilities and interests of the respective sexes. Certain difference and dominance feminists added to this contribution by highlighting the constructed and problematic nature of many taken-for-granted concepts and institutions, including the nuclear family and dominant and submissive sex roles. Anti-essentialist, postmodern, and queer feminist theorists have built on and extended these ideas by beginning to question the constructed nature not only of gender, but also of sex itself.

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quest to understand and classify these "perversions," sexologists made exacting inspections of numerous human subjects. In carrying out these inspections, they meticulously recorded various "abnormalities" in the measurements and positioning of certain body parts and took these abnormalities as evidence of the inner essential qualities of their subjects. In doing so, they therefore reinforced the idea that sex- and gender-nonconforming behavior originated with, and could serve as reliable indicators of bodily abnormalities. *See, e.g.*, SEXOLOGY UNCENSORED 45–47, 52–57, 77–90, 91–97; SEXOLOGY IN CULTURE 13, 15–23, 63–70.

As discussed above, I borrow conceptually from the anti-essentialist work of Angela Harris. As Harris has pointed out, traditional feminist theory has often painted an essentialist picture of women that either excluded certain groups—such as women of color—altogether, or else relegated them to the margins.[144] Transgender persons have often been the victims of this exclusion and marginalization.[145] Feminists have argued that both trans men and trans women have benefitted from male privilege in some form and are therefore not rightful beneficiaries of feminist activism.[146] In this Comment, I aim to examine the various fields of feminist legal theory to see what, if anything, they have to offer to trans advocacy. In this way, I aim to join the newly-formed movement of dedicated individuals who strive to move trans people from the margins to the center of feminist theorizing.[147]

I look first to *equality* or *sameness* feminism as exemplified by the work of Ruth Bader Ginsburg. The goal of equality feminists like Ginsburg is to remove from the law stereotypical ideas about the capabilities of men and women that prevent both sexes from freely pursuing their chosen academic, personal, and professional goals.[148] I then look at *difference* and *cultural* legal feminist theories, which seek to address the undervaluation of those activities and pursuits traditionally conceived of as feminine so as to make the legal and social treatment of women (and some disadvantaged men) more equitable.[149] I then move on to *dominance* feminism, which conceives of the problem of sexism as primarily a question of male dominance rather than of similarity or difference between the sexes.[150] Exemplified by the work of Catharine MacKinnon, dominance feminism seeks to illustrate the ways in which men are socialized to be dominant and aggressive while women are socialized to be submissive and subservient.[151]

Finally, I look at *anti-essentialist*, *postmodern*, and *queer* feminist legal theories. As previously discussed, Angela Harris's work proves especially useful as an example of anti-essentialist feminism, because it seeks to question the concept of "woman" as a unitary, preexisting category. She argues that any group or identity is the product of negotiation and construction, not an a priori, preexisting entity.[152] Postmodern theorists seek to question concepts presented

144. Harris, *Race and Essentialism*, *supra* note 10, at 585.

145. *See* Koyama, *supra* note 16, at 248.

146. *Id.* at 247.

147. *See, e.g.*, Gilden, *supra* note 124; Ilona M. Turner, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007); Sergey Moudriak, *The Sound of (Congressional) Silence: The Broader Meaning of "Sex" in Title VII*, 6 DUKEMINIER AWARDS 223 (2007); Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213 (2005).

148. *See infra* Part III.A.

149. *See infra* Part III.B.

150. *See infra* Part III.C.

151. *See infra* notes 196–203 and accompanying text.

152. *See infra* notes 206–07 and accompanying text.

as objective truths. They argue that such concepts are often constructed according to the mandates of particular forms of social power. As such, when legal institutions treat certain ideas about sex and gender as "natural," and "plain," they obscure and deny the roles that they themselves play in the construction and reinforcement of these ideas.[153] Queer theorists seek to disrupt sex and gender binarism and to show how the categories of "male" and "female" are not as separate and mutually exclusive as traditionally thought.[154] Queer legal theorists seek to make the law more responsive to the needs of sex- and gender-nonconforming persons and to call into question the ways in which legal actors and institutions, including traditional legal feminists, have relegated such persons to the margins of legal action and inquiry.[155]

I conclude that while most of these legal feminists do not explicitly propose theoretical interventions for trans persons, they do offer tools for disrupting traditional notions of sex and gender employed by the *Ulane* line of decisions. In particular, equality and difference theorists (and perhaps, to a lesser extent, dominance theorists) can aid trans plaintiffs by challenging the expectations that biology and gender expression will line up in normative ways. Postmodern, anti-essentialist, and queer feminists can drive this project even farther by challenging the assumption that biological sex is a priori and unconstructed.

A. Equality or Sameness Feminism

Prior to *Reed v. Reed*,[156] in which the Supreme Court upheld a claim of sex discrimination for the first time, the law was replete with sex-based distinctions that reflected the assumption that women were, and should be, relegated to the private sphere of home and family while men should dominate the public spheres of work, politics, and intellectual pursuits.[157] Prior to *Reed* the courts routinely denied claims challenging these sex-based distinctions, citing women's difference from men as justification for treating them differently.[158]

Ruth Bader Ginsburg, then an attorney for the American Civil Liberties Union (ACLU), was one of the most influential figures in bringing about a

153. *See infra* notes 204–05 and accompanying text.

154. *See infra* notes 217–25 and accompanying text.

155. *See infra* notes 244–51 and accompanying text.

156. 404 U.S. 71 (1971) (holding that a statute preferring males as administrators of decedents' estates violated the Equal Protection Clause of the Fourteenth Amendment).

157. MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 25 (2d ed. 2003). Chamallas also points out that rather than reflecting reality—women of color and working-class women had long worked outside the home to support themselves and their families—the separate spheres ideology represented the dominant culture's ideal conception of women's roles. *Id.*

158. *See, e.g.*, Bradwell v. Illinois, 83 U.S. 130 (1872); Muller v. Oregon, 208 U.S. 412 (1908); Goesaert v. Cleary, 335 U.S. 464 (1948), *overruled by* Craig v. Boren, 429 U.S. 190 (1976).

change in judicial approach to sex-discrimination cases. Ginsburg's equality-feminist strategy was to minimize the differences between the sexes and to highlight the ways in which rigid sex roles restricted the opportunities and personal development of both men and women.[159] Ginsburg did this by tapping into fields such as history, biology, and philosophy in order to convince the courts that many of the perceived differences between the sexes were not biologically inherent, but were rather learned through social stereotyping.[160] Ginsburg's strategy proved successful, as her advocacy led the Supreme Court to overturn a range of discriminatory laws in cases such as the aforementioned *Reed*,[161] *Frontiero v. Richardson*,[162] *Weinberger v. Wiesenfeld*,[163] and *Craig v. Boren*.[164]

It is almost certain that Ginsburg and her fellow equality feminists did not have the rights and needs of trans persons in mind when they developed their legal arguments and strategies. Therefore, one could conclude that equality feminism has little to offer the project of articulating an explicitly pro-transgender feminist theory. However, a second look might reveal that equality feminism could, in fact, be useful. A key part of the problem for trans persons is the fact that many courts, as exemplified by *Etsitty*, still adhere to the narrow notion that gender is (or should be) inherently predictable from biological sex.[165] Given this problem, equality feminism's guiding principle—the idea that the stereotyped roles assigned to men and women based on sex are not biologically inherent but rather socially ingrained or imposed—would seem directly relevant to making the case for a legal recognition of transgender discrimination as a form of sex discrimination.

