

## Fluid Identity Discrimination

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### INTRODUCTION

In its fiftieth year, it is no secret that the Civil Rights Act of 1964,<sup>1</sup> and, in particular, Title VII,<sup>2</sup> the law providing for equal employment opportunity, have not been wholly effective in eradicating discrimination in the workplace. Among scholars, critiques of Title VII and its resulting jurisprudence are plentiful and focus largely on the complexity of the proof structures and the increasingly more nuanced presentation of discrimination in the workplace.<sup>3</sup> There is, however, another equally

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<sup>1</sup>Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., & 42 U.S.C.).

<sup>2</sup>42 U.S.C. § 2000e–2000e-17 (2000).

<sup>3</sup>See generally Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469 (2005) (discussing how cognitive biases and normative expectations interfere with both the intentional discrimination and disparate impact frameworks); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that bias may be both unintentional and unconscious); Gregory Mitchell & Philip E. Tetlock, *Antidiscrimination Law and the Perils of Mindreading*, 67 OHIO ST. L.J. 1023 (2006) (arguing against use of implicit-prejudice research in employment discrimination law); Michael Selmi, *Response to Professor Wax: Discrimination as Accident: Old Whine, New Bottle*, 74 IND. L.J. 1233 (1999) (discussing the significance of, and potential remedies for, unconscious discrimination); Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69 (2011) (arguing that actual

compelling development in employment discrimination—the changing nature of social identity and its impact on Title VII’s protections. While the focus of criticism has been on changes in discriminators (their conscious or unconscious intent and the outward or hidden forms of discriminatory behavior),<sup>4</sup> there has been relatively little scholarly attention to the dramatic demographic and societal changes that have affected the “social identity” of victims of discrimination and that alter the way in which discrimination is performed and experienced.<sup>5</sup>

The dramatic changes in this area are attributable, in part, to the very notion of self-identification and personal experience of identity. In the past, one’s race, ethnicity, religion, and gender were thought to be easily identifiable by outsiders or, at the very least, easily expressed as membership in one specific category or group.<sup>6</sup> In the last several decades, these strongly ingrained notions have begun to change. As growing numbers of Americans identify as multiracial, multiethnic, postracial, transgender, gender nonconforming, and bi (or multi) religious—what this article calls “fluid identities”—it is increasingly difficult to profess with confidence “what” a person is absent his or her input. More importantly, the number of individuals who refuse to identify in a single category is increasing exponentially.<sup>7</sup> Individuals with fluid racial identities include those whose appearance does not suggest easy racial categorization; those who elect their racial identities to maximize opportunities;<sup>8</sup> those who project or cover different

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discrimination occurs in ways that currently recognized frameworks are incapable of encompassing); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999) (questioning whether antidiscrimination law should cover unconscious bias).

<sup>4</sup>See generally Foster, *supra* note 3 (critiquing the discriminatory intent and disparate impact tests as the framework for considering discrimination cases); Krieger, *supra* note 3 (discussing prevalence of unconscious bias); Sperino, *supra* note 3 (discussing insufficiency of existing Title VII rubrics).

<sup>5</sup>The term “social identity” in this article is intended to refer to an individual’s experience and self-identification as well as others’ perceptions of his or her race, ethnicity, religion, and gender.

<sup>6</sup>See *infra* notes 45–50 and accompanying text (discussing the U.S. Census’s approach to visual identification of participants’ racial identity).

<sup>7</sup>See Susan Saulny, *Census Data Presents Rise in Multiracial Population of Youths*, N.Y. TIMES, Mar. 25, 2011, at A3.

<sup>8</sup>See generally Camille Gear Rich, *Elective Race: Recognizing Race Discrimination in the Era of Racial Self-Identification*, 102 GEO. L.J. 1501, 1502–06 (2014) (arguing that “we are

aspects of their racial/ethnic identities based on context;<sup>9</sup> those who self-identify as racially “mixed;” and, those who are perceived simply as “other” by their co-workers and superiors. Individuals with fluid gender identities include those who identify as transgender; individuals who are transitioning from their birth sex to another sex; individuals born with intersex characteristics; cross-dressers; and, individuals who are gender nonconforming (those who by appearance or behavior defy traditional gender categorization).<sup>10</sup>

Despite the overall growth and increased visibility of individuals with complex, layered, or fluid identities, legal protections have failed to keep up with these changes. The courts that have dealt with fluid identity plaintiffs generally appear confused about Title VII’s application to these individuals or are unwilling to extend protection under traditional race and sex discrimination theories.<sup>11</sup> Such confusion, by nature, has an overall negative impact on employers and employees, since a lack of clarity in the courts may lead to more difficult employment decisions, an inability to effectively train management and

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currently living in the era of ‘elective race’—a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning”).

<sup>9</sup>See generally KENJI YOSHINO, *COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS* (2006) (describing the act of “covering” or downplaying identity traits in order to fit into the mainstream as both a social reality and a civil rights problem).

<sup>10</sup>See *GLAAD Media Reference Guide—Transgender Issues*, <http://www.glaad.org/reference/transgender> (last visited Mar. 5, 2015). The focus of this article is on the increasingly fluid nature of race and sex. With regard to the other identity traits Title VII covers, it is important to note that national origin (or ethnicity) has not been subjected to the demands of pure categorization that race and sex have, perhaps because of an innate understanding that a person can have multiple ethnic origins. In addition, religion has always been acknowledged as fluid because of the inherent ability to change religions during the course of one’s life. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 306-07 (D. D.C. 2008) (“No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination ‘because of religion’ easily encompasses discrimination because of a *change* of religion.”). Finally, “color” as a basis for discrimination differs from the other identity characteristics in Title VII because it describes a specific trait as opposed to an identity that appears through multiple traits. As a result, courts have not demanded that a plaintiff choose a “color” with which to identify, and, thus, have avoided the problems that victims of race and sex discrimination face when they self-identify in a fluid way. See generally Trina Jones, *Shades of Brown: The Law of Skin Color*, 49 DUKE L.J. 1487, 1554–56 (2000).

<sup>11</sup>See *infra* Part II.

human resources professionals, and litigation that eats up precious resources.

Several scholarly projects have considered individuals with fluid identities and the problems they face as employment discrimination plaintiffs.<sup>12</sup> For example, Nancy Leong has offered a comprehensive history of the discrimination faced by multiracial individuals and has considered the current problems experienced by multiracial plaintiffs in court.<sup>13</sup> Similarly, in an article advocating a rethinking of sex discrimination theory, Zachary Kramer thoughtfully considers the plight of transgender plaintiffs and their difficulty finding traction in a legal regime that views gender as binary and static.<sup>14</sup> Yet the scholars who address the fluid identities problem tend to view race and sex independently, addressing the problem either under race or sex discrimination jurisprudence and then suggesting specialized solutions that address only multiracial or transgender plaintiffs. As a result, the existing scholarship fails to recognize the larger systemic challenge that individuals with fluid identities present to employment discrimination law.

What is missing from the literature and what this article contributes is a discussion of the parallel ways in which the meanings of race and sex have changed in society and the resulting implications for employment law. Unlike age, an aspect of identity that lends itself to a categorical approach, our collective understanding and experience of racial and sexual identity have changed in dramatic and remarkably similar ways that demand changes in discrimination law.<sup>15</sup> This article considers the similar evolution of these social identity traits and argues that proposals to address multiracial or transgender employees separately—whether focused on legislative change, judicial interpretation, or litigation strategy—miss an opportunity to tackle the larger notion of “fluid identity” under the law by making more fundamental changes to Title VII and

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<sup>12</sup>See *infra* Part III.

<sup>13</sup>Nancy Leong, *Judicial Erasure of Mixed-Race Discrimination*, 59 AM. U. L. REV. 469 (2010).

<sup>14</sup>Zachary A. Kramer, *The New Sex Discrimination*, 63 DUKE L.J. 891 (2014).

<sup>15</sup>Discrimination based on age is prohibited under the Age Discrimination in Employment Act of 1967 (ADEA), which provides protection only for “individuals who are at least 40 years of age.” 29 U.S.C. § 631 (2011). As such, there is a protected class of individuals for purposes of the ADEA, and the trait that affords protection, attainment of a specific age, is not ambiguous or fluid in any way.

its interpretation. Looking at the “protected class” paradigm of Title VII through the lens of multiracial and transgender plaintiffs together, this article contends that a rethinking of the meaning of identity under Title VII is needed so that the law can more accurately reflect an evolving populace and provide greater clarity to those affected by discrimination because of that evolution. Finally, this article proposes several possible avenues for reform that advocate a shift from a categorical approach to a trait-based approach to discrimination, which would provide broad and flexible protection to those with fluid or static social identities alike.

## I. THE EVOLUTION OF THE FLUID IDENTITIES PROBLEM

The underprotection of workers with fluid identities and the overly rigid interpretation of social identity markers in Title VII cases<sup>16</sup> are problems that have evolved over time as a result of the language of Title VII, long-ingrained notions of race and sex as static and biologically determined, and, ironically, the legacy of the U.S. Supreme Court’s attempt, in *McDonnell Douglas, Corp. v. Green*,<sup>17</sup> to broaden the means of proving workplace discrimination. The result of this evolution is the notion, prevalent among employers, courts, and lawmakers that Title VII requires membership in one specific static identity group in order to claim its protections. That is, in order to make a Title VII claim as a victim of employment discrimination, many courts require a plaintiff to first demonstrate his or her exclusive affiliation with or membership in one racial group or one sex. There is little, if any, consideration for those individuals for whom such rigid social categorization is inauthentic.

### *A. Scientific and Societal Changes Since Title VII’s Passage*

The last fifty years have seen dramatic changes in our collective understanding of the meaning of race, sex, and identity in general. American society’s notion of race and sex in 1964 bears little resemblance to the majority of scholars’ and ordinary Americans’ views of those identity characteristics today. This shift, as will be explored below, is attributable

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<sup>16</sup>See *infra* Part II.

<sup>17</sup>411 U.S. 792 (1973).

both to the evolution of scientific notions of identity and to individuals' willingness to "out" themselves as having more complex identities than previously accepted.

The evolution of science's view of race in particular has exploded with our relatively new ability to examine an individual's genetic makeup. The 1950s view of race as a defining biological characteristic that impacts every aspect of a person's physical and intellectual makeup has been challenged by the scientific discovery that, in fact, "race has . . . no genetic basis."<sup>18</sup> As Alaina Walker reports, geneticists at the Human Genome Diversity Project believe that "the only variation between human beings due to race is skin color."<sup>19</sup> Walker notes that "[r]esearchers have discovered that there is far greater variation in the genes of people within the same racial group than between those of different races."<sup>20</sup> This fact obviously challenges the eugenics rationale for racial segregation that justified slavery and other abhorrent practices in the early twentieth century and that continues to impact our current view of identity.<sup>21</sup> Most scholars now agree that race is a "social construct" independent from biological or genetic bases.<sup>22</sup>

Similarly, the notion of sex or gender identity has undergone massive changes in both the scientific and lay community due to developing scientific knowledge and to an increasing willingness among all parties to discuss

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<sup>18</sup>Alaina R. Walker, *Choosing to Be Multiracial in America: The Sociopolitical Implications of the "Check All That Apply" Approach to Race in the 2000 U.S. Census*, 21 BERKELEY LA RAZA L.J. 61, 63 (2011).

<sup>19</sup>*Id.* at 63 n.11.

<sup>20</sup>*Id.* at 63.

<sup>21</sup>See Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1147-49 (2004) ("Although eugenics has receded from center stage, our history has been indelibly shaped and marked by racial and ethnic constructs; therefore, we continue to refer to these constructs to understand our history and the connections of past struggles to contemporary disputes.").

<sup>22</sup>See Walker, *supra* note 18, at 63; see also D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 133 (2013) (quoting Ian F. Haney Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. C.R.-C.L. L. REV. 1, 7 (1994)) ("Professor Haney-López defines 'race' as 'a vast group of people loosely bound together by historically contingent, socially significant elements of their morphology and/or ancestry.'").

ambiguities in the meaning of sex.<sup>23</sup> The long-accepted view that sex is binary and that every person can be easily categorized as either male or female has been challenged by an increased awareness of the existence of intersex individuals who may be born with anatomical, genetic, and hormonal characteristics of both sexes.<sup>24</sup> In an intersex individual, the external genitalia that typically determine a newborn's sex identification can be ambiguous or misleading.<sup>25</sup> Similarly, individuals with external genitalia that clearly signify one sex have been found to have chromosomal makeups that match the other sex.<sup>26</sup> While the existence of intersex individuals is not new, what is new is these individuals' greater willingness to openly discuss their status.<sup>27</sup>

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<sup>23</sup>The linguistics surrounding gender and sex can be somewhat confusing. While the term "sex" is commonly used to refer to the physical manifestations of sexual identity, "gender" is typically seen as a social construct and can refer to the sexual identity with which the person affirmatively affiliates, personality attributes, and mannerisms. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 20–22 (1995). Nonetheless, these terms are beginning to blur as the scientific community increasingly defines "sex" as incorporating both physical and social elements. In addition, there is increasing fluidity from a physical and social perspective, as demonstrated by intersex individuals and those medically transitioning from one sex to another, as well as transgender individuals who embody mannerisms of both genders, cross-dressers, and others who refuse to affiliate with one category only. As a result, this article will use the terms interchangeably unless specifically noted.

<sup>24</sup>See Mark E. Berghausen, Note and Comment, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U.L. REV. 1281, 1286 (2011) ("Intersex people have a condition that causes their biological sex traits to be ambiguous or mismatched, what doctors call a difference, or sometimes disorder, of sexual development (DSD).").

<sup>25</sup>*Id.* at 1288 n.41 (citing Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999)) ("Genetically male children born with 5-alpha-reductase deficiency, a DSD [disorders of sex development] that inhibits the body's ability to process testosterone before puberty, can appear female at a cursory glance but develop a more male sexual anatomy at puberty."); see also *Why Is ISNA Using "DSD"?*, INTERSEX SOCIETY OF NORTH AMERICA (May 24, 2006, 9:02 AM), <http://www.isna.org/node/1066> (describing a preference for the term DSD rather than intersex).

<sup>26</sup>Berghausen, *supra* note 24, at 1288–89 (discussing Maria Patino, a Spanish athlete disqualified because of male chromosomes she did not know she had).

<sup>27</sup>See generally INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org> (last visited April 14, 2015) ("The Intersex Society of North America (ISNA) was founded in 1993 in an effort to advocate for patients and families who felt they had been harmed by their experiences with the health care system. . . . ISNA evolved into an important resource for clinicians, parents, and affected individuals who require basic information about disorders of sex development (DSDs) and for how to improve the health care and overall well-being of

Moreover, more parents are now willing to reject the once standard treatment of assigning a sex at birth and performing surgery to assure physiological development to match that assignment.<sup>28</sup> Intersex individuals make up a significant portion of the population. In fact, as one scholar reports, “approximately one out of every 1500 to 2000 people is born with an intersex condition. . . . [T]his statistic suggests that intersex conditions as a whole are about as common as cystic fibrosis and Down’s Syndrome.”<sup>29</sup> As a result of the presence of intersex individuals, the scientific and medical communities now recognize numerous characteristics, both biological and social, that can determine a person’s sex.<sup>30</sup> The physical characteristics include the presence of genetic or chromosomal traits, reproductive organs, hormonal levels, and secondary sexual features. The social characteristics can include gender identity and assigned gender or rearing.<sup>31</sup>

Increased recognition in the scientific community of the fluidity of race and sex have perhaps spurred celebrities and average citizens alike to be more outspoken about their own fluid identities. In the last ten years alone, the number of news stories regarding multiracial and transgender individuals has increased dramatically and, with each new story, American society grows increasingly comfortable with the concept of

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people with DSDs. Largely as a result of ISNA’s efforts, there is now widespread acknowledgment among health professionals that the time has come to change how we think about and care for persons with DSDs.”).

<sup>28</sup>*See id.*; see also Hazel Glenn Beh & Milton Diamond, *An Emerging Ethical and Medical Dilemma: Should Physicians Perform Sex Assignment Surgery on Infants with Ambiguous Genitalia?*, 7 MICH. J. GENDER & L. 1 (2000) (discussing the emerging controversy over the surgical alteration approach to treating intersex infants that emerged in the 1950s and 1960s and had become the standard by the 1970s); see also Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 CARDOZO J.L. & GENDER 99 (2005); Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 290–92 (1999) (discussing surgical alteration cases in which a gender is assigned to a child that is not consistent with that identified at birth).

<sup>29</sup>Berghausen, *supra* note 24, at 1291.

<sup>30</sup>*See id.* at 1289 (defining sex as including “Genetic or chromosomal sex—XY or XX; Gonadal sex (reproductive sex glands)—testes or ovaries; Internal morphologic sex (determined after three months’ gestation)—seminal vesicles/prostate or vagina/uterus/fallopian tubes; External morphologic sex (genitalia)—penis/scrotum or clitoris/labia; Hormonal sex—androgens or estrogens; Phenotypic sex (secondary sexual features)—facial and chest hair or breasts; Assigned sex and gender of rearing; and Sexual identity.”).