Ginsburg's majority opinion in *United States v. Virginia*[166] provides a thorough illustration of her approach to questions of sex discrimination. In that case the Court ruled that the men-only policy of the Virginia Military Institute (VMI) violated women's equal protection rights, and ordered the Institute to start admitting women or forfeit its government funding.[167] Ginsburg applied the intermediate standard of scrutiny that she helped establish through her

159. *See* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 LAW & INEQ. 33, 54 (1984).

160. *See* AMY LEIGH CAMPBELL, RAISING THE BAR: RUTH BADER GINSBURG AND THE ACLU WOMEN'S RIGHTS PROJECT 35 (2003); Cole, *supra* note 159, at 55.

161. 404 U.S. 71.

162. 411 U.S. 677 (1973) (holding that federal statutes that automatically granted certain benefits to male servicemembers without any proof that their wives were actually dependent on them, but required female servicemembers to provide proof that their husbands were in fact dependent, were unconstitutional).

163. 420 U.S. 636 (1975). See *infra* notes 257–259 and accompanying text for discussion of this case.

164. 429 U.S. 190 (1976) (holding that an Oklahoma statute that prescribed different drinking ages for men and women was unconstitutional).

165. *See Etsitty*, 2009 U.S. App. LEXIS 7833 at *4; 502 F.3d at 1221.

166. United States v. Virginia, 518 U.S. 515 (1996) [hereinafter VMI].

167. *Id.*

advocacy as an ACLU lawyer.[168] Intermediate scrutiny requires the state to show that the challenged classification serves important governmental objectives and that the measures employed are substantially related to achieving those objectives.[169] Additionally, the justification must be "genuine" and cannot "rely on overbroad generalizations about the different talents, capacities, or preferences of males and females."[170] Ginsburg emphasized the lower courts' findings that "some women may prefer" the "adversative" training method employed at VMI to that which might be found in women's colleges, and that "'*some* women can meet the physical standards [VMI] now impose[s] on men.'"[171] "It is on behalf of these women," she observed, "that the United States has instituted this suit, and it is for them that a remedy must be crafted, a remedy that will end their exclusion from a state-supplied educational opportunity for which they are fit. . . ."[172] Justice Ginsburg concluded that Virginia's proposed women's academy would not remedy VMI's violation of the equal protection clause because its more cooperative and genteel environment would not be suited to those women who would prefer the physical demands and mental stress that were VMI's hallmarks.[173] She also noted that nowhere in the record did the State assert that the adversative, rigorous training employed at VMI was suitable for most men.[174]

Reflected in this opinion, and in her work generally, is the idea that biological sex should not determine the destiny of men or women. Ginsburg's liberal approach to women's rights led her to argue for a more open social and legal framework where both men and women would be free to make choices based on their own capabilities and preferences rather than on predetermined sex-based roles and restrictions.

Equality feminists like Ginsburg are more concerned with opening up a range of possibilities for women (and to a lesser extent, men) than in troubling the normative pairing of sex with gender in ways that would more directly address the interests of gender-nonconforming persons. Nevertheless, their work began paving a path for unmooring sex from gender in the legal realm. Other feminists and queer theorists have since built on this work and argued more forcefully and directly for a social and legal consciousness that recognizes the contingent and constructed nature of the categories of male and

168. *See Craig*, 429 U.S. 190. In fact, some would say that Justice Ginsburg actually used a more stringent version of the intermediate standard. Justice Scalia argued in his dissenting opinion that Ginsburg created a standard higher than intermediate scrutiny via the unconventional language she used in applying the standard to the VMI case. *VMI*, 518 U.S. at 571–72 (Scalia, J., dissenting).

169. *VMI*, 518 U.S. at 533.

170. *Id.*

171. *Id.* at 540–41 (citations omitted).

172. *Id.* at 550–51 (footnote omitted).

173. *Id.* at 547–51.

174. *Id.* at 550.

female, and of masculine and feminine.

B. Difference Feminism and Cultural Feminism

Following in the wake of the equality feminists' progress, a new feminist legal movement emerged in the 1980s with the goal of making the law more responsive to social structures and expectations that pose unique challenges for women, including work-related protections for pregnant women. The difference feminism school includes a group of theorists collectively called cultural legal feminists. Cultural legal feminists do not aim either to downplay the social and biological differences between men and women or merely to ensure that the law accommodates women's differences. Rather, they argue for the celebration of women's distinctive contributions to society, particularly women's capacity for nurturing, preservation of relationships, and empathy.[175] Extrapolating from these observations, legal theorists such as Carrie Menkel-Meadow, Leslie Bender, and Robin West propose new ways of looking at law through the prism of women's unique experiences of life and human relationships. Menkel-Meadow, Bender, and others have challenged the law's privileging of "male" values of objectivity, truth, and the adversarial model over more "female" approaches including client-centered advocacy, empathy, and cooperation.[176]

Difference and cultural feminist theories focus primarily on attaining equal valuation for characteristics that have been gendered as feminine. This preoccupation makes them less concerned with challenging the link between biological sex and certain gendered expectations in the same way that equality feminists are. As such, it may appear that difference and cultural feminist theories taken as a whole do not have very much to offer to this project. However, there are a few difference feminists whose work might provide some modest contribution to an explicitly pro-transgender feminist legal theory. Kathryn Abrams notes that while "first wave" feminist accounts of care were perhaps rightly criticized as essentialist, the "second wave" circumvented such critiques to a substantial extent by reflecting the lived experiences of varying groups of women as well as by incorporating the dependency and care work done by persons other than biological women.[177]

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175. CHAMALLAS, *supra* note 157, at 56. This body of legal feminist theory was greatly influenced by the work of developmental psychologist Carol Gilligan. Her book, *A Different Voice*, investigated how male and female children make moral choices and solve moral dilemmas. In her study, Gilligan discovered that boys were more likely to employ a logic- and principle-driven approach to solving moral problems, while girls were more likely to look for ways to preserve relationships, placing more value on human connection rather than on abstract rules. CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 25–63 (1982).

176. *See* Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1 (1990).

177. Kathryn Abrams, *The Second Coming of Care*, 76 CHI. KENT REV. 1605, 1611–13

This less essentialist, more nuanced approach is demonstrated in Martha Fineman's work. Fineman proposes the framing concept of a "gendered life,"[178] which does not presume "that women respond identically" to their gendered experience[179] but does provide the opportunity for diverse women to come together with the shared goal of "defining for ourselves the implications and ramifications of the gendered aspects of our lives."[180] To this end, Fineman examines how dependency and care work have been devalued and under-supported socially and legally.[181] She attributes this lack of support and appreciation to the law's focus on the "Husband/Wife dyad"[182] (i.e. the coupled heads of a household) as opposed to the "Mother/Child dyad."[183] She proposes abolishing marriage as a legal category in order to raise all intimate relationships—including nonsexual, dependency-oriented relationships—to the same level of legal support and recognition.[184]

Fineman's goal in reconceptualizing the family in this way is primarily to "unsubjugate[] motherhood,"[185] not necessarily to alter radically the public expectation that biological sex and gender presentation should always line up in conventional ways. However, Fineman's plan points to the disruption of the normative ideal family consisting of opposite sex, cisgender[186] parents raising "naturally" conceived children.[187] In this way, her goal of remodeling the family around dependency rather than sexual coupling arguably provides some

(2001). Generally, "first wave feminism" refers to the feminist movement that began in approximately 1848 and ended with the suffrage movement in 1920. This movement was most concerned with de jure (or officially mandated) sex inequalities. The second wave followed the first wave and focused on de facto or unofficial inequalities and how they interact with de jure inequalities. Second wavers also call attention to issues that have been insufficiently addressed by the first wave, including how other axes of oppression such as race and class affect women's lives Third wave feminism is the most recent "wave" and intersects in large part with the concerns of the second wave. However third wavers also look to postmodernist theories that complicate normative ideas concerning sex, gender, and sexuality. *See, e.g.*, Cathryne Bailey, *Making Waves and Drawing Lines: The Politics of Defining the Vicissitudes of Feminism*, HYPATIA, Summer 1997, at 17.

178. MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 47 (1995).

179. *Id.* at 48.

180. *Id.* at 54.

181. *Id.* at 226–35.

182. *Id.* at 233.

183. *Id.* at 230.

184. *Id.* at 230–32.

185. *Id.* at 233.

186. This is a term used mostly in the trans community. The term was developed to avoid using words like "normal" and "non-transgender," which define people by reference to a stigmatized other. *See, e.g.*, University of Texas at Austin Division of Diversity and Engagement, *FAQ—Transgender Issues*, July 22, 2008, www.utexas.edu/diversity/ddce/gsc/faqtransgender.php.

187. FINEMAN, *supra* note 178, at 232 ("This re-envisioning reflects current empirical and social reality as to evolving family form. Instead of being a society where our ideals and our ideology (the private, natural family) are out of sync with the real lives of many of our citizens, we would become a society that recognized and accepted the inevitability of dependency.").

of the leverage needed for the conceptual heavy-lifting involved in effective trans advocacy. Courts often resort to arguments based on the importance of family and childrearing in denying legal recognition of sexual relationships that disrupt normative ideas about sex, gender, and sexuality.[188] Therefore, a reconceptualization of the family that both takes the focus off the sexual dyad and places it on the caregiving dyad, and recognizes versions of the caregiving dyad outside of the prototypical biological-mother-and-child model, would hopefully open up spaces within—and ideally outside—the family for actors, including trans persons, to disrupt taken-for-granted norms related to sex and gender.

Another theorist whose work might prove useful is Christine Littleton, who, though reasonably classified as a difference theorist, is concerned not only with ensuring that women are protected under the law whenever perceived or "real" differences threaten to put them at a disadvantage, but also with highlighting how gender roles work injustice on both men and women.[189] Littleton's "equality as acceptance" approach requires that "social institutions react to gender differences, whether arising from biological or cultural sources, in such a way as to create equality between complementary male and female persons, skills, attributes and life patterns."[190] As such, Littleton seeks to redress the cultural disadvantaging of traditionally female roles and the cultural privileging of traditionally male roles, irrespective of whether these roles are performed by biological men or women. This approach offers a modest contribution to trans advocacy because, in envisioning a society where "[t]he difference between human beings, whether perceived or real, and whether biologically or socially based, should not be permitted to make a difference in the lived-out equality of those persons,"[191] Littleton provides for the uncoupling of sex and gender for people whose social roles do not line up in traditional ways with their biological sex.

The foregoing discussion illustrates that difference and cultural feminists have a modest contribution to make to the project at hand because they have worked to disrupt normative ideas regarding sex, gender, and sexuality by

188. *See, e.g.*, Andersen v. King County, 138 P.3d 963 (Wa. 2006) (upholding Washington State's ban on same-sex marriage on the grounds that the state had a legitimate interest in limiting marriage to heterosexual couples in order to encourage the formation of nuclear families in which children tend to thrive); J.L.S. v. D.K.S., 943 S.W.2d 766 (Mo. Ct. App. 1997) (upholding order forbidding lesbian-identified transgender woman who was the children's biological father from associating with other transgender individuals or sleeping with other women while the children were in her custody); Jacobson v. Jacobson, 314 N.W.2d 78 (N.D. 1981) (finding that best interests of child dictated awarding custody to heterosexual father rather than lesbian mother), *overruled by* Damron v. Damron, 670 N.W.2d 871 (N.D. 2003).

189. Christine A. Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043 (1987).

190. *Id.* at 1052 (1987).

191. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1284–85 (1987) (italics omitted).

advocating for equal valuation of characteristics gendered as feminine.

C. Dominance Feminism

Rather than looking at questions of sameness or difference, dominance feminism focuses on power and subordination. As Catharine MacKinnon explains it, dominance feminism "moves behind and beyond sameness and difference to the subordination and dominance that has been the real problem of inequality all along."[192] For MacKinnon, both inequality and gender entail, at their core, questions of power.[193] As such, dominance feminism is primarily concerned (at least according to MacKinnon) with how sexuality is deployed as both a product and a weapon of male power.

In MacKinnon's view, "sexuality is gendered as gender is sexualized. Male and female are created through the erotization of dominance and submission. The man/woman difference and the dominance/submission dynamic define each other."[194] As this quotation shows, MacKinnon's dominance feminism conceives of male and female, and of masculine and feminine, as socially constructed categories. The construction of these categories occurs in and through the definition and deployment of sexuality. This, in essence, is the "technology"[195] of the oppression of women. MacKinnon explains that "sexuality . . . [is] a social construct of male power: defined by men, forced on women, and constitutive of the meaning of gender."[196] "Masculinity precedes male as femininity precedes female, and male sexual desire defines both," MacKinnon writes.[197] "Specifically, 'woman' is defined by what male desire requires for arousal and satisfaction and is socially tautologous with 'female sexuality' and 'the female sex.'"[198] Thus, for MacKinnon, the category of "woman" is not natural or presocial, but is rather the product of social and sexual construction. Sexuality, as understood in dominance feminist terms, is a system through which male dominance delineates the concepts of sex, gender identity, and sexual pleasure in a way

192. CATHARINE A. MACKINNON, WOMEN'S LIVES MEN'S LAWS 53 (2005).

193. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32 (1987).

194. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635 (1983).

195. I use the term "technology" here in the same sense that Professor Katherine Franke uses it in her article on the wrong of sexual harassment: "If a 'technology' is a manner of accomplishing a task, or the specialized aspect of a particular field, then sexual harassment is both the manner of accomplishing sexist goals, and the specialized instantiation of a sexist ideology." Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691, 693 (1997) (internal citation omitted).

196. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 128 (1989).

197. *Id.* at 131.

198. *Id.*

that eroticizes male domination and female subordination.[199]

To the extent that MacKinnon's dominance theory has something to offer to trans advocacy, it is the way in which she questions the meaning and significance of the taken-for-granted categories of "man" and "woman," "male" and "female." MacKinnon challenges what she describes as the unquestioning acceptance of sex and sexuality as "primary natural prepolitical unconditioned drive[s]"[200] and "largely pre-cultural and universally invariant."[201] She contends, instead, that sexuality is "a pervasive dimension of social life . . . a dimension along which gender occurs and through which gender is socially constituted."[202] According to MacKinnon, the concept of "femininity" entails all that is required for male arousal and sexual satisfaction—that is, servility, social and sexual availability, enforced passivity, and humiliation—while the concept of "masculinity" necessarily includes finding sexual pleasure in these traits.[203] By shedding light on hegemonic constructions of sex, gender, and sexuality, dominance feminism could prove useful to a trans advocacy project.

D. Postmodern, Anti-Essentialist, and Queer Feminist Theories

In this section, I will look beyond theories that challenge notions of sex and gender to postmodern feminist theories that challenge the law's allegiance to the concepts of truth, knowledge, and objectivity as fixed and a priori. I will also look at anti-essentialist feminist theories that challenge the idea of a unitary identity or self, and queer theories that seek to disrupt sex and gender binarism. Given that these theories focus on exposing the constructedness of truth and objectivity, the inextricable link between law and power, and the ways in which the law creates and reinforces binaries, they are potentially quite useful to the project of obtaining legal recognition for transgender persons.