<sup>31</sup>*Id.*

fluid identities and increasingly frustrated with any attempt to impose “pure” categories on identity.<sup>32</sup>

Media coverage of multiracial celebrities tends to provoke discussion and debate about who that person is or “should be” but ultimately may result in larger changes in societal understandings of race itself. Perhaps the most famous example of a multiracial individual who cannot be easily categorized as a member of one status group is the current President of the United States, Barack Obama. The child of a black father and white mother, President Obama has self-associated primarily with the African American community, an association that resulted in much discussion and media attention during his presidential campaign.<sup>33</sup> In fact, many scholars and commentators argued that Obama’s identity provoked more discussion of multiracial identities than any organized event ever could have.<sup>34</sup> This discussion is occurring in other segments of society as well. For example, Tiger Woods, who some view as the first black golfer to achieve worldwide success in the sport, coined the term “Cablinasian” to describe the Caucasian, black, American Indian, and Asian aspects of his heritage.<sup>35</sup> That self-identification caused its own

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<sup>32</sup>See *infra* notes 33–57 and accompanying text (describing examples of increased media attention on multiracial and transgender individuals).

<sup>33</sup>During President Obama’s 2008 presidential campaign, the *Los Angeles Times* created a video montage of interviews with mixed race individuals commenting on President Obama’s race and the role of race in the campaign and society in general. See Iliana Rucker, *Race in the Race: Mixed Race Identity and Obama’s Campaign 3* (Nov. 11, 2009) (unpublished paper presented at the NCA 95th Annual Convention), available at [http://citation.allacademic.com/meta/p366651\\_index.html](http://citation.allacademic.com/meta/p366651_index.html).

<sup>34</sup>See Riley Blanton, *Panel Says Challenges Remain for Those of Multiracial Identity*, BROWN DAILY HERALD (Oct. 29, 2008), <http://www.browndailyherald.com/2008/10/29/panel-says-challenges-remain-for-those-of-multiracial-identity> (“‘On the one hand, blacks (do) not see him as one amongst them, and on the other hand, the whites (do) not see him as one amongst them,’ said Oscar Brookins, an associate professor of economics at Northeastern University. . . . Despite the difficulties of discussing his own race directly in his campaign, panel members agreed that Obama’s campaign has furthered the national discourse on race and multiracial identities. The panelists cited as seminal a speech in which the Democrat explained the racial composition of his family. ‘He has done more to normalize interracial kinship than anyone or any public event ever has,’ McClain Dacosta agreed.”).

<sup>35</sup>See *Cablinasian*, URBANDICTIONARY, <http://www.urbandictionary.com/define.php?term=Cablinasian> (last visited Apr. 6, 2015) (“Cablinasian: A term Tiger Woods himself made up. It is a portmanteau of Caucasian, Black, American-Indian, and Asian, which is his ethnic make-up of a quarter Chinese, a quarter Thai, a quarter Black, an eighth Native American and an eighth Dutch.”).

uproar as people of white and black heritage took issue with his failure to ally himself with one category or another.<sup>36</sup> But numerous commentators have also supported Woods's desire to self-identify and the resulting push to have more honest and accurate discussions of race and its increasingly porous boundaries.<sup>37</sup>

Similarly, transgender celebrities have pushed society to rethink and broaden the meaning of sex. In 2009, the world was riveted by a sports controversy when Caster Semenya faced mandatory sex identification testing after she won the 800 meter World Championship in Berlin.<sup>38</sup> The results showed that Semenya was, in fact, intersex, a revelation that "captured media interest and began broad speculation about the proper role of gender in sports."<sup>39</sup> The arts and entertainment world has also

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<sup>36</sup>See Thea Lim, *100% Cablinasian: Getting the Race Facts Right on Tiger Woods*, RACIALICIOUS (Dec. 8, 2009), <http://www.racialicious.com/2009/12/08/100-cablinasian-getting-the-race-facts-right-on-tiger-woods> ("Maybe Tiger Woods doesn't talk about race because no one really wants to listen to his experience as the mixed race child of mixed race parents. Instead white and black America insist that Woods choose one or the other. . . . [T]he insistence on designating Woods as solely black—and getting mad when he tries to articulate his ethnic heritage in a way that feels true to him—is about more than media bias towards black crime. It's about our need to simplify all complex racial phenomena into the binary of black and white, effectively erasing anyone who doesn't fit inside.").

<sup>37</sup>See Gary Younge, *Tiger Woods: Black, White, Other*, GUARDIAN (May 28, 2010), <http://www.theguardian.com/sport/2010/may/29/tiger-woods-racial-politics>; see also Jacqueline M. Chen & David L. Hamilton, *Natural Ambiguities: Racial Categorization of Multiracial Individuals*, 48 J. EXPERIMENTAL SOC. PSYCHOL. 152 (2012) (studying others' perceptions of multiracial individuals and the impact of miscategorization on those individuals); Jessica D. Remedios & Alison L. Chasteen, *Finally, Someone Who "Gets" Me! Multiracial People Value Others' Accuracy About Their Race*, 19 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 453–60 (2013). The story of Rachel Dolezal, the former NAACP official who, although born to Caucasian parents, self-identifies as black and has faced criticism for appropriating a racial identity that was not her own, is also instructive. See Lilly Workneh, *Rachel Dolezal Addresses Controversy Around Her Ethnicity On 'Today': 'I Identify As Black'*, HUFFINGTON POST (June 16, 2015), [http://www.huffingtonpost.com/2015/06/16/rachel-dolezal-speaks-interview\\_n\\_7591480.html](http://www.huffingtonpost.com/2015/06/16/rachel-dolezal-speaks-interview_n_7591480.html). Dolezal's story highlights both the fluidity of racial identity and the increasing importance of self-identification in this sphere.

<sup>38</sup>Christopher Clarey, *Gender Test After a Gold-Medal Finish*, N.Y. TIMES, Aug. 20, 2009, at B13.

<sup>39</sup>See Berghausen, *supra* note 24 at 1282–83. Another example of a runner with transgender characteristics emerged in the international news in October 2014. See Juliet Macur, *Fighting for the Body She Was Born With*, N.Y. TIMES, Oct. 6, 2014, at B11. Dutee Chand, "India's 100-meter champion in the 18-and-under category, was barred from competing against women" because of her condition, hyperandrogenism, as a result of which "her

begun to spotlight transgender individuals. In 2014, transgender individuals took center stage on television with the first openly transgender person nominated for an Emmy for her work on Netflix's "Orange Is the New Black."<sup>40</sup> In addition, 2013 brought the first transgender contender in a Miss Universe Organization pageant as Kylan Wenzel competed for the Miss California title.<sup>41</sup> Wenzel's participation became possible only after a massive public outcry following a transgender contender's disqualification from the Miss Canada competition.<sup>42</sup> In response to a threatened discrimination suit and a Change.org petition signed by over 20,000 people, Donald Trump agreed to change the rules for Miss Universe Organization pageants, paving the way for transgender contestants.<sup>43</sup> Finally, in 2015, *Vanity Fair* featured former Olympian, reality television star, and transgender woman, Caitlyn Jenner, in a twenty-two page cover story, attracting significant national media attention.<sup>44</sup>

Among average Americans, these changes in identification are increasing as well, promoted, in large part, by recent changes at the U.S.

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body produces natural levels of testosterone that... place her in the male range in the eyes of international track and field." *Id.* While Chand is fighting the decision to bar her from running, her "situation has highlighted one of the most perplexing issues facing sports and society: that there is no indisputable way to draw a line between male and female when most competitions have only two categories—one for men and the other for women." *Id.*

<sup>40</sup>Aleksandra Gjorgievska & Lily Rothman, *Laverne Cox Is the First Transgender Person Nominated for an Emmy —She Explains Why That Matters*, TIME MAG. (July 10, 2014), <http://time.com/2973497/laverne-cox-emmy>. See also Julie Zeilinger, *Laverne Cox, 'Orange Is the New Black' Star, On the Necessity of Diverse Female Characters*, HUFFINGTON POST, (Aug. 14, 2013), [http://www.huffingtonpost.com/2013/08/14/laverne-cox-orange-is-the-new-black\\_n\\_3750544.html](http://www.huffingtonpost.com/2013/08/14/laverne-cox-orange-is-the-new-black_n_3750544.html).

<sup>41</sup>Kylan Arianna Wenzel *Is First Transgender Woman Allowed to Compete in Miss California Pageant*, HUFFINGTON POST (Jan. 11, 2013), [http://www.huffingtonpost.com/2013/01/11/kylan-arianna-wenzel-transgender-miss-california\\_n\\_2457523.html](http://www.huffingtonpost.com/2013/01/11/kylan-arianna-wenzel-transgender-miss-california_n_2457523.html).

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

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

<sup>44</sup>See Buzz Bissinger, *Call Me Caitlyn*, VANITY FAIR (July 2015), <http://www.vanityfair.com/hollywood/2015/06/caitlyn-jenner-photos-interview-buzz-bissinger>. See also Stephanie Marcus, *Caitlyn Jenner, Formerly Bruce Jenner, Makes Her Debut On The Cover Of Vanity Fair*, HUFFINGTON POST (June 1, 2015), [http://www.huffingtonpost.com/2015/06/01/caitlyn-jenner-bruce-jenner-her-vanity-fair\\_n\\_7483176.html](http://www.huffingtonpost.com/2015/06/01/caitlyn-jenner-bruce-jenner-her-vanity-fair_n_7483176.html).

Census. When the Census began collecting information on the racial identity of respondents, it did so by having census administrators choose a race based on the respondent's appearance.<sup>45</sup> While self-identification was permitted as early as 1960, it was not until 2000 that the Census permitted respondents to "check all that apply" and thus to self-identify as having more than one racial identity.<sup>46</sup> The results of the 2010 Census showed a dramatic increase in the number of individuals, and particularly young Americans, who identify as multiracial.<sup>47</sup> In fact, in 2010, the number of people who chose more than one race increased by approximately thirty-two percent since 2000.<sup>48</sup> And in parts of the South and Midwest, the growth of the self-identifying multiracial population grew by as much as ninety-nine percent.<sup>49</sup> The most remarkable growth has been in the number of people who self-identify as both white and black, a number that has risen by 134% since 2000.<sup>50</sup>

The number of individuals who identify as transgender is increasing as well. Some studies report that as many as two percent of all live births present intersex characteristics,<sup>51</sup> and recent reports put the number of transgender Americans at roughly 700,000.<sup>52</sup> The visibility of this group and their willingness to outwardly identify as transgender has increased dramatically in the last decade.<sup>53</sup> In a move akin to

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<sup>45</sup>Walker, *supra* note 18, at 64.

<sup>46</sup>*Id.* at 64–65.

<sup>47</sup>See Saulny, *supra* note 7.

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>Anthony R. Enriquez, Note, *Assuming Responsibility for Who You Are: The Right to Choose "Immutable" Identity Characteristics*, 88 N.Y.U. L. REV. 373, 384 & n.48 (2013).

<sup>52</sup>*Transgender: By the Numbers*, TIMES UNION (Dec. 5, 2011), <http://www.timesunion.com/local/article/Transgender-by-the-numbers-2342726.php>.

<sup>53</sup>See Katy Steinmetz, *America's Transition*, TIME MAG., May 2014, 38 (chronicling the increased visibility of transgendered people in American society and the nation's evolving understanding of gender). As Alex Reed reports, traditional notions of masculinity and femininity and the traits associated with each are changing rapidly as well, further supporting the increasing reality of fluidity in gender identity. Alex Reed, *Opening the Floodgates: Expanded Employer Liability for Same Sex Harassment* 29–32 (unpublished manuscript) (on file with author).

the census “check all that apply” change, the social media site Facebook recently added fifty new terms that individuals can use to identify their genders, including “androgynous, bi-gender, intersex, gender fluid or transsexual.”<sup>54</sup> With approximately 159 million monthly U.S. users, this change will affect many Americans who were unable to accurately self-identify on the social media site that plays a prominent role in their lives.<sup>55</sup> Finally, in a sign that society at large is rapidly changing its approach to transgender individuals, Defense Secretary Chuck Hagel recently declared himself “open” to reconsidering the military’s policy on transgender individuals.<sup>56</sup> Recent estimates suggest that despite the military’s current policy “more than 15,000 transgender individuals [serve] in the military[,] the National Guard and the Reserve.”<sup>57</sup>

These examples signify that social identity is rapidly evolving for many Americans. The need to fit into binary categories is quickly being eclipsed by a determination to accurately self-identify using new words and new conceptions of race and sex. Unfortunately, however, courts interpreting Title VII have made little attempt to “catch up” to these changes.

### *B. Historical and Linguistic Reasons for Courts’ Categorical Approach to Title VII Cases*

The history of courts’ categorical approach to identity in employment cases naturally begins with the passage of Title VII<sup>58</sup> in 1964 and its origins in equal protection jurisprudence. As part of the historic Civil Rights Act of 1964,<sup>59</sup> Congress included protections against workplace

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<sup>54</sup>Martha Mendoza, *Facebook Adds New Gender Options*, HUFFINGTON POST (Feb. 13, 2014), [http://www.huffingtonpost.com/2014/02/13/facebook-gender\\_n\\_4782477.html](http://www.huffingtonpost.com/2014/02/13/facebook-gender_n_4782477.html).

<sup>55</sup>*Id.*

<sup>56</sup>Helene Cooper, *Hagel ‘Open’ to Reviewing Military’s Transgender Ban*, N.Y. TIMES, May 12, 2014, at A12.

<sup>57</sup>*Id.*

<sup>58</sup>42 U.S.C. §§ 2000e–2000e-17 (2000).

<sup>59</sup>Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., & 42 U.S.C.).

discrimination, providing, in section 703(a) of Title VII, that it is unlawful for an employer with fifteen or more employees

(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; (2) or to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.<sup>60</sup>

The choice to protect these five specific identity characteristics<sup>61</sup> (and perhaps the resulting rigid categorization of plaintiffs that has developed) was not random but was part and parcel of Congress's attempts to "help actualize some of the Fourteenth Amendment's equal

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<sup>60</sup>42 U.S.C. § 2000e-2(a). The legislative history of the Act suggests that its purpose was to eradicate discrimination against historically disadvantaged groups, African Americans in particular, and individuals. See E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 446 (1998) ("The legislative history of Title VII suggests both that Title VII was intended to remedy discrimination against historically disadvantaged groups, in particular 'Negroes,' and that the statute's broader purpose was to eliminate prohibited employment discrimination as applied equally to everyone.") In fact, as Cunningham points out, pattern and practice and disparate impact claims generally protect groups or classes of people since both claims require plaintiffs to demonstrate that an employer action negatively affected a group of applicants or employees. *Id.* at 447. In contrast, disparate treatment discrimination pertains specifically to prohibited discrimination against an individual in which case, membership in a protected class is not required. *Id.* at 449.

<sup>61</sup>Interestingly, "sex" was added to Title VII in an amendment on the floor of the House of Representatives that Representative Howard Smith of Virginia proposed, allegedly, in an attempt to prevent passage of the law. After a short debate, the amendment passed and became part of Title VII. See CHARLES WHALEN & BARBARA WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 115-16 (1985); Andrea Meryl Kirschenbaum, "Because of. . . Sex": *Rethinking the Protections Afforded Under Title VII in the Post-Oncale World*, 69 ALB. L. REV. 139, 143-44 (2005) (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986); 110 Cong. Rec. 2577 (1964)). But see Robert Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 138 (1997) ("Congress added sex as a result of subtle political pressure from individuals, who for varying reasons, were serious about protecting the rights of women."); see also Kramer, *supra* note 14, at 912 ("Sex discrimination law is hamstrung by the story of a political ploy gone wrong. That Smith may have introduced the amendment to thwart civil rights does not tell us anything about why legislators ultimately voted in favor of the provision. And yet the story endures, fostering a narrow vision of sex equality that constrains Title VII's capacity to respond to emerging forms of sex discrimination.").

protection guarantees.”<sup>62</sup> Under equal protection jurisprudence,<sup>63</sup> these characteristics are thought to deserve antidiscrimination protection because they are largely visible or, at least, easily identifiable characteristics that constitute unreasonable or morally arbitrary bases for disparate treatment.<sup>64</sup> And, perhaps more importantly, Fourteenth Amendment jurisprudence brought with it the notion that characteristics that are immutable are particularly deserving of protection because discrimination based on inherent characteristics that are not subject to change offends our basic notions of fairness.<sup>65</sup> Consequently, race, color, ethnicity, religion, and sex were identified as deserving of protection under equal employment opportunity laws as well.<sup>66</sup>

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<sup>62</sup>Rich, *supra* note 21, at 1200.

<sup>63</sup>See U.S. CONST. amend. XIV, § 1 (“No State shall... deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>64</sup>Rich, *supra* note 21, at 1200 (citing Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of “Don’t Ask, Don’t Tell,”* 108 YALE L.J. 485, 497–98, 498 n.250 (1998) (“[Yoshino argues] that courts requiring visibility of traits for Fourteenth Amendment protection are referring to physical ‘corporeal visibility,’ and not ‘social visibility.’”).

<sup>65</sup>See Enriquez, *supra* note 51 (discussing origins and changes to the notion of immutability under equal protection jurisprudence); see also Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (explaining that the immutability criterion in the Fourteenth Amendment’s equal protection inquiry is based on a biological construct of race and sex and taking the position that suspect-class status is not dependent on immutability); Sharona Hoffman, *The Importance of Immutability in Employment Discrimination Law*, 52 WM. & MARY L. REV. 1483, 1489, 1500–09 (2011) (detailing theories that explain federal employment discrimination law, concluding that the laws generally lack coherence and arguing that “prohibiting discrimination based on selected immutable characteristics most accurately describes the laws’ achievement”). For a discussion of the changing notions of immutability, see *infra* Part III.