Angela Harris's anti-essentialist work offers interesting insight into how the identity of "woman" has been delineated within feminist circles. Harris draws on postmodern ideas concerning the contingent and constructed nature of taken-for-granted ideas. As Harris explains: "Postmodernist thought refuses to accept any concept, linguistic usage, or value as pure, original, or incorruptible."[204] Rather, postmodernism "'suggest[s] that what has been presented . . . as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power.'"[205]

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199. *Id.* at 137.

200. *Id.* at 131–32 (footnote omitted).

201. *Id.* at 132.

202. *Id.* at 130.

203. *See id.*

204. Angela P. Harris, *The Jurisprudence of Reconstruction*, 82 CALIF. L. REV. 741, 750 (1994).

205. *Id.* at 748 (quoting Gary Peller, *Reason and the Mob: The Politics of Representation*, TIKKUN July/Aug. 1987, at 28, 30).

In her anti-essentialist critique of feminist theory, Harris asserts that among the contributions that black women have to offer feminism are "the recognition of a self that is multiplicitous, not unitary," and "the recognition that differences are always relational rather than inherent."[206] Harris also argues that identity and commonality are often products of intention and will, rather than already extant realities.[207] She argues that this realization helps us confront the fact that certain groups of women have not only been victims of power and oppression, but have actually used their positions of privilege against other women.[208] For example, white women have historically used race privilege to exercise power over women of color.[209] This line of argument is useful to the trans advocacy project in that it highlights the contingent nature of identity and shows how groups whose unity and coalescence are assumed to be natural actually come together through conscious effort and collaboration.

This insight can also help feminist activists to acknowledge cisgender privilege and to consciously grapple with the question of whether feminist advocacy should be deployed on behalf of certain groups that have often been marginalized by mainstream feminist movements, including transgender women.[210] The question of whether or not transgender persons are rightful beneficiaries of feminist advocacy has been a source of contention within feminist circles for some time. Some feminists accuse both trans men and trans women of benefiting from male privilege.[211] They argue that male-to-female transsexuals are socialized as males and therefore enjoy male privilege from childhood.[212] On the other hand, female-to-male transsexuals are seen as abandoning their female selves in order to attain male privilege.[213] As a result of these sentiments, feminists often excluded trans women from female-only spaces intended as safe havens from patriarchy.[214]

These "women's spaces" can be traced back to the 1970s, when the most vocal segment of the feminist movement consisted of white, middle-class women who prioritized sexism as the fundamental source of inequality while largely ignoring other factors such as racism and classism that also affected women's lives.[215] By realizing that both trans and cisgender women have benefited from various kinds of privilege,[216] and that no community takes shape

206. Harris, *Race and Essentialism*, *supra* note 10, at 608.

207. *Id.* at 612.

208. *Id.* at 613–14.

209. *Id.* at 614 n.158 (citing ELIZABETH V. SPELMAN, INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT 106 (1988); BELL HOOKS, FEMINIST THEORY: FROM MARGIN TO CENTER 49 (1st ed. 1984)).

210. *See* Koyama, *supra* note 16, at 248.

211. *Id.* at 247.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.* at 248.

216. Koyama notes that cisgender feminists need to acknowledge their privilege relative to

without conscious effort and negotiation, feminist activists and theorists of varying racial, ethnic, gender, and class backgrounds can continue the task of creating a more inclusive and representative community.

Harris's assertion that identity and group membership are constructed supports Katherine Franke's argument that the law should accommodate the experiences of persons whose lives challenge the hegemonic ideas about sex and gender that currently underlie sex equality jurisprudence.[217] Franke posits that "a central mistake" in the development of sex discrimination law has been the "disaggregation of sex from gender."[218] She argues that modern sex discrimination law operates on the notion that gender is cultural, i.e., malleable and constructed, while sex is biological, i.e., natural and fixed.[219] Franke asserts that by uncritically accepting biological differences, "equality jurisprudence reifies as foundational *fact* that which is really an *effect* of normative gender ideology."[220] By failing to behave in ways that supposedly flow naturally from biological sex, transgender people call into question this naturalness and point to the possibility that sex itself is socially mediated. Feminist theorist Judith Butler's rhetorical musings in *Gender Trouble* likewise illustrate that the concept of sex cannot be understood or located without reference to these underlying assumptions:

> [P]erhaps this construct called "sex" is as culturally constructed as gender; indeed, perhaps it was always already gender, with the consequence that the distinction between sex and gender turns out to be no distinction at all. . . . As a result, . . . gender is also the discursive/cultural means by which "sexed nature" or "a natural sex" is produced and established as "prediscursive," prior to culture, a politically neutral surface *on which* culture acts.[221]

In line with this reasoning, Franke asserts that "[t]o say that someone is a woman demands a complex description of the history and experience" of that person.[222] Sexual identity—that is, what it means to be a man or a woman—must be reconceived in nondeterministic terms that "at once enable and constrain a degree of human agency and create the background conditions for a

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their transgender counterparts ("[a]ny person who has a gender identity or an inclination toward a gender expression that matches the sex attributed to her or him has a privilege of being non-trans") and that trans women likewise should not deny their access to male privilege, however limited or qualified it may be ("[m]ost trans women have 'passed' as men . . . at some point in their lives and were thus given preferential treatment in education and employment, for example, whether or not they enjoyed being perceived as men. They have been trained to be assertive and confident, and some trans women manage to maintain these 'masculine' traits, often to their advantage, after transitioning"). *Id.* at 247–48.

217. Franke, *Central Mistake*, *supra* note 29, at 1, 8.

218. *Id.* at 1–2.

219. *Id.* at 1, 9.

220. *Id.* at 2.

221. JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 11 (2d ed. 1999) (emphasis in original).

222. Franke, *Central Mistake*, *supra* note 29, at 4.

person to assert, *I am a woman*."[223] Therefore, Franke suggests that discrimination because of sex should also be reconceived to encompass more than conduct that would not have occurred but for the plaintiff's biological sex.[224]

For example, Franke takes a critical look[225] at the Eleventh Circuit's decision in *Henson v. City of Dundee*.[226] In *Henson*, a sexual harassment case, the court held against the plaintiff[227] because the alleged harassment affected both male and female employees and therefore could not have been because of the plaintiff's sex.[228] The court held that Title VII does not apply to cases in which "the conduct complained of is equally offensive to male and female workers."[229] Therefore, in the court's formulation of the wrong of sex discrimination, the discriminatory conduct must be harmful only to members of one sex. Franke calls this result "absurd," arguing that "[w]omen who are sexually harassed in the workplace do not experience discriminatory harm because of their biology but because of the manner in which sex is used to exploit a relationship of power between victim and harasser."[230] This power is based on structural factors such as a supervisor/supervisee relationship or cultural gender roles that encourage men to use sex to subordinate women.[231] Franke notes that there is no inherent connection between these factors and biology, and so it makes no sense for the law to insist that there is such a connection.[232]

Franke's reconceptualization of sex discrimination law as an investigation of power rather than of biology would significantly benefit trans persons seeking legal redress. In fact, Franke explicitly acknowledges that it would extend protection to all persons who determine their gender presentation or identity independently of biological sex, including transgender persons.[233]