<sup>66</sup>See Hoffman, *supra* note 65, at 1508–21 (citing Samuel A. Marcossou, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 647 (2001) (noting that the concept of immutability has receded in Supreme Court equal protection analysis and “that it may be essentially extinct in Supreme Court jurisprudence”)) (describing immutability as a somewhat coherent theory underlying federal employment discrimination law); Marc R. Shapiro, *Treading the Supreme Court’s Murky Immutability Waters*, 38 GONZ. L. REV. 409, 412 (2003) (asserting that the Supreme Court appears interested in “phasing out the immutability concept”). Although religion is the most obviously mutable characteristic in this list, religion has always enjoyed special protection in the United States “because of the critical role that religious freedom played in the founding of our country.” Kramer, *supra* note 14, at 948.

As a result of Title VII's roots in equal protection doctrine, however, equal employment law also inherited the notion of suspect classes on which Fourteenth Amendment jurisprudence is based. The famous footnote in *United States v. Carolene Products, Co.*,<sup>67</sup> and its reference to insular minorities' need for additional protection or "heightened scrutiny" also brought with it the idea that an individual's membership in a protected minority group was the basis for protection against discrimination. That this concept carried over into Title VII jurisprudence is no surprise. Thus, courts' rigid devotion in Title VII cases to minority groups and plaintiffs' status as group members also likely has its origins in Title VII's reliance on equal protection jurisprudence. But, as this article will argue, that notion is neither essential to nor required by the language of Title VII or the U.S. Supreme Court's interpretations of the law.<sup>68</sup>

In drafting Title VII, Congress did not make membership in a minority group a requirement for protection from discrimination. As Camille Gear Rich points out in her article on performed identity traits, the statute does not define race at all or even delineate the borders of a racial group.<sup>69</sup> Instead, section 703(a) simply makes it unlawful to discriminate "because of such individual's race, color, religion, sex, or national origin."<sup>70</sup> Without mentioning group-affiliation, however, Title VII's singular language may be seen as suggesting that individuals may claim only one race, color, religion, sex, and national origin. This would have been a natural conclusion in 1964 given the "[c]onceptualizations of

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<sup>67</sup>304 U.S. 144, 152 n.4 (1938) (asking "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry"); see also Susan R. Schmeiser, *Changing the Immutable*, 41 CONN. L. REV. 1495, 1507-08 (2009).

<sup>68</sup>As Christi Cunningham points out, "[T]he Supreme Court has explicitly indicated that 'Title VII... was enacted pursuant to the commerce power to regulate purely private decision making and was not intended to incorporate and particularize the commands of the Fifth and Fourteenth Amendments.'" Cunningham, *supra* note 60, at 460 n.90 (quoting *Johnson v. Transp. Agency*, 480 U.S. 616, 627 n.6 (1987)). Thus, while the notion of membership in a protected group was prevalent in Title VII's precursor legislation and jurisprudence, that does not make it a necessary component of Title VII itself. See *id.* at 449.

<sup>69</sup>Rich, *supra* note 21, at 1138 n.9.

<sup>70</sup>42 U.S.C. § 2000e-2(a) (2000).

permanent, inheritable race, racial hierarchies, [and] ‘racial purity’” that were prevalent at the time of Title VII’s passage.<sup>71</sup> Scholars have long agreed that Title VII was initially and is often still interpreted against the background of an “age-old conceptualization of racial identity as biological, fixed, and inherent”<sup>72</sup> and “discrimination as a reaction to a set of biologically fixed traits.”<sup>73</sup> As Wendy Greene has pointed out, the ability to conceive of race as static and genetically or biologically based has justified multiple chapters in U.S. history from colonization to slavery to segregation.<sup>74</sup> And, as is necessary to support such drastically unequal treatment, these notions of race were supported by scientists and sociologists of all kinds.<sup>75</sup> Despite the near-universal condemnation of those actions and the “scientific” basis on which they relied, Greene notes, “a fixed, biological, and inherent notion of racial/ethnic identity remains salient—even for those who subscribe to the conception that race is a social construct.”<sup>76</sup> Nonetheless, nothing in the language of Title VII itself precludes a broader interpretation that would acknowledge society’s evolving notions of identity as fluid and of identity groups as having porous as opposed to hardened borders.

If the language of Title VII does not itself require membership in a particular class or group, how has that notion become so ingrained in our understanding of the law and so integral to the large majority of courts that interpret Title VII? The answer likely lies in one of the U.S. Supreme Court’s earliest attempts at interpreting the statute. *McDonnell Douglas Corp. v. Green* was, ironically, an attempt to add flexibility to the workings of Title VII, but, in doing so, the Court created the perhaps

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<sup>71</sup>Greene, *supra* note 22, at 131.

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

<sup>73</sup>*Id.* (quoting Rich, *supra* note 21, at 1134).

<sup>74</sup>*Id.* at 131–32.

<sup>75</sup>*Id.* at 132 (citing Christian B. Sundquist, *Science Fictions and Racial Fables: Navigating the Final Frontier of Genetic Interpretation*, 25 HARV. BLACKLETTER L.J. 57, 57 (2009)).

<sup>76</sup>*Id.* at 133; see also *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987) (expressly noting the socially constructed and fluid nature of race while implicitly adhering to a biological notion of race in its affirmation of the lower court’s holding that 42 U.S.C. section 1981 “‘at a minimum,’ reaches discrimination against an individual ‘because he or she is genetically part of an ethnically and physiognomically distinctive subgrouping of *homo sapiens*.’”).

unintended consequence of demanding rigid categorization of the alleged victim of discrimination. The now famous case dealt with the “proper order and nature of proof in actions under Title VII” and emerged out of civil rights protests at McDonnell Douglas Corporation’s headquarters in St. Louis, Missouri.<sup>77</sup>

In addressing the plaintiff’s race discrimination claim, the Court focused on the burden of proof in a case in which there was circumstantial but no direct evidence of racial bias. The Court laid out the now oft-repeated formula for establishing a prima facie case of race discrimination based on an inference of discrimination from the existing circumstances:

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.<sup>78</sup>

The Court then discussed the shifting of burdens of proof after a prima facie case is established and the plaintiff’s ultimate burden to prove that any legitimate reason provided by the employer was, in fact, a pretext for discrimination.<sup>79</sup>

The problem presented by fluid identity plaintiffs, however, focuses us on the very first element of the prima facie case, which courts and commentators often refer to as the “protected class” or “member of a protected class” prong.<sup>80</sup> As E. Christi Cunningham has aptly argued,

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<sup>77</sup>McDonnell Douglas Corp. v. Green, 411 U.S. 792, 793–94 (1973). The plaintiff, Percy Green, was a longtime employee until he was laid off during a general reduction in force. *Id.* at 794. Green was a civil rights organizer who took part in a “stall-in” and a “lock-in.” *Id.* at 795–96. Several weeks after these protests, McDonnell Douglas advertised positions for mechanics and Green applied for reemployment. *Id.* at 796. Despite his qualifications, Green was rejected on the basis of his participation in the protests. *Id.* In response, Green sued, alleging that he was rejected because of his race and his involvement in the civil rights movement. *Id.*

<sup>78</sup>*Id.* at 802.

<sup>79</sup>*Id.* at 802–04.

<sup>80</sup>*See, e.g.*, Kennedy v. City of Zanesville, 505 F. Supp. 2d 456, 494 (S.D. Ohio 2007); Mississippi Dep’t of Human Servs. v. Baum, 730 So. 2d 58, 64 (Miss. 1998); *see also* Ryan Mainhardt & William Volet, Note, *The First Prong’s Effect on the Docket: How the Second Circuit Should Modify the McDonnell Douglas Framework in Title VII Reverse Discrimination Claims*, 30 HOFSTRA LAB. & EMP. L.J. 219, 230 (2012); Jennifer Schechter Sharret, Note, *Refining*

this first prong, and the *McDonnell Douglas* prima facie case requirements as a whole, was meant as a mere example of one way to prove an inference of discrimination and was not meant to be applied to all cases.<sup>81</sup> The “protected class” concept highlighted the plaintiff’s status as among the disadvantaged identities so that adverse treatment itself could create an inference of discrimination.<sup>82</sup> The *McDonnell Douglas* test and its focus on the identity status of the plaintiff was intended as a simple and organized approach to evidence in cases in which “there will seldom be ‘eyewitness testimony to the employer’s mental processes.’”<sup>83</sup> In fact, the logic behind the presumption embedded in the test was rather progressive in its time—that given the minority status of the plaintiff, “these [adverse] acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.”<sup>84</sup>

Nonetheless, the test’s initial focus on the purported victim’s status is not a necessary component in every case. The Court’s own language makes that fact abundantly clear as it explicitly states that a prima facie case “may be” established by demonstrating the four prongs.<sup>85</sup> The remaining prongs themselves support this reading, as they focus on the specific situation at play when a plaintiff applies for and is rejected from an open job.<sup>86</sup> When, however, the case involves a termination, demotion, or some other adverse employment action, the prima facie case must necessarily change to fit those facts.<sup>87</sup> Despite this rather obvious point, courts applying the *McDonnell Douglas* test overwhelmingly treat

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*the Production Burden For “Regarded as Disabled” Claimants*, 28 CARDOZO L. REV. 991, 1004 (2006).

<sup>81</sup>See Cunningham, *supra* note 60, at 456–60.

<sup>82</sup>*Id.* at 452.

<sup>83</sup>Marcia L. McCormick, *The Allure and Danger of Practicing Law as Taxonomy*, 58 ARK. L. REV. 159, 179–80 (2005) (quoting *USPS Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)).

<sup>84</sup>*Id.* at 179 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

<sup>85</sup>*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (emphasis added).

<sup>86</sup>*Id.*; see also Cunningham, *supra* note 60, at 451–52, 456–58.

<sup>87</sup>The Supreme Court articulated this notion explicitly in *McDonnell Douglas*, noting that “[t]he facts necessarily will vary in Title VII cases, and the... prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.” 411 U.S. at 802 n.13; see also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577

the first prong of the prima facie test as an absolute requirement akin to a standing requirement, rather than as one example of an aide to determining an inference of discrimination.<sup>88</sup> As a result, courts often begin an analysis of a Title VII case by listing the plaintiff's race, sex, religion, or ethnicity, suggesting that membership in some "protected class" is a prerequisite for obtaining Title VII's protections.<sup>89</sup> However, as Greene has pointed out, the only prerequisite for coverage under Title VII is the plaintiff's status as an applicant or employee of a covered entity (e.g., having fifteen or more employees).<sup>90</sup>

Greene's point is particularly obvious in reverse race and sex discrimination cases, which have been permitted by the courts since the 1970s.<sup>91</sup> In the Supreme Court's first case on the issue, *McDonald v. Santa Fe Trail Transportation, Co.*, the Court rejected the lower courts' conclusions that Title VII protected only minority plaintiffs.<sup>92</sup> In these

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(1978); Greene, *supra* note 22, at 119 (noting that the Supreme Court reiterated in *Furnco* that the *McDonnell Douglas* test was not meant to be imposed ritualistically).

<sup>88</sup>See generally Cunningham, *supra* note 60, at 463–69 (demonstrating the overwhelming number of cases that treat prong one as a standing requirement despite the actual language of *McDonnell Douglas*).

<sup>89</sup>Cunningham elucidates this notion by pointing to *Smith v. University of North Carolina*, 632 F.2d 316 (4th Cir. 1980), a case involving age, sex, and religious discrimination in which the lower court accurately distinguished between age discrimination under the ADEA and religion and sex under Title VII but the Fourth Circuit missed this nuanced point. *Id.* at 464–65. To have ADEA protection, a plaintiff must, by the explicit terms of the law, be over the age of forty. 29 U.S.C. § 631(a) (2011). As a result, the plaintiff's age is a type of prerequisite for protection. In contrast, under Title VII, the only prerequisite for protection is the plaintiff's status as an applicant or an employee. See Cunningham, *supra* note 60, at 464–65. His or her racial, religious, or sexual status is used to determine if an inference of discrimination arises, not to decide if the law affords protection at all. *Id.*

<sup>90</sup>Greene, *supra* note 22, at 129, 140 ("Title VII protects everyone who is an employee of or seeks employment with a covered entity against race, color, sex, national origin, and religious discrimination... Fundamentally, the only class of individuals unable to benefit from Title VII's proscriptions consists of those discriminated against by entities not covered by Title VII.")

<sup>91</sup>See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (holding that Title VII protects members of the majority from discrimination as well as members of the minority).

<sup>92</sup>*Id.* at 280 (citing 110 CONG. REC. 2578 (1964) (remarks of Rep. Celler); 110 CONG. REC. 7218 (1964) (memorandum of Sen. Clark); 110 CONG. REC. 7213 (1964) (memorandum of Sens. Clark and Case); 110 CONG. REC. 8912 (1964) (remarks of Sen. Williams)) (describing legislative history indicating an intent to protect whites as well as blacks under Title VII).

cases, courts alter the “member of a protected class” inquiry to ask instead whether the plaintiff can demonstrate that the “defendant is the unusual employer that discriminates against the majority,” before moving to the other *McDonnell Douglas* prima facie prongs.<sup>93</sup> Clearly then, a plaintiff’s membership in a minority group is not essential to succeed under Title VII. Nonetheless, that “requirement” has become pervasive to the point of being considered a prerequisite under the law.<sup>94</sup>

## II. MODERN COURTS AND THE FLUID IDENTITIES PROBLEM

Given courts’ rigid adherence to the “protected class” prong in Title VII cases, it is perhaps not surprising that when faced with multiracial and transgender individuals who defy easy categorization in a protected class, courts struggle with how and even whether to apply the law’s protections to them.<sup>95</sup> Courts often seem flummoxed by such individuals and deal with their confusion in inconsistent ways that rarely take into

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<sup>93</sup>*Notari v. Denver Water Dep’t*, 971 F.2d 585, 588 (10th Cir. Colo. 1992) (noting that “a number of courts have concluded that the *McDonnell Douglas* prima facie case formulation must be modified when the plaintiff pursues a “reverse discrimination” claim) (citing *Parker v. Baltimore & Ohio R.R. Co.*, 652 F.2d 1012 (D.C. Cir. 1981)); see also *Gorecke v. UPS*, No. 11-CV-6591 (MAT), 2014 U.S. Dist. LEXIS 45602, at \*10–11 (W.D.N.Y. Apr. 1, 2014) (“The confusion arises from the wording of the first prong of the prima facie test because a white plaintiff cannot establish membership in a ‘protected class’ in the same way a plaintiff belonging to a minority group that has been historically discriminated against can.”).

<sup>94</sup>Greene, *supra* note 22, at 136–37 (discussing the tendency of some courts to view “misperception discrimination” claims as third-party claims in which “the plaintiffs are seeking redress for the unlawful discrimination that other individuals have suffered” and noting that courts rejecting these claims reason that the “discrimination is unrelated to the plaintiffs’ protected status”); Camille Gear Rich, *Marginal Whiteness*, 98 CAL. L. REV. 1497 (2010) (discussing third-party claims). *But cf.* David S. Schwartz, *The Case of the Vanishing Protected Class: Reflections on Reverse Discrimination, Affirmative Action, and Racial Balancing*, 2000 WIS. L. REV. 657, 657 (2000) (quoting *Nichols v. Frank*, 42 F.3d 503, 511 (9th Cir. 1994)) (arguing that courts are finding that the protected class inquiry is “unnecessary because all individuals belong to a ‘protected’ group for purposes of determining discrimination”).

<sup>95</sup>In reviewing fluid identity discrimination cases, this article focuses exclusively on federal courts because, despite some evidence of an increase of discrimination suits in state courts, federal courts still hear the majority of such cases. See Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, 1999 U. ILL. L. REV. 583, 593 n.64 (1999).

account the individual's self-identification.<sup>96</sup> In cases involving mixed race and transgender plaintiffs, courts tend to approach these fluid identities in remarkably similar ways.

The courts' discomfort typically results in one of two possibilities (and sometimes an overlap of both): (1) the court explicitly struggles with categorizing a fluid identity individual and often concludes that such an "uncategorizable person" may not receive protection under antidiscrimination law; or (2) the court ignores the complexity of a fluid identity and simply assigns a single race or sex to the fluid identity individual, sometimes resulting in protection under the law but also nearly always resulting in an inaccurate presentation of reality that is potentially damaging to future plaintiffs.<sup>97</sup> These cases demonstrate time and again that the "protected class" approach to discrimination cases makes it difficult if not impossible for courts to accurately address the potential harms done to those who do not fit neatly into traditional categories.

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<sup>96</sup>In considering the problem of fluid identity individuals in the courts, I began with Nancy Leong's research as a starting point for federal employment discrimination cases dealing with mixed race individuals. See Leong, *supra* note 13. Leong acknowledges the paucity of claims explicitly involving discrimination against mixed race individuals but contends that this is not necessarily reflective of a lack of discrimination. Instead, this results from (1) attorneys framing their cases in monoracial terms because they are more likely to succeed that way and (2) courts reformulating mixed race discrimination to fit into the categorical structure with which they are experienced. See *id.* at 505, 541–43. I used Zachary Kramer's work along with that of Shawn D. Twing and Timothy C. Williams as a starting point for employment cases dealing with transgender individuals. See Kramer, *supra* note 14; Shawn D. Twing & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People are a Protected Class Under the Term "Sex" and Practical Implications of Inclusion*, 15 TEX. J. C.L. & C.R. 173 (2010). After reviewing the cases they identify, I updated the research to this article's publication date, considering all cases that discuss fluid identity individuals playing any role in a discrimination lawsuit. There have been a number of these cases, and the above discussion includes a sampling of them.