Vicki Shultz, like Franke, challenges the idea that social differences observed between men and women can primarily be explained by essential or deterministic accounts of the relationship between sex and gender. Specifically, Shultz challenges the law's role in reinforcing the idea that women and men have innate differences that result in profound workplace sex-segregation.[234]

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223. *Id.* at 3–4 (emphasis in original).
224. *See id.* at 4.
225. *Id.* at 90–92.
226. 682 F.2d 897 (11th Cir. 1982).
227. The plaintiff was not transgender. *Id.* at 899.
228. *Id.*
229. *Id.* at 904.
230. Franke, *Central Mistake*, *supra* note 29, at 91.
231. *Id.*
232. *Id.*
233. *See id.* at 8.
234. *See generally* Vicki Shultz, *Women "Before" the Law: Judicial Stories about Women, Work, and Sex Segregation on the Job*, *in* FEMINISTS THEORIZE THE POLITICAL (Judith Butler & Joan W. Scott eds., 1992) [hereinafter Shultz, *Women Before the Law*]; Vicki Shultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

Shultz examines what she terms the "lack-of-interest"[235] argument used to justify sex-segregation discrimination in cases such as *EEOC v. Sears, Roebuck & Co.*[236] In that case, the EEOC argued that the lower numbers of women in the stores' higher paying commission sales positions was a result of sex discrimination on the part of Sears.[237] The court refused to hold in the plaintiffs' favor, finding instead that the discrepancy was due to women applicants' own lack of interest in higher-paying commission sales jobs.[238]

Shultz argues that cases raising the lack-of-interest argument show how the legal system "reproduce[s] the very categories of gender that women are struggling to subvert through law."[239] The legal system characterizes the question of what kind of work women as a class prefer as a "question of fact," but in reality courts draw on cultural assumptions about women and work to answer this question.[240] This judicial approach "suppresses law's constitutive capacity":[241] the law is presumed unable to influence women's "natural" (that is, biologically determined, or predictably socially structured) work aspirations and identities. The law's power to change sex segregation is thus denied. Shultz argues that experiences in the workplace shape people's aspirations and identities—that is, gender is reinforced as well as importantly constructed in the workplace.[242] Women develop interests and aspirations not because of innate and essential traits, but in response to the structural features of the work world.

Shultz's discussion of the courts' unquestioning acceptance of the argument that women end up in lower paying jobs because they prefer those jobs seems to leave open the question of whether this view stems from a belief that women's preferences are dictated by biology or by predictable patterns of socialization, or a combination of both.[243] Whatever the underpinning belief, Shultz seeks to reveal the courts' role in constructing gendered expectations that they claim are the "natural" cause of women's overrepresentation in low paying jobs. By claiming that occupational sex segregation occurs independently of any of the structural aspects of the workplace, the courts refuse to acknowledge that biological sex characteristics do not necessarily line up with certain gender-based expectations, whether those expectations are biologically dictated or socially programmed.

Shultz's observation that courts are reluctant to conceive of variable and unconventional pairings of biological sex and gender characteristics can also be seen in the courts' repeated assertion that the "natural" meaning of "sex"

235. Shultz, *Women Before the Law*, *supra* note 234, at 298.
236. 628 F. Supp. 1264 (N.D. Ill. 1986).
237. *Id.* at 1278.
238. *Id.* at 1305–15.
239. Shultz, *Women Before the Law*, *supra* note 234, at 298.
240. *Id.* at 299.
241. *Id.* at 306.
242. *Id.* at 299.
243. *See generally* Shultz, *Women Before the Law*, *supra* note 234.

precludes trans plaintiffs from accessing legal redress under Title VII. In this way the courts claim that they are constrained in their decisions by the pre-existing "natural" meaning of "sex," when they actually function as part of the constructive process that fixes alignments between sex and gender as "natural."

Another person whose work might be useful in this project is queer legal theorist Janet Halley. In her book *Split Decisions: How and Why to Take a Break from Feminism*,[244] Halley offers the provocative proposition that there are times when it may be beneficial, even responsible, to break away from feminist modes of theorizing about and advocating for issues related to sex, gender, and sexuality.[245] Halley lists three characteristics that she asserts are present in all strains of feminism as practiced in the United States: (1) feminism presupposes a distinction between male and female (m and f), (2) feminism is committed to theorizing about the subordination of f to m, and (3) feminism is committed to working against said subordination.[246] Halley abbreviates these characteristics as "m/f, m>f, and carrying a brief for f," respectively.[247]

Against this backdrop, Halley explains that to "take a break from feminism" means spending time outside of the bounds of feminist theory and realizing that solutions to social and legal problems concerning sex, gender, and sexuality might not resonate with feminist goals or a feminist vision of the world.[248] It is recognizing that feminism need not be the yardstick by which we measure the utility or success of any particular progressive or justice-oriented social or legal project concerning these issues and that women, females, and all that is feminine need not be the constituencies on whose behalf these projects are undertaken.[249] Halley believes this is necessary because theorists and activists "decide immense questions of social distribution and social welfare . . . when we commit to one . . . theor[y] over another."[250] She argues that it is important to realize that feminist legal theory and activism has the potential to bring about harms as well as benefits in the lives of those affected because there are some issues and problems for which the "m/f, m>f, carrying a brief for f" framework will not necessarily be the most productive or beneficial starting point.[251] This critique is reminiscent of Mayeda's ethics of responsibility which requires that critical schools of theory recognize the importance of self-critique in order to effectively advocate on behalf of the other.[252]

Halley's critique likely gives too little credit to legal feminists' work in resisting gender determinism in society and in the law and fails to account for

244. HALLEY, *supra* note 28.
245. *Id.* at 8–9.
246. *Id.* at 17–18.
247. *Id.*
248. *Id.* at 10.
249. *Id.* at 26.
250. *Id.* at 9.
251. *Id.* at 8–9, 17–18.
252. *See* Mayeda, *supra* note 17, at 426–27.

the diversity of ideas and approaches that can be found among the various schools of legal feminist theory. However, the insights and ideas that animate Halley's argument are likely useful to trans advocacy. One of Halley's primary concerns is what she sees as feminism's inability to acknowledge the contested and clashing realities involved in sexuality. For example, Halley has argued that feminist desire to protect women from harm at the hands of men tends to preclude a queer understanding of sexuality that appreciates the often complicated relationships between sexual pleasure, autonomy, and unwantedness.[253] As such, Halley is very concerned with challenging what she sees as unbending feminist opposition to certain sexual activities—such as sadomasochistic sex[254]—deemed inherently demeaning or harmful (especially when the "dominant" participant is male and the "submissive" participant female).

Halley's insights regarding the ways in which some strains of feminist theorizing makes assumptions about how sex and gender operate in sexual situations (particularly a tendency towards heteronormative conceptualizations of sexual situations in which women always occupy the submissive/exploited position and men always occupy a dominant/exploiter position) can be useful to trans advocacy in that they may pose important challenges to certain assumptions and expectations regarding sex and gender. Halley's admonition of what she sees as the three ever-present characteristics of feminism resonates strongly with the goal of challenging traditional ideas about sex and gender that make the legal system largely unresponsive to transgender persons' claims. One example of Halley's rejection of such ideas can be seen in *Sexuality Harassment*, where she discusses how queer sexual couplings subvert and rearrange gender hierarchies and points out that queer theory acknowledges the complex and contingent ways in which gender interacts with sex as well as with power.[255] This queering of sexuality presents one method of reconceptualizing sex and gender in a way that troubles normative ideologies regarding these concepts.

This queer approach to theorizing is not, as Halley seems to believe, in tension or opposition with all of feminist theory. Butler, Franke, and Shultz have all questioned traditional assumptions regarding sex and gender. Both

253. *See, e.g.*, Janet Halley, *Sexuality Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW 182 (Catharine A. Mackinnon & Reva B. Siegel eds., 2004) [hereinafter Halley, *Sexuality Harassment*]. In *Sexuality Harassment*, Halley argues that MacKinnon's formulation of the harm of sexual harassment is totalizing in its conception of women as unwanting victims of men's sexual attention. As such, sexual harassment law as currently conceived does not allow for a queer understanding of sexuality that acknowledges that desire and unwantedness often stand in complex relationship to one another. It does not allow for the possibility of being at once repulsed by and desirous of sexual activity. *See id.* at 189–92.

254. In *Split Decisions*, Halley provides a "re-reading" of the case Twyman v. Twyman, 855 S.W.2d 619 (Tex. 1993), where a man who engaged in sadomasochistic sex with his wife was later sued by her for intentional infliction of emotional distress. *See* HALLEY, SPLIT DECISIONS, *supra* note 28, at 348–63. *See also* Halley, *Sexuality Harassment*, *supra* note 253, at 196.

255. *See* Halley, *Sexuality Harassment*, *supra* note 253, at 196.

Franke and Shultz have challenged these assumptions and critiqued legal decisions that have relied on them. Franke has also proposed legal interventions based on acknowledging the constructed and contingent nature of both sex and gender and allowing for varied relationships between the two. Halley critiques what she describes as feminism's subscription to the idea of sex as binary and dimorphic (m/f). She also takes issue with feminism's unqualified devotion to advocating on behalf of women with the goal of ending male domination (m>f and carrying a brief for f). The foregoing discussion of postmodern and anti-essentialist feminist theories illustrate that several feminists have challenged the very ideas that Halley believes prevents feminism from advocating effectively and responsibly when it comes to certain issues related to sex, gender, and sexuality.

Having examined various fields of legal feminism to see what they have to offer to trans legal advocacy, I proceed in the next Part to explain how these tools might be used to make sex discrimination law more responsive to the needs of trans persons.

III
PUTTING THE TOOLS OFFERED BY FEMINIST LEGAL THEORY TO WORK ON BEHALF OF TRANS PLAINTIFFS

The foregoing discussions indicate that, although most feminist legal theorists have not explicitly proposed theoretical and practical legal interventions on behalf of trans persons, there are tools within feminist legal theory that could prove useful to such a project. In this section, I hope to marry those tools with trans advocacy principles to suggest ways that legal trans advocates can make the law more responsive to trans needs. In particular, I suggest strategies for convincing courts to routinely recognize trans discrimination as an actionable form of discrimination because of sex.

Transfeminist activist and author Emi Koyama has observed that: "Though the second wave of feminism popularized the idea that a person's gender is distinct from her or his physiological sex and is socially and culturally constructed, it largely left unquestioned the belief that there was such a thing as true physical (biological) sex. . . . [This] allowed feminists to question only half of the problem, avoiding questions of the naturalness of essential female and male sexes."[256] As Koyama's observation suggests, effective advocacy on behalf of trans persons requires challenging *both* the construction of gender and expectations that biology and gender expression will line up in normative ways *and* the assumption that biological sex is a priori and unconstructed. Feminists such as Ruth Bader Ginsburg, Christine Littleton, and—arguably to a lesser extent—Catharine MacKinnon effectively worked to achieve the first goal by unhooking biological sex from gender and introducing

256. Koyama, *supra* note 16, at 249.

into the legal realm the idea that gender is a constructed category. The postmodern and anti-essentialist work of Katherine Franke, Angela Harris, and Vicki Shultz move towards achieving the second goal by calling into question taken-for-concepts such as truth and objectivity, specifically the idea that biological sex is a fixed, essential trait rather than a product of social construction. Mayeda's articulation of a new feminist ethic of responsibility that accounts for transgender identity is an indication that feminist legal theorists are beginning to apply feminist principles in ways that explicitly and centrally address the needs of transgender persons.

Ruth Bader Ginsburg's efforts led to the invalidation of many laws that reinforced overly deterministic gender role assignments. For example, in *Weinberger v. Wiesenfeld*, Ginsburg successfully argued before the Supreme Court that certain provisions of the Social Security Act were unconstitutional under the Due Process Clause of the Fifth Amendment.[257] While the Act granted benefits based on the earnings of a deceased husband and father to both his widow and minor children, it granted those benefits only to the minor children but not the surviving husband of a deceased wife and mother.[258] The Court invalidated the provision after stating that it was enacted based on the outdated notion that a man was responsible for the support of his wife and children.[259] The Court noted, however, that even in light of empirical data indicating that men are more likely than women to be the primary supporters of their spouses and children "[s]uch a gender-based generalization cannot suffice to justify the denigration of the efforts of women who do work and whose earnings contribute significantly to their families' support."[260] The Court found instead that the provision's real purpose was to enable widowed women to elect to stay at home and care for their children.[261] Given this purpose, the Court found the distinction drawn based on sex irrational because "[i]t is no less important for a child to be cared for by its sole surviving parent when that parent is male rather than female" and "to the extent that women who work when they have sole responsibility for children encounter special problems, it would seem that men with sole responsibility for children will encounter the same child-care related problems."[262] Therefore the statute provided dissimilar treatment to men and women who were similarly situated and thus violated the Due Process Clause of the Fourteenth Amendment.

As discussed above, Catharine MacKinnon contributed to the separation of sex and gender by developing her theory of dominance feminism in which she explained that the categories of male and female, and of masculine and

257. 420 U.S. 636 (1975).
258. *Id.* at 637–38.
259. *Id.* at 644.
260. *Id.* at 645.
261. *Id.* at 648–51.
262. *Id.* at 652.

feminine, are socially constructed via the definition and deployment of sexuality. MacKinnon argues that sexuality has been used to achieve the oppression of women by defining all things female and feminine to include submission and servility and all things male and masculine to include domination and authority. As such, there is nothing "natural" or predetermined about these categories as we know them. Rather, they are the constructed components of the technology of oppression.

Difference feminists like Christine Littleton and Martha Fineman contributed to the separation of sex and gender by conceptualizing a society where traditionally female roles and feminine traits would be valued, regardless of the biological sex of the person exhibiting them. These theorists propose a system where caregiving activities would receive an equal portion of societal resources regardless of the biological sex of the caregiver and regardless of whether there was a biological relationship between the caregiver and the care-receiver. Fineman takes this deconstructed view on caregiving a step further by proposing that there should be a shift in societal focus from the sexual dyad to the caregiving dyad within the family. Such a reconceptualization of the family would seemingly disrupt many of the normative ideas about the relationships between sex, gender, and sexuality in the context of the family, and therefore would open up a space for the legal and social recognition of persons who challenge such normative ideas, including trans persons.

The theories proposed by Ginsburg, MacKinnon, Littleton, and Fineman laid the essential groundwork for the postmodern and anti-essentialist work of Katherine Franke, Angela Harris, and Vicki Shultz. With the exception of theorists like Katherine Franke, who argues that law should not be grounded in biology because "every sexual biological fact is meaningful only within a gendered frame of reference,"[263] these later theorists have begun to press towards—but have not yet arrived at—the second necessary step in achieving effective trans advocacy: legal recognition of the constructed nature of biological sex. As Franke's work illustrates, by harnessing the tools offered by these theorists we can begin to conceptualize legal interventions that are even more directly targeted at achieving this goal. Mayeda's work is further proof of the kind of theoretical intervention that can result from such work.