<sup>97</sup>Looking at a similar but not identical grouping of cases, Leong categorizes the cases as follows: (1) cases that reformulate mixed race individuals into a singular race for purposes of the case and (2) cases that acknowledge the plaintiff's mixed race only when the evidence makes it impossible to ignore. See Leong, *supra* note 13, at 508–09. Kramer, looking at similar cases involving transgender individuals essentially sees the courts either (1) providing no coverage for transgender individuals or (2) using gender stereotyping theory with inaccurate results. See Kramer, *supra* note 14, at 916–17. I propose that the similarities across race and sex cases are remarkable and that all fluid identity cases fall into the categories I described above.

### A. Fluid Race Cases

In the mixed race cases, courts have often expressed an inability to deal with the complexity that comes with a fluid identity and confusion over the proper categorization of such individuals. Whether the court decides the motion for summary judgment on this basis or not, such statements have a dual effect: first, they send a clear message that the law as it is currently interpreted cannot handle the reality of racial identity in the twenty first century; and, second, they dissuade future plaintiffs from bringing legitimate claims when they are the target of discrimination based on fluid identity. The race cases tend to fall into two categories: those in which the plaintiff is mixed race and those in which a potential comparator is mixed race—both categories present courts with a complicated picture that they seem unable or unwilling to untangle.<sup>98</sup>

*Walker v. University of Colorado Board of Regents*, a 1994 case, clearly demonstrates the difficulties of cases involving fluid identity.<sup>99</sup> In *Walker*, the plaintiff self-identified as “a multiracial person of Black, Native American, Jewish, and Anglo descent.”<sup>100</sup> Having acknowledged the plaintiff’s fluid identity, the court then promptly rejected his argument that he was a member of a protected class of “multiracial persons” because, the court contended, such a standard “would be impracticable

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<sup>98</sup>The importance of comparators in discrimination cases emerges from the fourth prong of the *McDonnell Douglas* prima facie case. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To establish that the adverse action resulted from discriminatory treatment, “a plaintiff may point to a similarly situated comparator who was not discriminated against” but “the comparator must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer.” *Caraway v. Sec’y, U. S. Dep’t of Transp.*, 550 F. App’x 704, 709 (11th Cir. 2013) (quoting *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)). Of course, the “similarly situated comparator” method is not the sole way to demonstrate disparate treatment, but it has become nearly ubiquitous in discrimination cases, with courts often concluding that the absence of a valid comparator dooms the plaintiff’s case. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 750 (2011); see also Emma Reece Denny, *Mo’ Claims Mo’ Problems: How Courts Ignore Multiple Claimants in Employment Discrimination Litigation*, 30 LAW & INEQ. 339, 366 (2012).

<sup>99</sup>Civ. A. Nos. 90-M-932, 92-M-372, 1994 WL 752651 (D. Colo. Mar. 30, 1994); see also Leong, *supra* note 13, at 509–10.

<sup>100</sup>*Walker*, 1994 WL 752651 at \*1.

to apply.”<sup>101</sup> The court maintained that it would be a disservice to the plaintiff himself were the court to consider his fluid identity as the source of the discrimination, contending that such a protected class “could be so self limiting that a particular person is the only identifiable member of the group.”<sup>102</sup> Presumably, the court disfavored this option because it would mean that everyone else is a member of a different protected class and thus a possible comparator, a situation that the court must have viewed as unwieldy. Alternatively, the court opined that multiracial individuals could be “considered members of each of the protected groups with which they have any significant identification,” making it very difficult to point to a comparator who is a member of a different group for purposes of raising an inference of discrimination.<sup>103</sup> Thus, *Walker* perfectly embodies the problem with current interpretations of Title VII as it pertains to fluid identities—the existing categories lead to an “impracticable” situation that offers too many comparators or none at all. The mixed race person must pick or be assigned a specific category in order to use the existing proof structures that courts expect.

Since the *Walker* decision twenty years ago, very little has changed in courts’ abilities to deal with fluid identities. A more recent case is *Nash v. Palm Beach County School District*.<sup>104</sup> In *Nash*, the court properly identified the plaintiff as “mixed race,” but, like the court in *Walker*, appeared confounded by exactly *which* protected class he was a member of, seemingly concluding that “mixed race” is itself the protected class and finding that the plaintiff could point to “no evidence of a similarly situated employee who is not of mixed race.”<sup>105</sup> The court failed to discuss what

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<sup>101</sup>*Id.*

<sup>102</sup>*Id.*

<sup>103</sup>*Id.*

<sup>104</sup>No. 08-80970-CIV-MARRA, 2010 U.S. Dist. LEXIS 82330 (S.D. Fla. Aug. 12, 2010). The mixed race plaintiff brought harassment and disparate treatment race discrimination claims. *Id.* The court quickly dispensed with the harassment claim noting that only one racially charged comment was insufficient to make out a hostile work environment claim. *Id.* at \*17–19. Notably, however, the one comment plaintiff referred to was a supervisor’s question to Plaintiff, “at a Thanksgiving luncheon, while slicing a turkey, [asking whether] he would like ‘white or dark meat because I know you are a little of both.’” *Id.* at \*19.

<sup>105</sup>*Id.* at \*30.

it meant by “not of mixed race”—must the comparator identify with only one racial background? Or, could he or she hail from multiple but different racial backgrounds than the plaintiff? And how racially “pure” must one be to count as a comparator who is “not of mixed race”? Would one black grandparent disqualify the person and so on? The court ignored these questions, seemingly unwilling to deal with the complications that arise from a “mixed race” protected class. Instead, the court found there to be insufficient evidence in the record with regard to potential comparators and the alleged adverse employment action and dismissed the disparate treatment claim on those grounds.<sup>106</sup>

Similarly, in *Smith v. CA, Inc.*,<sup>107</sup> the court included a remarkably telling admission by the mixed race plaintiff but failed to incorporate any real discussion of his identity in its analysis:

Smith requested that HR classify him as Caucasian rather than African American. . . . In his deposition, Smith explained that he is biracial, stating that “I pick and choose what I call myself, or how I identify myself, dependent on the situation at hand and what’s beneficial for me at the time.” Smith further explained that he has suffered racism from both sides, stating “since I get hit from both sides, I play both sides.”<sup>108</sup>

While the court relegated these comments to a footnote, their inclusion suggests some acknowledgment of the current complexity of fluid identities. Nonetheless, this quote from the plaintiff’s deposition constituted the only discussion of his mixed race and admittedly fluid identity since the court then simply stated that for purposes of its *McDonnell Douglas* analysis, “[t]here is no dispute that Smith was a member of a protected group as a biracial African American and Caucasian.”<sup>109</sup> Like the *Nash* court, the *Smith* court granted the mixed race plaintiff protected class status but failed to discuss which protected class he was a member of and who might be a legitimate comparator. The court ultimately decided the case on the basis of a lack of an adverse employment

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<sup>106</sup>*Id.* at \*31–32 (“Because the record is devoid of facts upon which a reasonable juror could find that Plaintiff has identified a similarly situated employee who was treated more favorably or that Plaintiff suffered an adverse employment act, Defendants are entitled to summary judgment with respect to the disparate treatment claim.”).

<sup>107</sup>No. 8:07-cv-78-T-30TBM, 2008 U.S. Dist. LEXIS 106142, (M.D. Fla. Dec. 30, 2008).

<sup>108</sup>*Id.* at \*4 n.3 (internal citations omitted).

<sup>109</sup>*Id.* at \*30.

action and conduct that did not rise to the level of unlawful harassment, and so did not delve into the plaintiff's identity and its impact on his claims.<sup>110</sup> Here again the court cautiously acknowledged some complexity but then ignored it in favor of a simpler analysis.

In addition to difficulty dealing with mixed race individuals as plaintiffs, courts are also confounded by fluid identity individuals as comparators. The confusion typically arises because the existence of a mixed race comparator complicates the standard *McDonnell Douglas* analysis in which the comparator's membership in an identity class that is different from that of the plaintiff is the basis for the inference of discrimination.<sup>111</sup>

For example, in *McCauley v. Stanford University Medical Center*,<sup>112</sup> the court was faced with a race discrimination claim from an African American plaintiff. The court acknowledged in a footnote that one of the comparators was, in fact, "of mixed race" but then described her as "another African-American woman," making her an insufficient comparator for *McDonnell Douglas* purposes.<sup>113</sup> The court explained its approach as follows:

McCauley reasons that, although [the comparator] claims to be of "mixed race," she does not have African-American facial features. McCauley does not cite any authority for the proposition that her subjective characterization of [the comparator's] facial features is sufficient to call into doubt whether [the comparator] legally is in the same protected class as McCauley.<sup>114</sup>

In *McCauley*, the court struggled explicitly with the boundaries of protected categories and how to determine who fits where. The plaintiff viewed the proposed comparator as not being black because of her facial features, demonstrating, if nothing else, the complexity of racial identification even among those who self-identify as members of a

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<sup>110</sup>*Id.* at \*21-22, 32-33.

<sup>111</sup>*Cf. supra* note 98 (discussing role of comparators in *McDonnell Douglas* analysis).

<sup>112</sup>No. C 07-1784 JF (RS), 2009 U.S. Dist. LEXIS 18748 (N.D. Cal. Mar. 11, 2009).

<sup>113</sup>*Id.* at \*26 & n.6. The court discussed comparators who were treated more favorably and specifically pointed to "another African-American woman in the compensation department, Shara Johnson, [who] was offered the same training" as the nonblack woman who the plaintiff had suggested was a similarly situated comparator. *Id.* at 26 n.6.

<sup>114</sup>*Id.*

racial group. But the court, unable to deal with this complexity within the protected class structure, fell back on a lack of “authority” for the plaintiff’s “subjective characterization” of the mixed race comparator sufficient to make a legal determination of her protected class.<sup>115</sup> And, the court relegated the entire discussion to a footnote, acknowledging the complexity of mixed race individuals under the existing rubrics but refusing to let that complexity derail its primary analysis.

In a similar case, a Michigan court explicitly struggled with a claim that a mixed race comparator was not a member of the same protected class as the African American plaintiff, only to dismiss such a notion as too complicated to endorse. In *Moore v. Dolgencorp, Inc.*,<sup>116</sup> the court expressed disdain for the claim that a mixed race male was not a member of the same protected class as the African American plaintiff:

It is undisputed that plaintiff’s replacement, Young, is the son of an African-American. The court rejects plaintiff’s claim that a light-skinned African-American of “mixed race” heritage is not entitled to protection as a member of this particular protected class (i.e., race). To recognize a legal hierarchy within the protected class of race based upon differences in the hues of skin color would create or deny legal remedies based upon subcategories of this class that Congress has not chosen to recognize. It could also open the door to nearly insurmountable issues of proof in court regarding the actual racial heritage of a plaintiff and/or a person replacing a plaintiff, not to mention difficulties for everyone in the daily application of the Civil Rights Act. The court finds that Young is a member of plaintiff’s protected class.<sup>117</sup>

This discussion is remarkably telling and problematic. First, the court suggested that viewing mixed race plaintiffs as anything other than African American would create subcategories of the protected class that have not been endorsed by Congress. As was discussed above, Congress

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<sup>115</sup>*Id.* The argument is somewhat ridiculous—what possible authority could she provide for a determination that is inherently social and potentially fluid?

<sup>116</sup>No. 1:05-CV-107, 2006 WL 2701058 (W.D. Mich. Sept. 19, 2006). Moore was an African American plaintiff claiming race discrimination when she was fired from her position as manager of a Dollar Store. *Id.* at \*1. The court denied defendant’s summary judgment motion in this case based on the existence of two white comparators who were not fired under similar circumstances but still chose to discuss a mixed race comparator. *Id.* at \*13–14, 21–25.

<sup>117</sup>*Id.* at \*13–14 (internal citations omitted).

did not create “protected classes” of any kind.<sup>118</sup> The notion that mixed race individuals must be categorized as one race because Congress has not endorsed subclasses is rather absurd in light of this reality. In addition, like *Walker*, in *Moore*, the court again seemed flummoxed by the proof problems that would arise from recognizing mixed race individuals as anything but members of a single protected class.

Finally, a Kentucky court recently struggled with how to categorize a mixed race comparator but solved the problem by looking to the comparator’s visual appearance, while acknowledging that solution’s challenges. In *Perry v. Autozoners, LLC*,<sup>119</sup> the court struggled in response to the plaintiffs’ contention that a mixed race comparator is not in the same protected class as African Americans:

The Court finds that the [law] protects mixed-race individuals insofar as that individual visually appears to belong to a protected class. The Court recognizes that such a holding could prove difficult to apply in a society increasingly populated by multiracial individuals, which in turn may inhibit the ability to perceive another’s ethnicity or race. Nevertheless, the Court is satisfied that Kentucky courts would protect a mixed-race individual in the present situation, given that Harper admits that the individual appears to be African-American. Therefore, Plaintiffs cannot establish a prima facie case for discriminatory failure to promote, because [the mixed race comparator] occupies the same protected class as [the African American plaintiffs].<sup>120</sup>

This conclusion is a rather easy solution to a much more complicated problem, a sentiment that was almost acknowledged by the court when it conceded that this solution will be increasingly difficult to apply as society becomes more multiracial and visual appearance is not definitive.<sup>121</sup>

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<sup>118</sup>*See supra* notes 80–94 and accompanying text (discussing the evolution of the “protected class prong” in court decisions).

<sup>119</sup>948 F. Supp. 2d 778 (W.D. Ky. 2013). In *Perry*, two African American plaintiffs contended that they were denied promotions because of their race. *Id.* at 728–84. The employer countered that they could not make out a prima facie case because the promotion was instead given to a mixed race individual who the court classified as being a member of the same protected class, which defeated the *McDonnell Douglas* prima facie case of race discrimination. *Id.* at 785–86.

<sup>120</sup>*Id.* at 787.

<sup>121</sup>*Id.*; see *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749, 751, 754 (6th Cir. 2014) (rejecting expert evidence on “race rating”—in which expert hired “raters” to identify the race of each person by viewing drivers’ license photos in case alleging credit check policy was discriminatory).

Nonetheless, the court applied its “visual appearance” solution here without any explanation for why it works in this case or any discussion of the comparator’s physical features that purportedly suggested his proper protected class. The court, in essence, suggested we “take its word for it” that the comparator was in the same protected class as the plaintiff, but, as the court itself admitted, such a solution is not practicable moving forward.<sup>122</sup>

In contrast to the courts that openly struggle with fluid racial identities, others deal with the problem by merely assigning a category to a fluid identity individual in order to make the prima facie case analysis a simpler proposition.<sup>123</sup> In cases out of Virginia, Texas, and Minnesota, courts were presented with claims brought by a mixed race plaintiff but gave scant if any attention to this complex identity, preferring to simply assign the plaintiff a category that allowed for easy application of the *McDonnell Douglas* protected class paradigm.<sup>124</sup> In these cases, the courts typically noted that the plaintiffs identified themselves as “multiracial,” or “biracial,” and then proceeded to describe them simply as “black” or “African American” for the remainder of the opinion.<sup>125</sup> This was the case even where the alleged discrimination consisted of harassing statements that seemed to have been directed specifically at the plaintiff’s mixed race status.<sup>126</sup>

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<sup>122</sup>For a similar case involving a mixed race comparator that the court, without any discussion, treats as a member of the same protected class as the African American plaintiff, see *McKinney v. Sands Expo & Convention Center, Inc.*, No.: 2:11-cv-02081-GMN-VCF, 2013 U.S. Dist. LEXIS 90562, at \*11 n.3 (D. Nev. June 26, 2013) (“The Complaint additionally alleges that a mixed race (black and white) Custodial Supervisor was not disciplined suggesting that similarly situated employees of the same protected class were treated dissimilarly, and further prohibits the inference of racial discrimination.”).

<sup>123</sup>While the goal of such an approach may be admirable, the means to the end are problematic in themselves as the actual social identity of these individuals is, as Nancy Leong writes, “erased” by courts. See Leong, *supra* note 13.

<sup>124</sup>See *Jones v. Hosp. Corp. of Am.*, 16 F. Supp. 3d 622, 629 n.1 (E.D. Va. 2014); *Callicutt v. Pepsi Bottling Co.*, No. Civ. 00-95DWEAJB, 2002 WL 992757, at \*1–6, 9 (D. Minn. May 13, 2002); *Mitchell v. Champs Sports*, 42 F. Supp. 2d 642, 646–47 (E.D. Tex. 1998).

<sup>125</sup>*Jones*, 16 F. Supp. 3d at 629 n.1; *Callicutt*, 2002 WL 992757 at \*1–6, 9; *Mitchell*, 42 F. Supp. 2d at 646.

<sup>126</sup>See, e.g., *Callicutt*, 2002 WL 992757 at \*11–12 (stating that plaintiff was called “Sinbad” and told that “he was not black”).