Franke argues that "we all possess a degree of sexual agency beyond the rigid determinism of biology, or the bleak overdeterminism of strong constructionism."[264] This idea is reflected in Butler's discussion of gender (and therefore sex) as an act rather than a preexisting state:

> Consider that a sedimentation of gender norms produces the peculiar phenomenon of a "natural sex" or a "real woman" . . . and that this is a sedimentation that over time has produced a set of corporeal styles

263. Franke, *Central Mistake*, *supra* note 29, at 98.
264. *Id.* at 8.

> which, in reified form, appear as the natural configuration of bodies into sexes existing in a binary relation to one another. . . . As in other ritual social dramas, the action of gender requires performance that is *repeated*. This repetition is at once a reenactment and a reexperiencing of a set of meanings already socially established; and it is the mundane and ritualized form of their legitimation.[265]

Under this view, sex and gender are constituted and legitimated by way of daily performance rather than merely inhabited as preexisting truths. Therefore each individual has a measure of agency and autonomy beyond his or her assignment to one or the other category of sex or gender, and courts should acknowledge that the term "sex" includes a person's self-understood and self-articulated identification of his or her sex. In Franke's words, the law "must resist the essentializing impulses that constrain both sexual equality and sexual agency,"[266] or risk "becom[ing] an instrument of discrimination itself."[267]

As such, a person who experiences discrimination due to his or her status as a transgender person should have an actionable sex discrimination claim under Title VII. This must be the result if the law is truly meant to be a tool of practical justice rather than a set of abstract and lofty ideals.

This is an illustration of the feminist critical approach identified by Mayeda which identifies and challenges the normative essentialist concepts incorporated into laws and traditional legal analysis.[268] Under this approach, in the *Voyles*[269] case discussed above, the fact that Title VII does not mention change of sex, or that its legislative history does not indicate congressional intent "to embrace 'transsexual' discrimination,"[270] should not be dispositive. Voyles, Ulane, Etsitty, and other transgender sex discrimination plaintiffs should have their cases heard and decided on the merits rather than dismissed because of the courts' determination to hold on to the myth that biology above all determines a person's "true" sex, despite considerable evidence to the contrary. The courts' adherence to conventional understandings of sex and gender—which are but *one* possible approach to understanding these concepts—does not reflect the lived reality and experiences of thousands of individuals.

Courts insist that, by denying that transgender discrimination is a form of sex discrimination, they are simply giving the word "sex" its "plain meaning."[271] This is reminiscent of Shultz's observations about courts finding that women are disproportionately found in low paying positions not because of

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265. BUTLER, *supra* note 221, at 178.
266. Franke, *Central Mistake*, *supra* note 29, at 8.
267. *Id.*
268. Mayeda, *supra* note 17, at 471.
269. Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456 (1975).
270. *Id.* at 457.
271. *See, e.g.*, Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 U.S. Dist LEXIS 16261 at *10; Ulane v. E. Airlines, 742 F.2d 1081, 1085 (1984).

discrimination, but because of their own preexisting, innate preferences for such jobs. Just like this "lack-of-interest" argument, the "plain meaning" argument serves to absolve the courts of their role in creating and reinforcing legal and cultural assumptions about sex and gender.[272] Courts assert that there is nothing either they or employers can do to fix sex segregation in the workplace if women have a natural preference for low paying jobs. Likewise, they assert that there is nothing they can do about the fact that the "plain meaning" of sex as used in Title VII does not encompass transgenderism. In taking such a stance, courts deny their role as creators and reinforcers of a system that leaves transgender persons strangers to the law, vulnerable to discriminatory and harmful conduct at the hands of employers who face no threat of legal punishment.

Courts have been unwilling to acknowledge trans discrimination as an actionable form of sex discrimination in part because they subscribe to the dominant view of sexual identity as a fixed, predetermined trait that exists outside of a given person's will or capability to do anything to influence or change it. However, if Harris is correct that identity is a product of will and creativity rather than a preordained trait to be discovered in the body, then whether or not a person has an actionable sex discrimination claim should not turn on his or her ability to fit into one of two neatly labeled and mutually exclusive boxes designated "M" and "F." Rather, a person's expressed sex identification should be granted respect and acknowledgment both socially and legally. Only then can the legal system truly claim to provide redress for all persons who face unjust discrimination in the workplace "because of sex."

If identity and community membership are products of cooperation and compromise rather than natural and preexisting phenomena, then it is disingenuous for courts to claim that discrimination based on a person's status as transgender cannot be a form of sex discrimination. Under an anti-essentialist conception of identity and group membership, the court's statement in *Ulane* that the plaintiff had not presented a valid case of sex discrimination because the plain meaning of "sex" as used in Title VII "implies that it is unlawful to discriminate against women because they are women and against men because they are men"[273] comes across as disingenuous or, at best, ignorant. It takes as a given the proposition that "man" and "woman" are preexisting, mutually exclusive groups whose members are placed in one category or another not because of any actions or decisions on their part, but because of the fortuitous and inscrutable workings of nature.

These insights also provide the tools needed to overcome the equivocation exhibited by the *Smith*, *Barnes*, *Creed*, and *Schroer* courts. Even as these courts have taken steps towards moving transgender discrimination jurisprudence

272. *See* Shultz, *Women Before the Law*, *supra* note 234, at 298–99.

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

forward, they have simultaneously been reluctant to make the findings and holdings that would make this area of law even more receptive to transgender plaintiffs' claims. *Smith* and *Barnes* established that transgender litigants can establish a claim of Title VII sex discrimination if they allege impermissible sex stereotyping.[274] This was definitely a breakthrough in transgender legal advocacy, but, at the same time, it created something of a hierarchy among sex discrimination claims brought by trans plaintiffs. After *Smith*, some courts, as exemplified by the *Creed* decision, felt authorized to recognize Title VII claims brought by trans plaintiffs so long as those claims were brought or easily analyzed under the sex stereotyping framework. Claims based directly on transgender status, however, remained beyond the reach of Title VII.

Schroer went a step further by holding that discrimination based on a person's decision to transition from male to female was literally discrimination because of sex.[275] This marked another progressive step in transgender discrimination jurisprudence. But, as discussed above, the *Schroer* court left much unsaid in its opinion. The court declined to hold that "sex" encompasses gender identity as well as biological characteristics, claiming that that determination was beyond its competence. However, as the foregoing discussion of the work of Judith Butler, Katherine Franke, Vicki Shultz, Janet Halley, and Angela Harris illustrates, these are not topics that need to be left to the realm of the imponderable. In fact, if Franke is correct that the justice system itself risks becoming a tool of discrimination if it fails to resist the essentializing forces that constrict sexual agency, then the issue of what should constitute "sex" for legal purposes is one that courts should tackle head on. This becomes even more of a moral imperative once we realize, as Shultz argues, that courts are not passive factfinders when it comes to issues related to sex and gender. They do not simply look for the truth that exists "out there" and then apply it to the instant case. Rather, they help to produce and reinforce normatively accepted ideas concerning sex and gender that operate to oppress and disenfranchise certain segments of society. If we can bring these realizations to bear on courts' decision-making processes, the result would hopefully be decisions that are more directly aimed at recognizing transgender persons as full, legitimate actors before the law.