*B. Fluid Sex and Gender Cases*

The struggle and confusion over categorization of racially fluid identity individuals finds its parallel in cases dealing with transgender plaintiffs. In the sex and gender cases, like the race cases, courts typically begin by trying to place the transgender individual into a protected class. In the race cases, this struggle often ends with the court's refusal to recognize a "mixed race" class and, at times, a decision to view the person as African American in order to avoid complications. Similarly, courts' struggles to categorize transgender individuals typically end either in a refusal to recognize protection for transgender individuals or a decision to rely on sex stereotyping theory, which similarly places the plaintiff in an inauthentic "protected class" in order to provide protection under the law.

Courts began struggling with transgender plaintiffs in the mid-1970s and, until very recently, most courts that explicitly considered whether Title VII protects against transgender discrimination have answered "no."<sup>127</sup> This traditional approach was evident in *Etsitty v. Utah Transit Authority*,<sup>128</sup> a 2007 case in which the plaintiff who was in the process of transitioning from male to female was terminated from her position as a bus driver explicitly due to her transgender status. Like in the race cases discussed above, *Etsitty* was primarily concerned with assigning the plaintiff to a recognized protected class for purposes of her Title VII claim and failing to find easy categorization, left the plaintiff unprotected:

This court ... concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII ... [T]here is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such

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<sup>127</sup>See *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748, 749–50 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977).

<sup>128</sup>502 F.3d 1215, 1219 (10th Cir. 2007) ("[Management] expressed concern about the possibility of liability for UTA [the Utah Transit Authority] if a UTA employee with male genitalia was observed using the female restroom... [and] explained the reason Etsitty was terminated was the possibility of liability for UTA arising from Etsitty's restroom usage.").

protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.<sup>129</sup>

Thus, *Etsitty* continued the approach to fluid gender identity plaintiffs that began in the 1970s, concluding that to be protected under Title VII, a plaintiff must fit neatly into a protected category and, because “sex” offers only two such categories—male and female—a transgender person cannot claim protection under this provision.

To its credit, *Etsitty* did acknowledge that there may come a time when “sex” encompasses more than two protected classes, noting,

Scientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female. At this point in time . . . we conclude discrimination against a transsexual because she is a transsexual is not ‘discrimination because of sex.’<sup>130</sup>

In making this admission, the court acknowledged the challenge presented by fluid identity individuals to the existing protected class paradigm and the changing meaning of identity in society. Unfortunately, in 2007 the U.S. Court of Appeals for the Tenth Circuit was not ready to allow societal change to alter its approach to discrimination law. In addition, despite the passage of several years during which attitudes toward transgender individuals have changed dramatically, litigants continue to rely on this exact argument in employment discrimination cases today.<sup>131</sup>

While individuals who are medically transitioning from one sex to another present the most obvious challenge to rigid sex-based protected classes, the notion of gender-based fluid identity or more simply “transgender” encompasses a range of social identities that do not fit into traditional notions of sex, including cross-dressers and others who

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<sup>129</sup>*Id.* at 1221–22.

<sup>130</sup>*Id.* at 1222 (citing *Schroer v. Billington*, 424 F. Supp. 2d 203, 212–13 & n.5 (D.D.C. 2006) (noting “complexities stemming from real variations in how the different components of biological sexuality . . . interact with each other, and in turn, with social psychological, and legal conceptions of gender”)) (internal citations omitted).

<sup>131</sup>This argument was made as recently as December 2014 by Saks & Company in response to a discrimination suit that a transgender plaintiff brought. See Motion to Dismiss, *Jamal v. Saks & Co.*, No. 4:14-cv-02782 (S.D. Tex. Dec. 29, 2014) (“Plaintiff’s retaliation claim fails to state a claim because it is well settled that transsexuals are not protected by Title VII.”).

refuse to be defined by static categories. Here, too, transgender individuals face confusion in the courts and a refusal to acknowledge a changed social reality. For example, in a 2002 case, a Louisiana court concluded that a transgender individual, fired for being a man who, outside of work, occasionally dressed in women's clothing received no protection under the law.<sup>132</sup> The protected class paradigm again created an obstacle for this plaintiff when the court conceived of only two possible protected classes for sex discrimination and could not find a place for a cross-dresser in either of them:

The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be a female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they were born.<sup>133</sup>

Again, this approach not only creates an obvious gulf between social reality and the law but in the case of transgender plaintiffs, leaves many without protection against discrimination.

Notwithstanding the conclusions in *Etsitty* and *Oiler*, a handful of federal district courts and the Equal Employment Opportunity Commission (EEOC) have explicitly concluded or, at least, referenced the possibility that transgender individuals might be protected under Title VII's basic sex discrimination coverage. The first and most extensive district court ruling in favor of a transgender plaintiff based its finding on the express

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<sup>132</sup>*Oiler v. Winn-Dixie, La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXUS 17417 (E.D. La. Sept. 16, 2002). In *Oiler*, the plaintiff was a truck driver and cross-dressed outside of work several times per month. *Id.* at \*1-7. Winn-Dixie explicitly terminated Oiler because of a concern over the discomfort that he would cause in third parties—in this case, customers who might see him dressed as a woman and then refuse to shop at Winn-Dixie. *Id.* at \*10-13.

<sup>133</sup>*Id.* at \*19-20 (quoting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1080, 1085 (7th Cir. 1984)). The court in *Oiler* could not ignore the rapidly changing societal reality and conception of social identity but refused to allow it to influence the way in which it applied Title VII to sex discrimination: "Despite the fact that the number of persons publicly acknowledging sexual orientation or gender or sexual identity issues has increased exponentially since the passage of Title VII, the meaning of the word 'sex' in Title VII has never been clarified legislatively." *Id.* at \*224.

conclusion that the meaning of “sex” has changed and that transgender individuals should be covered under the plain language of Title VII.<sup>134</sup> But that court also based its finding on the sex stereotyping theory, suggesting its lack of confidence in the simple sex discrimination approach.<sup>135</sup> The EEOC and the Department of Justice have also recently endorsed the view that discrimination against transgender individuals on the basis of their status as such is per se sex discrimination under Title VII, but neither conclusion necessitates a change in the courts.<sup>136</sup> Consequently, only a few district courts and no circuit courts have adopted that approach.<sup>137</sup>

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<sup>134</sup>*Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

<sup>135</sup>*Id.* at 305–06.

<sup>136</sup>*See* *Macy v. Holder*, EEOC Appeal No. 0120120821 at \*11 (Apr. 20, 2012) (“[I]ntentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination ‘based on sex.’”). The EEOC recently filed two cases in federal district courts in Michigan and Florida, claiming that transgender discrimination is sex discrimination under the *Macy* approach and under the sex stereotyping approach. *See EEOC v. Lakeland Eye Clinic*, No. 8:14-cv-2421 (M.D. Fla. Sept. 25, 2014); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, No. 2:14-cv-13710 (E.D. Mich. Sept. 25, 2014); *see also* Memorandum from the Attorney General to United States Attorneys 2 (Dec. 15, 2014), available at [http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title\\_vii\\_memo.pdf](http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2014/12/18/title_vii_memo.pdf) (“After considering the text of Title VII, the relevant Supreme Court case law interpreting the statute, and the developing jurisprudence in this area, I have determined that the best reading of Title VII’s prohibition of sex discrimination is that it encompasses discrimination based on gender identity, including transgender status.”); Complaint, *U.S. v. S.E. Okla. State Univ.*, No. Civ.–15-324-C (W.D. Okla. Mar. 30, 2015) (Asserting that denial of tenure based on professor’s transgender status was per se sex discrimination under Title VII).

<sup>137</sup>A number of other federal district courts have also suggested this approach but not as explicitly as the *Schroer* court did. *See Finkle v. Howard Cnty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014) (quoting *Etsitty Utah Transit Auth.*, 502 F.3d 1215, 1222 n. 2 (10th Cir. 2007)) (“Plaintiff’s claim that she was discriminated against ‘because of her obvious transgendered status’ is a cognizable claim of sex discrimination under Title VII. To hold otherwise would be ‘to deny transsexual employees the legal protection other employees enjoy merely by labeling them as transsexuals.’”); *Hart v. Lew*, 973 F. Supp. 2d 561, 580 (D. Md. 2013) (rejecting motion to dismiss a claim by transgender IRS worker because “[h]er allegations allow the Court ‘to draw the reasonable inference’ that she was discharged because of her sex, her status as a transsexual, and/or her failure to conform with gender norms”); *see also* Motion to Dismiss, *Jamal v. Saks & Co.*, No. 4:14-cv-02782 (S.D. Tex. Dec. 29, 2014) (“Plaintiff’s retaliation claim fails to state a claim because it is well settled that transsexuals are not protected by Title VII.”).

Given that the large majority of courts still hold that transgender individuals cannot claim per se sex discrimination under Title VII, it is not surprising that advocates have sought out other theories and approaches that will offer greater protection. The approach that has offered the most success to transgender plaintiffs centers on the sex stereotyping theory of discrimination. Despite offering more protection against discrimination, this approach comes with a price. Like in the mixed race cases where the court simply places a multiracial individual into a protected class to simplify the analysis, in the sex stereotyping cases, the transgender individual must argue and be viewed by the court as a member of one sex in order to achieve protection. While the goal is laudable, the means often result in the erasure of the transgender plaintiff's lived reality and identity.<sup>138</sup>

The sex stereotyping theory adopted by transgender plaintiffs emerges from the Supreme Court's decision in *Price Waterhouse v. Hopkins*,<sup>139</sup> which revolved around a female candidate for partnership in an accounting firm who claimed that she had been denied partnership because of her sex. The evidence in the case demonstrated that Ann Hopkins was denied partnership, at least in part, because of sex stereotyping—that is, despite her high level of performance and effectiveness at work, she faced discrimination for not being feminine enough in her interpersonal interactions.<sup>140</sup> The Court made the important decision in the case that sex stereotyping can be a form of sex discrimination prohibited by Title VII.<sup>141</sup>

The application of sex stereotyping theory to transgender plaintiffs is relatively new but is expanding rapidly. The first court to take this step was the U.S. Court of Appeals for the Sixth Circuit in *Smith v. City of*

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<sup>138</sup>See generally Leong, *supra* note 13 (discussing judicial erasure of mixed race plaintiffs).

<sup>139</sup>490 U.S. 228, 231–32 (1989).

<sup>140</sup>*Id.* at 235–37.

<sup>141</sup>*Id.* at 250–52. This decision has gained more prominence recently as transgender plaintiffs precluded from bringing traditional sex discrimination claims have begun to rely on sex stereotyping theory to argue successfully that discrimination based on, or at least related to, their transgender status is prohibited under Title VII. See, e.g., Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

*Salem*.<sup>142</sup> *Smith* first acknowledged that prior cases from multiple circuits had rejected the notion that Title VII protected transgender individuals under the sex discrimination provision but then clarified that such an approach had been “eviscerated by *Price Waterhouse*.”<sup>143</sup> The Sixth Circuit clarified the application of *Price Waterhouse* to this and other cases in which the plaintiff’s gender identity did not match his or her employer’s or co-workers’ expectations:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex. . . . Sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual,” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.<sup>144</sup>

Clearly, *Smith* was a significant victory for transgender individuals who could now formulate discrimination claims in sex stereotyping terms. The U.S. Court of Appeals for the Eleventh Circuit has explicitly endorsed the Sixth Circuit’s holding in *Smith*, as have numerous district courts.<sup>145</sup> In addition, the U.S. Court of Appeals for the First and Ninth

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<sup>142</sup>378 F.3d 566 (6th Cir. 2004). In *Smith*, a lieutenant in the fire department sued for sex discrimination and retaliation when his supervisors and high-level officials conspired to force his resignation in response to his decision to act and appear more feminine as part of his medically supervised transition from male to female. *Id.*; see Twing & Williams, *supra* note 96, at 183–85 (discussing the evolution of transgender plaintiffs using sex stereotyping theory).

<sup>143</sup>*Smith*, 378 F.3d at 573.

<sup>144</sup>*Id.* at 574–75.

<sup>145</sup>See *Glenn*, 663 F.3d at 1317–18 (11th Cir. 2011) (quoting *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 659–61 (S.D. Tex. 2008) (“Title VII and *Price Waterhouse*. . . do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and a ‘macho’ female who. . . is perceived by others to be in nonconformity with traditional gender stereotypes.”)); *Michaels v. Akal Sec., Inc.*, No. 09-CV-01300-ZLW-CBS, 2010 WL 2573988 (D. Colo. June 24, 2010) ((allowing transgender plaintiff’s sex-stereotyping claim); *Lopez*, 542 F. Supp. 2d at 653 (allowing sex-stereotyping claim by transgender plaintiff); *Schroer*, 577 F. Supp. at 304–06; *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521, at \*5 (W.D. Pa. Feb. 17, 2006) (holding that a transgender plaintiff may state a claim for sex

Circuits have endorsed the applicability of sex stereotyping to transgender individuals in contexts similar to Title VII suits.<sup>146</sup>

Notwithstanding the important progress made by these cases, the reliance on sex stereotyping as the primary avenue to federal victories for transgender victims of employment discrimination brings with it some significant problems—namely the requirement that the court choose a sex for the plaintiff, ignoring the plaintiff’s lived reality, to make this claim work properly. Consider the way in which the *Price Waterhouse* sex stereotyping theory applies to transgender individuals: in the case of a plaintiff who was born a biological male but is transitioning or has transitioned to female, the court must essentially refer to the plaintiff as a man whose appearance and mannerisms do not match the employer’s stereotype or expectations of a man. For example, “he” dresses in women’s clothes, has an effeminate voice, and has an effeminate walk. But this characterization must necessarily disregard the way in which the plaintiff views herself—as a woman. Her gender identity is not that of a man who fails to live up to society’s expectations for men, but rather simply as a woman.<sup>147</sup> Thus, the courts that have applied sex stereotyping theory act much like the

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discrimination by “showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant’s actions”); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, No. CIV 02-1531-PHX-SRB, 2004 U.S. Dist. LEXIS 29825, at \*8–9 (D. Ariz. June 2, 2004), *aff’d*, 325 F. App’x 492 (9th Cir. 2009) (“[N]either a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait.”); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003) (holding transgender plaintiff may state a claim under Title VII “based on the alleged discrimination for failing to ‘act like a man’”).

<sup>146</sup>See *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (applying sex stereotyping theory to case involving transgender plaintiff who was denied a loan application); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–03 (9th Cir. 2000) (applying sex stereotyping theory to male-to-female transgender plaintiff’s claim under the Gender Motivated Violence Act because “the perpetrator’s actions stem from the fact that he believed that the victim was a man who ‘failed to act like’ one”); see also *Glenn*, 663 F.3d at 1317 (citing these circuit cases as support for its Title VII holding).

<sup>147</sup>Zachary Kramer highlights this problem: “The court’s reasoning effectively erases transgenderism as an identity. Although the employee was asserting a *female* identity in the workplace, in order to avail herself of the gender-stereotyping theory she had to take on a *male* identity, namely, as a man who wanted to participate in the workplace dressing and looking like a woman. As one commentator notes of the case, “Transsexuals or transgender people per se do not really exist in the *Smith* opinion; there just happen to be some men

courts that assign mixed race plaintiffs a single racial identity to insure membership in a protected class and thereby coverage under Title VII. The courts in both types of cases aim to provide protection against discrimination for fluid identity individuals but, in the process, end up “erasing” their actual identities.<sup>148</sup>

In sum, despite significant societal changes over the last twenty-five years, courts have made little progress in understanding and adapting to the fluidity of racial and sex or gender identity. The two approaches by courts in these cases may cause significant harm, regardless of whether the plaintiff achieves discrimination protection under Title VII. In cases where the court denies legal protection to a fluid identity individual, the harm is obvious—failure to protect an employee who suffers discrimination because of a racial or sex trait is an affront to the goals of Title VII. At the same time, ignoring an individual’s lived reality and social identity in order to fit the person into binary categories results in harm of a psychic and social nature—the plaintiff is deprived of the right to name his or her own identity and receive recognition under the law. This, in turn, may prevent the individual from putting trust in the

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out there who want to wear dresses.” Kramer, *supra* note 14, at 916 (quoting ANNA KIRKLAND, *FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD* 86 (2008)).

<sup>148</sup>The sex stereotyping theory, beyond being symbolically problematic, is also not a panacea for all discrimination claims brought by transgender plaintiffs, since its focus on a plaintiff’s mannerisms or appearance is not applicable to all transgender discrimination claims and can be overcome through creative lawyering on the employer’s side. For example, the plaintiff in *Etsitty* raised the sex stereotyping claim to no avail because the court concluded that the plaintiff had failed to counter effectively the employer’s stated nondiscriminatory reason for her termination—a concern about her use of public women’s restrooms. See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224–25 (10th Cir. 2007). *Etsitty* demonstrates an essential problem with the stereotyping theory: if the employer can point to a reason for the termination that is separate and distinct from the plaintiff’s mannerisms or clothing, it can get away with discrimination no matter how ridiculous or unfounded the “legitimate reason” sounds. See also *Kastl*, 325 F. App’x 492 (9th Cir. 2009) (rejecting transgender plaintiff’s sex stereotyping claim based on “legitimate nondiscriminatory reason” focused on lack of appropriate bathroom); *Creed v. Family Express Corp.*, 3:06-CV-465RM, 2009 U.S. Dist. LEXIS 237, at \*24–29 (N.D. Ind. Jan. 5, 2009) (rejecting sex stereotyping claim by plaintiff transitioning from male to female when employer fired her for wearing long hair, nail polish and makeup in violation of sex-specific dress code policy); *Rice v. Deloitte Consulting, LLP*, Civ. A No. 12-cv-00253, 2013 U.S. Dist. LEXIS 95439 (D. Colo. July 9, 2003) (rejecting sex stereotyping claim brought by transgender plaintiff despite comments from co-workers about her having “unique/odd... mannerisms, style and interactions” because these were not relevant to a gender stereotype about women).

law and devalues Title VII as a tool of achieving societal change.<sup>149</sup> As society changes, so too must our interpretation of law, and the failure to adapt law to modern realities of racial and sexual identity will result in an antidiscrimination law that is increasingly irrelevant.

### III. EXISTING SCHOLARLY APPROACHES TO FLUID IDENTITY

This article is not alone in recognizing the difficulties in discrimination suits faced by plaintiffs with fluid identities. Surprisingly, however, given the enormous body of literature on race and sex discrimination, only a few isolated projects have fully explored fluid identity issues and these have proposed narrow solutions. This part will describe some of the primary scholarly voices in this area and offer critiques of each. This article's overall contention, however, is that commentators on race and sex have considered the problem of fluid identities in a highly compartmentalized manner, looking either at race or sex and failing to consider the larger impact that mixed race and transgender plaintiffs should have on the meaning of identity under Title VII. As the prior parts demonstrate, the struggles of individuals with fluid racial and sexual identities in society at large and particularly in court are more similar than they are different. As a result, what is needed is a rethinking and retooling of Title VII's categorical approach, whether through legislative or judicial changes, so that the law can address the modern reality of fluidity that is now a hallmark of social identity rather than an aberration.

#### *A. Scholarship on Mixed Race Discrimination*

There is no shortage of thought-provoking scholarship on the complexity of racial identity in employment discrimination law.<sup>150</sup> Nonetheless,

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<sup>149</sup>See Chen & Hamilton, *supra* note 37; Remedios & Chasteen *supra* note 37 (discussing psychic harm associated with miscategorization of identity); see also *infra* notes 154–55 and accompanying text (describing Nancy Leong's critique of these cases).

<sup>150</sup>Any primer on the subject should include Angela Onwuachi-Willig and Mario Barnes's writing on plaintiffs who are "regarded as black;" Camille Gear Rich's discussion of the performance of racial and ethnic identity; Wendy Greene's critique of the "actuality requirement" in Title VII identity litigation; and, Kenji Yoshino's arguments on "covering" as a significant identity-based civil rights problem, among many others. See Angela

only a handful of scholars have focused specifically on the problem of discrimination against multiracial individuals. Nancy Leong, along with her critics Tina Fernandes and Scot Rives, has offered the most substantive discussions of the struggles of mixed race plaintiffs under the current doctrinal regime.

In Leong's *Judicial Erasure of Mixed-Race Discrimination*, she details the history of discrimination against multi- and biracial individuals and discusses their treatment under Title VII and equal protection jurisprudence.<sup>151</sup> Leong considers the relatively small number of cases alleging discrimination on the basis of the plaintiff's multiracial status. She theorizes that the paucity of such claims does not demonstrate a lack of discrimination against this population, but rather an acknowledgment that mixed race discrimination does not fit neatly into the conventional categorical approach of discrimination law and is, therefore, discouraged as the basis of a claim.<sup>152</sup> She then considers the cases that have dealt with discrimination on this basis and argues that courts tend to address mixed race claims by reformulating them to match existing racial categories, thereby "erasing" the actual lived

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Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded as" Black, and Why Title VII Should Apply Even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283 (2005); Rich, *supra* note 21; Greene, *supra* note 22; Yoshino, *supra* note 9; see also Rich, *supra* note 21, at 1504 n.9 (2014) (citing Tanya Katerí Hernández, "Multiracial" Discourse: Racial Classifications in an Era of Color-Blind Jurisprudence, 57 MD. L. REV. 97 (1998)) ("[Hernández warns] that the multiracial identity movement may cause multiracials to psychologically disconnect with persons of color and serve as a buffer class disconnected from racial equality efforts."); Gustavo Chacon Mendoza, Comment, *Gateway to Whiteness: Using the Census to Redefine and Reconfigure Hispanic/Latino Identity, in Efforts to Preserve a White American National Identity*, 30 U. LA. VERNE L. REV. 160 (2008) (arguing fluid definitions of Latino/Hispanic are being used to court Latinos into identifying as white) (discussing Critical Race Theorists who have spoken to the perils of fluid identity); cf. Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262, 1292-98 (2000) (warning against the naïve celebration of fluid understandings of race because employers often cherry-pick between certain types or performances of racial identity to find models that more easily comport with established workplace norms); D. Wendy Greene, *Black Women Can't Have Blonde Hair... in the Workplace*, 14 J. GENDER RACE & JUST. 405 (2011) (exploring the risks of embracing fluid conceptions of race).

<sup>151</sup>Leong, *supra* note 13; see also Ken Nakasu Davison, Note and Comment, *The Mixed-Race Experience*, 12 ASIAN L.J. 161, 162 (2005) (arguing, similarly, that antidiscrimination jurisprudence should focus on the intent of the discriminator rather than the identity of the victim).

<sup>152</sup>Leong, *supra* note 13, at 505.

identity of the plaintiff.<sup>153</sup> Having identified a history of discriminatory treatment against multiracial individuals and the ways in which courts fail them, Leong describes the psychic, symbolic, and replicating harm that results:

By devaluing the individual multiracial plaintiff's narrative and recasting it as a familiar monoracial one, courts divest the plaintiff of the power associated with narrative integrity; likewise, they deprive the plaintiff of the dignity inherent in the opportunity to vindicate his narrative in court. Moreover, the court distances the individual from the legal system, decreasing the likelihood that he will place his trust in the legal system to address his grievances in the future. By rechanneling a narrative of multiracial discrimination into a monoracial framework, courts thus inflict an additional injury upon an individual already wounded by an original instance of discrimination.<sup>154</sup>

Arguing that law has practical and symbolic power, Leong maintains that the disconnect between the individual's self-identification and the narrative imposed upon him by the law constitutes its own harm.<sup>155</sup>

Having established the fundamental nature of the problem, Leong proposes a fairly narrow solution. She contends that courts need not necessarily determine a plaintiff's "objective" racial category and could instead redirect this inquiry to a determination of whether *the employer's perception of the victim's race* motivated the discriminatory treatment.<sup>156</sup> Leong finds analogy and support for her proposal in the "regarded as" provision in the Americans with Disabilities Act and case law on Native Americans achieving protection based on employer perception rather than proof of tribe affiliation.<sup>157</sup> Her solution, she contends, would "add flexibility to the definition of 'protected class'" by including those who are perceived to be members of an existing protected class regardless of their self-identification.<sup>158</sup> Leong argues that in complex identity cases, her approach would allow a focus on the employer's animus rather than

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<sup>153</sup>*Id.* at 509–17.

<sup>154</sup>*Id.* at 533.

<sup>155</sup>*Id.*

<sup>156</sup>*Id.* at 543–44.

<sup>157</sup>*Id.* at 544–45 (discussing *Perkins v. Lake Cnty. Dep't of Utils.*, 860 F. Supp. 1262 (N.D. Ohio 1994) and the Americans with Disabilities Act, 42 U.S.C. § 12102(1)(A), (C) (1990)).

<sup>158</sup>*Id.* at 548.

on the victim's status, while retaining the protected class structure that has become a hallmark of Title VII.

Leong's critics take issue with her proposal practically and theoretically. On a practical level, Fernandes, for example, points out that Leong's proposal could fail to protect mixed race individuals, about whom Leong is primarily concerned.<sup>159</sup> Moreover, as Rives comments, Leong's proposal places an additional burden on the plaintiff to prove the employer's perception of the employee in the early stages of litigation when the plaintiff already faces significant hurdles.<sup>160</sup>

On a more theoretical level, Fernandes takes issue with Leong's proposal because it turns away from the historical goal of antidiscrimination law—namely, “to protect historically marginalized and oppressed minority groups.”<sup>161</sup> Although Fernandes is focused, in this comment, on equal protection law, the statement is equally applicable to employment discrimination law. As Bradley Areheart and others have described, employment discrimination law can be seen as encompassing antisubordination and anticlassification agendas, each of which advocates achieving equality, albeit in different ways.<sup>162</sup> Antisubordination theory advocates prohibiting “practices that ‘enforce the inferior social status of historically oppressed groups’ and allow[ing] practices that challenge

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<sup>159</sup>Tina Fernandes, *Antidiscrimination Law and The Multiracial Experience: A Reply to Nancy Leong*, 10 HASTINGS RACE & POVERTY L.J. 191, 211 (2013) (“[A] switch to ‘perceived race’ instead of actual race (what Professor Leong calls ‘categorical’ race) would more likely result in the inclusion in the class of specially protected persons who should not be specially protected (namely, persons who only seem to be multiracial but are not actually multiracial), and the exclusion from protection of persons who should be specially protected (namely, persons who actually are multiracial).”).

<sup>160</sup>Scot Rives, Comment, *Multiracial Work: Handing over the Discretionary Judicial Tool of Multiracialism*, 58 UCLA L. REV. 1303, 1334–36 (2011).

<sup>161</sup>Fernandes, *supra* note 159, at 202.

<sup>162</sup>Bradley A. Areheart, *The Anticlassification Turn in Employment Discrimination Law*, 63 ALA. L. REV. 955, 957–58 (2012); see also Jessica L. Roberts, *The Genetic Nondiscrimination Act as an Antidiscrimination Law*, 86 NOTRE DAME L. REV. 597, 626–29 (2011) (“For decades scholars have debated what should be at the heart of the American antidiscrimination project: a principle based on ending group subordination or a principle based on prohibiting any classification on the basis of certain forbidden traits. Thus, the antidiscrimination principle is often described in terms of two sometimes competing, sometimes complementary, interpretations: antisubordination and anticlassification.”).

historical oppression.”<sup>163</sup> In contrast, anticlassification theory focuses on prohibiting differentiation of individuals based on a particular category.<sup>164</sup> While some scholars, including Areheart, have argued that employment discrimination legislation and jurisprudence have turned toward anticlassification-supported approaches, the early affirmative action precedents and the antistatutory principles behind them still stand and still guide much of antidiscrimination law. In this context, Fernandes’s critique of Leong’s solution is more profound—by focusing on the perpetrator’s perception rather than the victim’s actual identity, antidiscrimination law can be used to protect employees who are not members of historically oppressed groups. For example, a white individual who nonetheless is perceived by his employer to be African American or Latino could claim protection under Title VII on the basis of this perception. Fernandes argues that Leong’s perception-based solution abandons the original antistatutory principles upon which antidiscrimination law was premised.<sup>165</sup>

Although Fernandes and Rives offer important critiques of Leong’s approach, the solutions they propose do not provide wholly satisfactory alternatives either. Instead of focusing on the discriminator’s perception, Fernandes and Rives each propose adding a “multiracial” category to the list of groups already protected under antidiscrimination law.<sup>166</sup> This solution, Fernandes argues, would achieve the goal of “protecting multiracial plaintiffs from the unique kind of discrimination they face and allow the plaintiffs themselves to racially self-identify.”<sup>167</sup>

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<sup>163</sup>Areheart, *supra* note 162, at 957 (quoting Reva B. Siegel, *Equality Talk: Antistatutory and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1472–73 (2004)).

<sup>164</sup>*Id.* at 957–58.

<sup>165</sup>In fact, taken to its logical conclusion, Leong’s proposal is not supported by an antistatutory principle either. Because Leong’s approach could allow prohibited discriminatory behavior to be disconnected entirely from the actual identity of the victim, individuals could claim protection of the laws without referencing either group membership or possession of a particular trait.

<sup>166</sup>Fernandes, *supra* note 159, at 209–10; Rives, *supra* note 160, at 1310. Rives too suggests adding a multiracial category but adds that plaintiffs should be able to self-identify, followed—if applicable—by an opportunity for the employer to demonstrate that it perceived the plaintiff’s race differently. *Id.*

<sup>167</sup>Fernandes, *supra* note 159, at 209.

While this solution may solve some of the problems with Leong's perception-based proposal, the addition of a "multiracial" category is also problematic practically and theoretically. On a practical level, it is not clear that a "multiracial" category would protect all fluid identity plaintiffs who face discrimination based on their identities. Although the multiracial category would protect those mixed race individuals who face discriminatory treatment that is explicitly based on their "mixed" or "impure" status, it would not necessarily protect those who face discriminatory treatment based on fuzzier biases—prejudice against "otherness," based on the inability to visually categorize the individual into one or more known categories.

Imagine a plaintiff who has both black and white ancestry and considers herself to be multiracial, but whose appearance does not lend itself to easy identification. She is mistreated by her employer and constantly asked "what are you?" Trina Jones, in her seminal work on colorism, deemed this the "Je ne sais quoi" approach to discrimination:

Sometimes it is impossible to determine a person's race, national origin, or ethnicity—especially in a social context where there are a number of racial groups and where race-mixing is on the rise.... [A] defendant may argue that he did not view the plaintiff as Black, as White, or as multiracial. Under this "Je ne sais quoi" approach to discrimination, when viewing a very light-complected person, the discriminator thinks: "Maybe I cannot specify your race, religion, or national origin. In fact, I may not know who or what you are. However, one thing is clear from your skin color. You are not like me." In other words, notwithstanding the ambiguity concerning the individual's race, that person may still be viewed as an inexorable Other. Not White. Not Black. Just Different.<sup>168</sup>

Unless this plaintiff can prove that the discrimination was a result of her multiracial identity or her black or white ancestry, she will have difficulty in court even with the addition of a multiracial category.<sup>169</sup> Jones

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<sup>168</sup>See Jones, *supra* note 10, at 1554.

<sup>169</sup>Moreover, as Greene has argued, plaintiffs who face discrimination based on a perceived identity that is not, in fact, their actual identities often fail as courts insert an "actuality requirement" into Title VII. See Greene, *supra* note 22, at 108–11. This can often impact multiracial plaintiffs whose identity outsiders cannot easily determine. *Id.* (discussing *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012), in which an individual with black and white ancestry was harassed for being "Mexican" but was denied relief under Title VII because his actual identity did not match the nature and cause of the discrimination).

sees a color discrimination claim as a potential solution to this problem, and in fact, the notion of color discrimination is occasionally raised by courts in multiracial cases where the multiracial identity is too complicated for the court to handle with the traditional rubrics.<sup>170</sup> However, color discrimination, as endorsed by the specific mention of “color” in Title VII, is a focus on one specific race-related trait that, as discussed below, may aid some but not all fluid identity individuals. A broader fix is essential.<sup>171</sup>

In addition, the multiracial category might not protect an individual who faces discrimination because he performs a racial identity that is different from the identity thrust upon him by virtue of his appearance. Consider, for example, an employee who appears to be white but identifies with African American culture whether because of ancestry or ideology. When he adopts a style of clothing or hair associated with some African American communities, his employer suspends him (despite the fact that his clothing choice is completely unrelated to his job). The employer defends his actions arguing that he has nothing against either race but does not like it when a member of one racial group tries to look or act like those of another. The discrimination is neither based on multiracial status nor his membership in a racial category, but rather his performance of an identity to which he does not appear to belong. A multiracial category would likely offer little protection to this employee. Neither would traditional antidiscrimination categories. Nonetheless, the victim in this hypothetical decidedly faced racial discrimination of some kind.

Lastly, a multiracial category would not alleviate the confusion evident in opinions involving multiracial plaintiffs or comparators. If an employee is subjected to adverse treatment because he has both black and white ancestors, should the court view his co-worker who has Latino and white ancestry as a member of the same class or a different protected class? And how should the court view an employee who appears to most of his co-workers to be white but self-identifies as multiracial

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<sup>170</sup>Jones, *supra* note 10, at 1556–57; *see, e.g.*, Moore v. Dolgencorp, Inc., No. 1:05-CV-107, 2006 WL 2701058, at \*3 (W.D. Mich. Sept. 19, 2006) (contending that plaintiff’s claim of “discrimination based upon her replacement by a mixed-race male rather than a black female, appears to be a back-door attempt to amend the complaint to add claims of sex and color discrimination”).

<sup>171</sup>*See infra* Part IV.

because of black ancestry? Any attempt to locate comparators without a more complex understanding of racial identity and fluidity will eviscerate any benefits provided by the addition of a multiracial category.

In sum, the proposals put forth by Leong, Fernandes, and Rives each alleviate some but not all the problems faced by those with fluid racial identities. These scholars acknowledge the fluid nature of racial identity, describe race as a social construct, and discuss the notion of “performing” racial characteristics. Yet, they do not conceive of the fluid identity problem as being a larger systemic issue that involves more than race and that requires a broader rethinking of Title VII’s categorical approach.

### *B. Scholarship on Transgender Discrimination*

Like the scholarship on racial identity, a number of scholars have tackled the growing complexity of sex and gender identity and their disconnect with the existing jurisprudence and legislative protections. And, like the scholars who address discrimination against mixed race plaintiffs, those who deal with transgender plaintiffs typically suggest limited solutions that address only the particular problems faced by transgender individuals.