Traditional feminist legal theory has begun this process by effectively introducing into the law the idea that gender is socially constructed and is not always aligned with sex in predictable and traditional ways. This achievement was an essential step towards making the law more receptive to the claims of sex- and gender-nonconforming persons. It also laid the foundation for later forms of feminist legal theories, including postmodern and anti-essentialist feminist theories, which have taken more direct steps towards explicit

274. Smith v. City of Salem, Ohio, 378 F.3d 566, 573, 574–75 (6th Cir. 2004); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2004).

275. Schroer v. Billington, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008).

transgender advocacy but have, with few exceptions, including Katherine Franke's and Graham Mayeda's work discussed above, stopped short of getting all the way there. These theories provide us with potent tools that can be used in trans advocacy. By shedding light on the courts' failure to acknowledge the contingent and constructed nature of the "truths" that often animate their legal reasoning, and by pointing out the law's role in the construction and reinforcement of certain taken-for-granted categories and ideas, the postmodern and anti-essentialist feminist legal theories can be used as a basis for introducing into the legal realm the idea that "biological" sex is, in fact, a product of social construction.

In order to effectively convince judges that trans discrimination is sex discrimination, advocates need practical and effective strategies and arguments. Feminist legal theory offers such practical strategies. One such strategy resembles Robin West's advice to legal feminists that, in order to achieve justice for women, they must tell women's stories in ways that make women's issues rational and intelligible to legal actors.[276] The same strategy needs to be employed by trans legal advocates. Mary Dunlap wrote in 1979 that "[t]he considerable potential for change embodied in the principle that the individual should be the ultimate arbiter of that individual's own sex identification(s) has not yet been advocated in any wide sense by those challenging sex-discriminatory laws" and that "political and legal advocates have not yet addressed the idea that the authority of government to prescribe and enforce male and female identities ultimately . . . conflicts with the principle of individual freedom from sex-based discrimination."[277] Although some progress has been made since then, these observations remain somewhat true today, especially regarding advocacy on behalf of trans person at the federal judicial level.

In tackling this problem, trans advocates should adopt Ruth Bader Ginsburg's strategy of educating jurists about the sources and effects of the assumptions that stand in the way of full legal and social equality for trans persons. In describing her litigation strategy, Ginsburg wrote: "The Supreme Court needed basic education before it was equipped to turn away from the precedents in place."[278] The same can be said of today's jurists. They need an education about sex and gender identity and how these concepts affect the lives of trans persons. As such, trans advocates should follow Ginsburg's method of "leaving no stone unturned"[279] by persuasively and fully presenting courts with historical data along with sociological insight to illuminate the assumptions regarding sex and gender that run throughout the law.[280] This is the kind of

276. *See* Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 68–70 (1988).

277. Mary C. Dunlap, *The Constitutional Rights of Sexual Minorities: A Crisis of the Male/Female Dichotomy*, 30 HASTINGS L.J. 1131, 1138–39 (1979).

278. CAMPBELL, *supra* note 160, at 35.

279. *Id.*

280. *See id.*

information that will provide courts with the competency the *Schroer* court felt it lacked, which prevented it from holding that "sex" under Title VII encompasses more than just biological characteristics.[281] Advocates need to explain to the courts that not only do overly deterministic notions about sex and gender harm trans persons, but they also inhibit the personal freedoms of people generally and the productive and beneficial development of society as a whole. As Mayeda notes: "The issues raised by transgender identity are important issues. Their importance is not limited to queer and transgender politics. As with all questions of identity, transgender identities require us to address some of the issues that arise at the intersection of various forms of marginalization."[282]

The interventions discussed in this section are not the products of mere whimsy; they do, in fact, stand a chance of success if strategically deployed. In the Title VII sex discrimination context, advocates need to emphasize to courts that the meaning of the word "sex" as it appears in that statute is not a foregone conclusion. William Eskridge has observed that the statutory interpretation of that word has proven manipulable over time as courts' interpretations of it have broadened and changed.[283] Certain kinds of cross-sex sexual harassment that were at one time rejected are now routinely accepted. Additionally, as observed by the *Schroer* court, same-sex sexual harassment is now recognized as a cognizable Title VII sex discrimination claim.[284] The congresspersons who voted on the bill likely agreed with the older, more restricted interpretations of the word "sex," but these interpretations have since been overtaken by social and legal developments.[285] Likewise, the identified policies underlying Title VII have also changed over time.[286] Eskridge notes that "Title VII's evolution will be driven not by the dictionary or the original legislative history, but by the pragmatics of the nation's shifting political consensuses on issues presented by women, gay men and lesbians, and transgendered people in the workplace."[287]

CONCLUSION

For the most part, courts have not been especially receptive to the claims of transgender persons who allege sex discrimination in the workplace under Title VII. However, there has been some progress in this area of jurisprudence in recent years. Some courts have begun to recognize that discrimination against a transgender person can be impermissible sex stereotyping punishable under Title VII. In addition, one court recently held that an employer who

281. *See* Schroer v. Billington, 577 F. Supp. 2d 293, 306 (2008).
282. Mayeda, *supra* note 17, at 425.
283. Eskridge, *supra* note 6, at 155–66.
284. *Schroer*, 577 F. Supp. 2d at 307.
285. *See id.* at 156.
286. *Id.* at 159–60.
287. *Id.*

rescinds an offer of employment because of an employee's decision to transition from male to female is literally discriminating "because . . . of sex." This trend offers some hope that the law will continue to be more responsive to the claims of transgender plaintiffs. However, there is reason to be cautious in our optimism. As of yet, most cases have followed the traditional pattern of giving "sex" its "plain meaning," which excludes gender identity. Also, the cases that have been favorable to transgender litigants have, to varying degrees, avoided explicitly acknowledging that discrimination based on transgender status is sex discrimination under Title VII. *Smith* and *Barnes* created somewhat of a hierarchy, privileging those cases that meet the "sex stereotyping" standard of cognizable sex discrimination while leaving those cases based directly on transgender status in a more precarious position.

Schroer went a step further by arguing in the alternative that discrimination based on a person's decision to change sexes is literally sex discrimination within the meaning of Title VII. However, this decision also stopped short of declaring that sex discrimination unequivocally includes transgender discrimination and left open the question of the validity of decisions like *Ulane* and *Etsitty*, which clearly hold that it does not. In light of these developments, transgender advocates still have plenty of work to do to make sure that the day comes when the law fully and legitimately recognizes transgender persons as social and legal actors. I argue that this is an effort in which feminist legal theorists and activists should rightfully participate.

Notwithstanding all the work that feminists have done to challenge the hegemonic idea that sex, gender, and sexual orientation are or should be inextricably linked in predictable ways, there have been few attempts to date by legal feminists to advocate for legal reform aimed at doing away with legal adherence to overly deterministic and biologically derived definitions of what it is to be a man or a woman.

Given the social and legal obstacles that face transgender and other sex- and gender-nonconforming persons, and given feminists' commitment to achieving a society where persons can pursue self-actualization unhampered by outdated ideas about sex and gender, this is a project that is rightly within the ambit of feminist legal advocacy. To that end, I have attempted in this Comment to identify what, if anything, feminist legal theory has to offer to the project of making the law more amenable to the needs and rights of transgender persons, particularly in the context of workplace sex discrimination. My conclusion is that feminist legal theory offers several conceptual tools from which to fashion both doctrinal and practical interventions on behalf of trans persons who have faced discrimination. Yet only a select few feminist theorists have begun the work of constructing a theory of legal feminism that is explicitly and centrally concerned with transgender advocacy. I have attempted to continue the process of sketching what these interventions might look like, but it is my hope that my musings lead to more exploration—and action—in this area.