Given the number of courts that have concluded that Title VII offers no protection to transgender plaintiffs, it is, perhaps, not surprising that the large majority of recent transgender discrimination scholarship has focused on litigation strategies that can offer protection under existing Title VII jurisprudence. A number of scholars have argued in favor of the sex stereotyping or gender nonconformity approach available after *Price Waterhouse*.<sup>172</sup> Ilona Turner lays out the basic premise of this argument:

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<sup>172</sup>See e.g., Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205 (2007); Colleen Keating, *It’s Her-story Too: Title VII and Gender Nonconformity in Men: Extending Title VII Protection to Non-Gender-Conforming Men*, 4 AM. U. MODERN AM. 82 (2008); Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007). Cf. Jason Lee, Note, *Lost in Transition: The Challenges of Remediating Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 427 (2012) (contending that existing cases fall into three categorical approaches: (1) the Gender Nonconformity Approach; (2) the Per Se Approach, which is based on the literal language of Title VII; and (3) the Constructionist Approach, in which courts contend that “‘sex’ and ‘gender’ are social constructs” and, as a

Civil rights law “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,” which would define impermissible sex discrimination to include compelled conformance with gender stereotypes.<sup>173</sup>

This line of scholarship has been inordinately important in driving the successes that transgender plaintiffs have achieved using the sex stereotyping theory.<sup>174</sup>

While it is difficult to argue with the ability of the sex stereotyping approach to achieve victories in court for transgender victims of discrimination, the same symbolic problems adhere to these scholars’ views as those discussed with reference to the cases that have followed their lead—namely, the erasure of the transgender plaintiff’s lived identity in order to succeed on the discrimination claim.<sup>175</sup> An individual transitioning from male to female, for example, who both views herself and holds herself out to others as a woman, must, for purposes of her lawsuit, claim to be a man who was discriminated against for not living up to societal expectations of men because she dressed as a woman, wore makeup, and used the female restroom. The parallel to multiracial employees is obvious—a biracial employee feels he must file his lawsuit as black or white in order to increase his chances of protection despite the fact that his actual identity is far more complex, and the discrimination he suffered was based on that complex identity. In both cases, victories in court come at the expense of psychic and social harm as we allow the legal system to continue to diverge from the lived reality of those who rely upon it.

A second avenue of scholarship on transgender discrimination focuses on legislative action as opposed to litigation strategies. Advocates of legislative solutions are split over the best way to protect

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result, “gender performance and/or gender identity should merit protection under Title VII”).

<sup>173</sup>Turner, *supra* note 172, at 566 (quoting Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 8 (1995)).

<sup>174</sup>See Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011) (citing Turner, *supra* note 172, at 563; Taylor Flinn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001)).

<sup>175</sup>See *supra* notes 138–48 and accompanying text (discussing cases that apply sex stereotyping to claims by transgender plaintiffs).

transgender victims of discrimination—an amendment to Title VII or a stand-alone civil rights statute that would protect against discrimination on the basis of sexual orientation and gender identity.<sup>176</sup> The stand-alone statute that has been proposed is known as the Employment Non-Discrimination Act (ENDA) and has fluctuated between including and excluding a prohibition on gender identity discrimination, albeit for political reasons related to Congress’s perceived unwillingness to include the transgender community in any protections it provides to lesbian, gay, and bisexual victims of discrimination.<sup>177</sup> Despite the ambitions of its sponsors, however, ENDA and its precursor bills have been proposed but failed to become law more than half a dozen times in the last twenty-five years.<sup>178</sup> Those who seek legislative solutions to the fluid identity problem must, of course, rely on an increasingly impotent Congress that has demonstrated time and again its deep-seated reluctance to institute change for this particular minority group. There may be more reason to be optimistic now than in the past as public attitudes and the courts grow increasingly open to same sex marriage and to homosexuality in general.<sup>179</sup> Nonetheless, either

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<sup>176</sup>See Jennifer S. Hendricks, *Instead of ENDA, A Course Correction or Title VII*, 103 NW. U. L. REV. COLLOQUY 209 (2008); J. Banning Jasiunas, *Is ENDA the Answer? Can a “Separate but Equal” Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1545 (2000); Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL’Y 219, 234–35 (2010); Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835 (2013); William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 497-501 (2011); Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonor-mativity*, 7 SEXUALITY RES. & SOC. POL’Y 155, 156 (2010).

<sup>177</sup>See generally Reed, *supra* note 176, at 868–69 (arguing that ENDA should exclude gender identity discrimination because courts are increasingly accepting it as covered by Title VII, which provides more robust protections for transgender victims of discrimination than they would receive under ENDA).

<sup>178</sup>*Id.* at 840–41.

<sup>179</sup>See, e.g., *Kitchen v. Herbert*, 755 F.3d 1193 (10th Cir. 2014); *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis. 2014); *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014); *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (D. Or. 2014); *Latta v. Otter*, 19 F. Supp. 3d 1054 (D. Idaho 2014); *Deboer v. Snyder*, 973 F. Supp. 2d 757 (E.D. Mich. 2014); *De Leon v. Perry*, 975 F. Supp. 2d 632 (W.D. Tex. 2014); *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014); *McGee v. Cole*, No. 3:13-24068, 2014 U.S. Dist. LEXIS 158680 (S.D. W. Va. Nov. 7, 2014); *Bishop v. United States ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla.

ENDA or an amendment to Title VII would still face a significant uphill battle to passage.

Perhaps the most wide-ranging recent commentary on the complexities of sex and gender discrimination can be found in Zachary Kramer's article, *The New Sex Discrimination*, in which he deals with fluid sexual identity issues in a broader context.<sup>180</sup> Rather than argue for a particular litigation strategy or legislative proposal, Kramer argues that our doctrinal approach to sex discrimination should be adjusted. He analogizes modern-day sex discrimination to religious discrimination and accommodation theory and advocates protecting sex "as both a status and a practice."<sup>181</sup> Kramer aims not to abandon traditional approaches to sex discrimination, but rather envisions "a two tiered sex discrimination regime" where the first tier focuses on an employee's status as male or female, and the second tier addresses discrimination that is based not on who the employee is but on "how she (or he) acts in the workplace."<sup>182</sup> While he discusses a rethinking of sex in general, his approach would impact transgender victims of discrimination who could claim sex discrimination based on their performance of their gender identities.<sup>183</sup> For example, the act of being pregnant or nursing a baby is a performance of sex traits, as is the wearing of or refusal to wear makeup by either a man or a

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2014) (cases overturning prohibitions on same sex marriage). President Obama's recent executive order requiring that all companies that contract with the federal government for more than \$10,000 not discriminate on the basis of sexual orientation and gender identity is also a positive step that may make legislation more likely. See Zack Ford, *Obama Administration Announces Executive Order Protecting LGBT Employees of Federal Contractors*, THINKPROGRESS (June 26, 2014, 11:53 AM), <http://thinkprogress.org/lgbt/2014/06/16/3449270/obama-lgbt-executive-order/>.

<sup>180</sup>Kramer, *supra* note 14.

<sup>181</sup>*Id.* at 898.

<sup>182</sup>*Id.* at 945–46.

<sup>183</sup>*Id.* at 940–43. Kramer notes that "[s]ex discrimination should foster an ethic of self-definition; it should shield employees against gender norms that seek to dampen constitutive elements of an employee's identity." *Id.* at 931. While stereotypes and gender nonconformity theory would obviously play a role in his approach, Kramer advocates a broader rethinking of what sex means so that we recognize and prohibit discrimination based on a person's performance of his sex traits and not simply his status as biologically or socially male or female. *Id.* at 945–46.

woman.<sup>184</sup> Kramer argues that we should protect the “doing” as well as the “being” in the realm of sex discrimination.<sup>185</sup>

While Kramer’s approach to sex discrimination articulates a need to rethink the meaning of that particular identity trait, like the race scholars discussed above, Kramer sees sex as a stand-alone identity in need of reformation. In fact, he explicitly argues that sex is akin to religion (and should be interpreted as requiring accommodation like religion) but not to race. In responding to potential critics who would distinguish between religion and sex on the basis that religion is mutable while sex is immutable, Kramer notes,

The theory here is that religion requires special treatment because it is not a fixed identity like race or sex. It comes down to a person’s control over her identity. If a person can change her religion—or even abandon religion altogether—then the person has a greater say in who she is and how she lives her life. We do not, by contrast, get to choose our race, race being biologically determined. Sex is another story, though. Although the vast majority of people do not exercise choice over their sex, some people do, going to great lengths to change their birth sex.<sup>186</sup>

But Kramer fails to recognize that in an increasingly blurry world, religion, sex, and race, are all quite similar. They are all fundamental to an individual’s sense of self and are not always easily determined by others. They can all be changed, whether through medical procedure, religious ceremony, social passing or covering, or election.<sup>187</sup> And all of these social identity characteristics can be conceived of as both status and process.<sup>188</sup> It is this reality of modern social identity that the scholarship in this field has overlooked and that this article seeks to highlight.

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<sup>184</sup>See generally *id.* at 940–48.

<sup>185</sup>See *id.* at 945–46.

<sup>186</sup>*Id.* at 949.

<sup>187</sup>See generally Yoshino, *supra* note 9; Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769 (2002); see also Rich, *supra* note 8, at 1505 (“[W]e are currently living in the era of ‘elective race’—a time when antidiscrimination law is being asked to attend to the dignity concerns of individuals as they attempt to control the terms on which their bodies are assigned racial meaning.”).

<sup>188</sup>See Rich, *supra* note 21, at 1172–86.

*C. The Need for a Systemic Rethinking of Social Identity*

As has been discussed above, the existing scholarship on complexities in race and sex discrimination have made enormous contributions to our understanding of the fluidity of identity and to courts' willingness or unwillingness to protect those who defy easy categorization. Nonetheless, none of these scholars has been willing to expand the discussion beyond the social identity characteristic that was their focus. The scholarship on race deals only with racial complexities, and the same is true for scholarship on sex. The problem we are all addressing, however, is a far more global issue than has previously been recognized, and the solutions that attempt to cure the problem only for fluidity in race or sex do not capture that global nature. Society is nearing consensus that neither race nor sex is easily definable based on biological traits, that neither race nor sex contains identifiable groups with finite borders, and that the meaning of these identities is constantly evolving.<sup>189</sup> However, these realizations are not captured in courts' interpretations and applications of Title VII.<sup>190</sup> The problem, simply stated, is the overwhelming discord between the categorical nature of judicial approaches to Title VII and the reality of American society in which finite categories are increasingly unrealistic. The contribution this article makes is to shine a light on Title VII's categorical problem as a systemic one requiring a broad solution that impacts both race and sex.

There are inherent similarities in these identity characteristics, and the jurisprudence has similarly affected both identities. First, race and sex have physiological aspects but cannot be defined solely based on biology.<sup>191</sup> In many cases, race and sex are socially determined components of identity that depend on self-determination, external perception, and a complex series of factors including biology and culture that operate differently in each person's life.<sup>192</sup> In addition, courts traditionally viewed race and sex as obvious, visually identifiable, and requiring a modicum of analysis to determine. Although in recent years, courts have begun to recognize the

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<sup>189</sup>*See supra* Part I.

<sup>190</sup>*See supra* Part II.

<sup>191</sup>*See supra* Part I.A.

<sup>192</sup>*See id.*

complexities and nuances involved in determining an individual's social identity, the old rubrics and precedents the courts cling to in discrimination cases make full acknowledgment of this new reality difficult if not impossible.<sup>193</sup>

Perhaps most importantly, however, race and sex are essential aspects of a person's identity. Kramer alludes to this truth about sex in discussing a need to redefine immutability to protect against discrimination given our current understanding about the ability to change our identities: "Maybe we need a softer definition of immutability. Rather than thinking of traits as locked identities, we can define immutability as a trait that is so central to our sense of self that it would be extremely difficult to change."<sup>194</sup> Anthony Enriquez makes a similar point about race, sex, and sexual orientation alike, arguing that "the contemporary visibility of multiracial, intersex, and transgender identities demands a reassessment of biological immutability in the equal protection context" and he proposes that courts in equal protection cases should use the definition of immutability that is common in asylum cases—"fundamental immutability."<sup>195</sup> Under this approach, "an immutable characteristic is not simply a quality one cannot change, determined at birth. Rather, as a baseline, it is an electable status that one should not be forced to change because it is fundamental to identity."<sup>196</sup> Most courts would agree that with regard to race and sex, even if science developed a simple, inexpensive way to change sex organs or skin pigments, race and sex discrimination would not become permissible

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<sup>193</sup>See *supra* Part I.B. and Part II.

<sup>194</sup>Kramer, *supra* note 14, at 949; see also Schmeiser, *supra* note 67, at 1508–19 (describing the history of immutability in equal protection jurisprudence and arguing that for purposes of sexual orientation, immutability can be read more broadly to mean "characteristics central to personal identity, if not either genetic in origin or entirely imperious to change" or, perhaps more helpfully, focused "on the persistence of 'social and legal ostracism' as the relevant aspect of group definition").

<sup>195</sup>Enriquez, *supra* note 51, at 377.

<sup>196</sup>*Id.*; see also *Watkins v. U.S. Army*, 847 F.2d 1329, 1347 (9th Cir. 1988) ("Reading the case law in a more capacious manner, 'immutability' may describe those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be.").

as a result.<sup>197</sup> The key aspect of racial and sex characteristics is their formidable and essential role in shaping our social identities and the broad agreement that they deserve protection as a result of that role.

As a result of these commonalities, any proposal that targets fluidity in race but not sex and vice versa misses an opportunity to tackle a larger disconnect between law and social identity in general. Instead of adding new categories (for multiracial or transgender employees) or focusing on perceptions of discriminators (under a “perceived as” approach or sex stereotyping theory), what is needed is a broad rethinking of our approach to employment discrimination that protects against identity discrimination without mandating unnatural categorization as part of the process.<sup>198</sup>

#### IV. PROPOSALS FOR REFORM

This article has argued that the growing visibility of multiracial and transgender individuals demands a rethinking of the meaning of these social identity characteristics under Title VII. The new reality of fluid identities should make us rethink group membership as a model for discrimination. Whether the change is legislative or interpretive, moving forward, it is essential to eliminate the perception that the first prong of

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<sup>197</sup>See *Watkins*, 847 F.2d at 1347 (“Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one’s skin pigment.”).

<sup>198</sup>In addition to similarities in racial and sexual characteristics in general, even the proposed solutions to the problem of fluid identities tend to play out similarly for race and sex. The scholars who have addressed the fluid identities problem in employment discrimination law have generally maintained the traditional protected group approach, proposing solutions that either construe the fluid identity individuals as protected within the existing group-based jurisprudence or that seek to add an additional protected group. The “perceived as” solution Leong offered functions similarly to the “gender non-conformity” strategy Turner and others put forth in that both solutions work within existing legal frameworks and focus on the bias and expectations of the discriminator rather than the status of the victim. Similarly, Fernandes’s proposal to add a multiracial category mirrors the suggestion of numerous scholars who advocate for a legislative solution that would add “gender identity” to the protected classes under Title VII or a stand-alone statute that would provide this protection. These scholars too work within the existing legal regime but seek merely to amend or add to existing laws to provide for “new” fluid identities. See *supra* Part III.

*McDonnell Douglas* or the notion of “protected classes” is a requirement. In addition, it is not sufficient to merely add categories to accommodate those individuals who blur the traditional identity borders. Given the dramatic changes in this area that have occurred in the last ten years alone, it seems naïve to think that any additions would withstand the test of time or even the next decade. Instead, Title VII should acknowledge the fluid nature of social identity and offer a flexible approach to proving discrimination that allows for self-determination and fluid identity but continues to ban discrimination based on essential identity characteristics. Finally, as was discussed above, the psychic and symbolic harm that results from a legal system that fails to acknowledge societal realities cannot be overstated and should be the driver of change in this area. The following sections will explore several proposals for reform—both statutory amendment and judicial reinterpretation.

#### *A. Statutory Reform*

A legislative solution that amends the language of Title VII to explicitly recognize the fluid nature of identity and to eliminate the necessity of membership in a protected class would provide the clearest path forward. Such an amendment could take a number of acceptable forms. For example, an amendment could be modeled on ENDA proposals that include a ban on discrimination based on “gender identity.”<sup>199</sup> However, instead of limiting the change to gender identity, the amendment could address all of the Title VII traits.<sup>200</sup>

For example, the most recent version of ENDA proposed prohibiting discrimination “because of such individual’s actual or perceived sexual orientation or gender identity.”<sup>201</sup> A fluid identities amendment to Title VII could continue to provide protection based on an “individual’s race, color, religion, sex, or national origin” and add protection based on “*an individual’s actual or perceived racial or gender identity.*” This approach, while dramatic in its suggestion of legislative reform, also conservatively maintains the existing protected class structure for those cases where

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<sup>199</sup>See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) Library of Cong.

<sup>200</sup>See *supra* notes 60–66 and accompanying text (discussing Title VII protected traits).

<sup>201</sup>See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) Library of Cong.

that approach does not present a problem or a disconnect from the plaintiff's lived reality.

Alternatively, the identity language of Title VII could be rewritten entirely to specifically prohibit discrimination "*on the basis of the presence or perception of racial, sex, gender, religious, color, and national origin identity characteristics or traits*" instead of the existing language.<sup>202</sup> While this approach might be overbroad in light of this article's discussion of fluid identities in the race and sex contexts only, such an amendment would provide the clearest endorsement of the notion that categorization is not necessary and can be a destructive component of antidiscrimination legislation.

For the fluid identity plaintiff, these approaches change the initial inquiry from a focus on membership in a protected class to a focus on the existence or perception of identity traits. As will be discussed in the next section, this change in focus would continue protections for those with static identities but also would expand and increase protection for fluid identity individuals.<sup>203</sup>

While any proposal for legislative reform faces an uphill battle, there are practical and political benefits to proposing large-scale reform of Title VII and not simply change that benefits only one segment of the population. The likelihood of passage would of course increase if the proposal impacts (and can be touted by) all those who either have or support the notion of fluid identity. And, finally, a legislative solution has the benefit of making the change explicit and mandatory, with helpful congressional findings that can assist courts in applying the law to modern realities.<sup>204</sup> Nonetheless, any statutory solution would face

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<sup>202</sup>Notably, when Congress amended Title VII in 1991, the language used reflected a focus on protected traits rather than protected classes. The 1991 amendment clarified that employers have violated the Act when a plaintiff "demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m) (2006). As Greene has demonstrated, however, courts consistently look to the original language of Title VII and the *McDonnell Douglas* prima facie test rather than this more recent statutory amendment. See Greene, *supra* note 22, at 118.

<sup>203</sup>See *infra* Part IV.B.

<sup>204</sup>See generally Lars Noah, *Divining Regulatory Intent: The Place for a "Legislative History" of Agency Rules*, 51 HASTINGS L.J. 255 (2000) (considering the use of congressional findings to aid in statutory interpretation).

significant political obstacles to passage, making it important to consider interpretive change, as well.

### B. Interpretive Reform

While statutory reform would provide the most clarity for courts, it is also possible to envision equally effective reform of Title VII at the judicial level. In fact, without congressional guidance or mandate, the judiciary can end its blind reliance on the *McDonnell Douglas* prongs with nothing more than a citation to that case's language explaining that it was merely an example and not the sole approach,<sup>205</sup> and can begin to interpret Title VII, even as currently written, as focusing on identity traits and not group membership. In adopting this approach, courts could then interpret Title VII's reference to the individual's race and sex as being a prohibition on discrimination based on a race- or sex- or gender-related trait, rather than membership in a race or sex protected class.<sup>206</sup>

The trait-based approach, in contrast to the existing categorical approach, would provide protection to victims of discrimination in a variety of ways. Such an approach would continue to protect those plaintiffs who identify as members of a protected class but could also provide protection to those with fluid identities. First, a trait-based approach would continue traditional protections for those who identify with a particular protected class because those individuals inherently possess identity traits that they could point to instead of class membership. In addition, a trait-based interpretation of Title VII would protect individuals who face discrimination based on their "mixed" status, as the very fact of being of mixed race or transgender is a race- or gender-related trait that could be pointed to as the cause of the discriminatory behavior.

Similarly, those multiracial or transgender individuals who face discrimination based on their "otherness"—that is, discrimination based on the perpetrator's inability to categorize the victim's racial or sex/gender category (or based on the perpetrator's miscategorization of them)<sup>207</sup>—

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<sup>205</sup>See *supra* Part I.B.

<sup>206</sup>It might be possible to consider a trait-based approach for all five of the Title VII categories, but such a consideration is beyond the scope of this article.

<sup>207</sup>See generally Greene, *supra* note 22.

could point to this “otherness” as their race- or gender-related trait. The flexibility and breadth of this change is its key benefit and it piggy-backs to some extent on Jones’s argument that a colorism claim can be a solution to “otherness” discrimination.<sup>208</sup> In focusing on traits rather than categories, this shift would incorporate skin color and many more traits as well. Perhaps the uncategorizable plaintiff is perceived as “other” because of her skin color, the texture of her hair, her eye shape, her nose or lip shape, her clothing, her speech patterns, or all of the above. A focus on traits broadens this “otherness” claim to include all those who experience what Jones calls the “*Je ne sais quoi*’ approach to discrimination” and not just those whose skin color drives the negative treatment.<sup>209</sup> Similarly, transgender employees would be aided by this change to the extent that they face discrimination in any way related to others’ discomfort with their lack of belonging to a clear gender category. Whether it is the employee’s clothing, mannerisms, speech patterns, hairstyle, piercings, makeup, or any other gender-related trait that make the employee “uncategorizable,” a trait-based approach would capture and prohibit discrimination on this basis.

The trait-based approach, like sex stereotyping theory under existing jurisprudence, also offers protection to those whose appearance or behaviors (traits themselves) do not match stereotypes typically associated with the race or sex to which observers assign them, since in that scenario, it is decidedly the employee’s nonconforming race- or gender-related trait or traits that lead to the discrimination. Unlike sex stereotyping theory and the “perceived as” approach proposed by Leong, however, a trait-based approach allows the plaintiff to file her claim and self-identify in accordance with her lived reality while pointing to the traits she possesses that led to the discriminatory treatment. Finally, individuals who face discrimination based on performance of their race or gender identity (e.g., based on clothing, hair, speech patterns, etc.) would be protected if they can demonstrate that the performative trait is either racial or gendered in nature.<sup>210</sup>

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<sup>208</sup>See *supra* notes 168–70 and accompanying text (discussing Trina Jones’s views on color discrimination).

<sup>209</sup>*Id.*

<sup>210</sup>See generally Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 41 DUKE L.J. 365, 376–81 (1991) (arguing for protection of race-expressive traits

As described above, protected race- or gender-related traits could be physical, genetic, morphological, or performative.<sup>211</sup> They could be based on an individual's pronounced self-identification or based on others' perceptions of them so long as the plaintiff can demonstrate a causal connection between the identity trait and the discriminatory action. As a result, a trait-based approach would provide greater protection from discrimination in all of its varied forms.

### 1. Judicial and Scholarly Precedents for the Shift to Trait-Based Discrimination

The suggestion of a reinterpretation of Title VII as focused on traits rather than group membership is not inherently a new idea. Despite the original wording of Title VII, the legislative history of the Act along with the 1991 amendments<sup>212</sup> suggest the plausibility of a trait-based approach. In fact, numerous courts have used the language of "protected traits" as opposed to "protected classes"—a semantic adjustment that this article reimagines as a much more meaningful shift.<sup>213</sup> In addition, scholars have proposed a shift to a trait-based approach but with other purposes in mind.<sup>214</sup> This article suggests that adoption of that approach could also provide a broad and flexible solution to the fluid identities problem discussed here.

The original language of Title VII's antidiscrimination provision is unclear and perhaps even suggestive of a group-membership-based

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like hairstyle); D. Wendy Greene, *Title VII: What's Hair (and Other Race-Based Characteristics) Got to Do with It?*, 79 U. COLO. L. REV. 1355, 1358–59 (2008) (discussing the viability of "[c]laims involving employment decisions based on the display of racialized, mutable characteristics"); Rich, *supra* note 21.

<sup>211</sup>See generally Rich, *supra* note 21; Carbarido & Gulati, *supra*, note 150, at 1262–63 (arguing that race discrimination can be based on an employee's racial status or on how he or she "performs" her racial identity).

<sup>212</sup>42 U.S.C. § 2000e-2(m) (1991).

<sup>213</sup>See *infra* note 220 (listing cases that use the terms "protected trait" or "protected characteristic").

<sup>214</sup>See *infra* notes 224–27 and accompanying text (describing scholarship that advocates a trait-based approach).

approach.<sup>215</sup> Notwithstanding this phrasing, the legislative history suggests that Congress had a broader view of the protections it was instituting. As Greene has pointed out, a bipartisan memo that the floor managers entered into the *Congressional Record* described the protections of the 1964 Act as follows: “[T]o discriminate is to make a distinction, to make a difference in treatment or favor, and those distinctions or differences in treatment or favor which are prohibited by section are those which are based on any five of the forbidden criteria: race, color, religion, sex, and national origin.”<sup>216</sup> This memo pointing to “forbidden criteria” as opposed to protected groups supports a trait-based approach to Title VII.

In addition, the 1991 amendments included broader language that lends itself to a trait-based approach.<sup>217</sup> For example, the amendments clarified that plaintiffs may make “mixed motive” claims in which the discrimination is alleged to be a motivating factor, but not the sole factor leading to the adverse employment action, and included the following language: “[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”<sup>218</sup> In contrast to the original language, the amendment makes a slight but important change in the way it describes the Act’s protection—it no longer suggests that an individual may have only one race, color, religion, sex, or national origin, and instead provides that these characteristics may form the basis of a claim when they constitute the motivating factor for the adverse employment action. Without using the term “trait” or “characteristic,” the 1991 amendments suggest a subtle but fundamental shift in the way that victims of discrimination may bring claims and allow for the interpretive shift this article advocates.<sup>219</sup>

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<sup>215</sup>42 U.S.C. § 2000e-2(a)(1) (making it unlawful to discriminate “because of such individual’s race, color, religion, sex, or national origin.”).

<sup>216</sup>Greene, *supra* note 22 at 117 (quoting 110 CONG. REC. 7213 (1964)).

<sup>217</sup>Greene, *supra* note 22 at 118.

<sup>218</sup>42 U.S.C. § 2000e-2(m).

<sup>219</sup>*See* Univ. of Tex. Southwestern Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2539 (2013) (Ginsburg, J. dissenting) (“Section 2000e2(m) provides that an ‘unlawful employment practice is

Beyond the statute itself, there also is semantic and analytical doctrinal precedent for a shift to a trait-based approach. Although the large majority of courts tend to view Title VII as requiring membership in a protected group, numerous courts have used the phrase “protected characteristic” in reference to Title VII’s protections when group membership was not specifically at issue.<sup>220</sup> Thus, linguistically at least, courts appear prepared to make this change.

More importantly, from an analytical perspective, the U.S. Supreme Court’s acknowledgment that stereotyping constitutes discrimination in *Price Waterhouse* paved the way for a more complete move to the trait-based approach.<sup>221</sup> In concluding that Ann Hopkins faced discrimination because of her astereotypical sexual traits, the Court essentially viewed Title VII as protective of specific traits rather than membership in specific groups. As Mark Berghausen has pointed out, “[u]nder the plain text of Title VII, it is the individual’s sex, not the sex of a larger group, that the courts must seek to protect.”<sup>222</sup> The very existence of the sex or race stereotyping theory under Title VII thus serves as a tacit endorsement of a trait-based approach to discrimination. For decades, courts applying these theories have been implicitly focusing on the plaintiff’s particular sex or racial traits and not on group membership.<sup>223</sup>

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established’ when the plaintiff shows that a *protected characteristic* was a factor driving ‘any employment practice.’”) (emphasis added).

<sup>220</sup>See, e.g., *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 608–09 (1993) (using the term “protected characteristics”); *Costa v. Desert Palace*, 299 F.3d 838, 847 (9th Cir. 2002) (using the “protected characteristics” language); *Felix v. California*, No. 1:13-cv-0561 LJO SKO, 2013 U.S. Dist. LEXIS 97756, at \*12 (E.D. Cal. July 12, 2013) (using “protected characteristic” in describing the prima facie case); see also *Coker v. MARTA*, 559 F. App’x 868, 870 (11th Cir. 2014); *Noble v. Lear Siegler Servs.*, 554 F. App’x 275, 276 (5th Cir. 2014).

<sup>221</sup>See *supra* notes 139–41 and accompanying text (discussing sex stereotyping theory of discrimination). See also *Knight v. Nassau County Civil Service Comm’n*, 649 F.2d 157, 162 (2d Cir. 1981) (concluding that racial stereotyping, even if based on benign or laudable intentions, constitutes a violation of Title VII).

<sup>222</sup>Berghausen, *supra* note 24 at 1310.

<sup>223</sup>The notion that this approach was not part of Congress’s original intention in 1964 is not an obstacle to interpretive shifts when merited by societal changes. See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

The trait-based approach to Title VII has also been discussed by scholars as a solution to other Title VII protection problems. For the most part, existing scholarship has focused on trait discrimination as part of an antiassimilationist argument. As Kimberly Yuracko, Barbara Flagg, and others contend, employees should not be forced to abandon traits essential to their racial or gender identity as a condition of employment.<sup>224</sup> Consider the case of an African American woman who wears her hair in cornrows, dresses in African garb, or listens to Hip Hop rather than classical music, and is passed over for promotion while other African American women in her department who dress and act in a way that more closely resembles their white colleagues are promoted.<sup>225</sup> Under an approach that views Title VII as protecting groups against discrimination rather than individuals, the African American woman in the above example would have difficulty proving discrimination based on the employer's treatment of other African American women.<sup>226</sup> In contrast, an understanding of Title VII as prohibiting trait discrimination when those traits are substantially race-, gender-, or ethnicity-related offers protection in these cases. And that protection thus empowers employees to perform or live out their authentic social identities in the workplace.<sup>227</sup> As a result, when a trait-based approach to discrimination has been advocated in the past, it was in service of this antiassimilationist notion—to protect minorities who face adverse treatment not only because of their skin color but also because their clothing, hairstyle, residential neighborhood, musical tastes, or any number of other performative traits separating them from the majority group. However, as argued above, in addition to the important role to be

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<sup>224</sup>See Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 GEO. WASH. L. REV. 365, 366–69 (2006); see also Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 720–21 (2001); Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009 (1995); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating “National Origin” Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833, 839 (1994).

<sup>225</sup>This hypothetical woman is a composite of examples. See Flagg, *supra* note 224, at 2009–12; Carbado & Gulati, *supra* note 224, at 714–16.

<sup>226</sup>See Carbado & Gulati, *supra* note 224, at 715–16.

<sup>227</sup>See also Kramer, *supra* note 14, at 943–44 (suggesting a focus on “protected traits” as opposed to “protected groups” to facilitate his shift to a “new sex discrimination” that is focused on both status and practice).

played by trait discrimination in combating forced assimilation in the workplace, a trait-based approach to Title VII would also alleviate the problem faced by fluid identity individuals who do not neatly fit into protected categories and are thus unable to benefit fully from Title VII's protections.

## 2. Practical Problems and Considerations

While a shift to a trait-based approach to discrimination offers broader and more flexible protection for fluid identity individuals than existing solutions, it is not without its drawbacks. This section will consider some of the questions and critiques likely to arise in response to this proposal.

### *a. Which traits to protect*

The most difficult consideration in shifting to a trait-based approach to discrimination centers on how exactly to define a protected racial or sex trait. Which traits should be protected? How closely must a trait be related to race or gender to be protected? Are hairstyles and clothing race related? Are speech patterns gender related? These are among the more difficult questions presented by this approach.

In considering these questions in the context of an antiassimilation agenda, Yuracko has proposed specific and nuanced responses to different types of trait discrimination depending on the relevance of the trait to the plaintiff's ability to do his or her job.<sup>228</sup> For example, with respect to traits that are wholly irrelevant to the plaintiff's job, she advocates protection whenever the discrimination adversely impacts members of traditionally disadvantaged racial or ethnic groups.<sup>229</sup> Yuracko essentially contends that employers should not be permitted to use irrational reasons to deprive minorities of employment opportunities.<sup>230</sup>

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<sup>228</sup>See Yuracko, *supra* note 224, at 368–69.

<sup>229</sup>See *id.* at 370. In response to traits that are job relevant but where the relevance itself is a product of bias (e.g., an accent in an employee hired to do data entry), Yuracko argues that the employer should only be permitted to engage in discrimination if the trait negatively impacts an unbiased party (e.g., if “the accent impairs communication to an unbiased listener”). *Id.* at 368. Yuracko also discusses traits that fall in between job relevant and irrelevant and proposes a matrix of factors for courts to consider in assessing discrimination “based on trait requirements that are linked to soft qualifications.” *Id.* at 369.

<sup>230</sup>*Id.* at 368–69.

That approach, however, again requires a plaintiff to affiliate with a traditionally defined group, defeating the purpose of using a trait-based approach for fluid identity individuals.

In contrast, Kramer advocates a trait-based approach as part of his proposal to view sex as a practice rather than merely a status.<sup>231</sup> To that end, he focuses on protecting the ways that employees perform their gender identities at work.<sup>232</sup> In determining which gender-related practices to protect, Kramer suggests an approach modeled on religious discrimination law that allows the plaintiff to make an argument that a particular practice is essential to his or her gender identity.<sup>233</sup> Using the example of a male employee arguing that his practice of karate is essential to his masculine identity, and so his need to take time off work for karate classes should be accommodated, Kramer acknowledges the potential for overbreadth and perhaps abuse under such an approach.<sup>234</sup> He nonetheless contends that this approach furthers open dialogue between employee and employer that is a good in itself and serves Title VII's overall goals whether or not a court would ever endorse karate practice as a gender-related trait.<sup>235</sup>

For purposes of fluid identity individuals, neither approach is perfect. Some middle ground is needed. Kramer's proposal is appealing because of its focus on self-identification rather than group-affiliation, while Yuracko's approach offers a more practical and clear-cut method for courts to assess claims. I propose allowing a plaintiff to self-identify a race- or gender-related trait as the source of discrimination. If there is no objection by the employer to the categorization of the trait as related to identity, the case could move forward as usual. Where there is disagreement, however, the plaintiff could rely on sociological evidence (perhaps in the form of expert testimony) to demonstrate that he or she is not alone in identifying the particular trait at issue as inherently related to identity and that numerous individuals share this

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<sup>231</sup>See Kramer, *supra* note 14, at 946–47.

<sup>232</sup>*Id.* at 946.

<sup>233</sup>*Id.* at 946–48.

<sup>234</sup>*Id.*

<sup>235</sup>*Id.*

identification.<sup>236</sup> Where such evidence is convincing, one hopes courts would endorse the plaintiff's view.<sup>237</sup> Of course, reliance on judicial discretion creates an uncomfortable level of uncertainty. Nonetheless, given the case-specific scenarios at issue and the need to respond flexibly and in a sophisticated way to complex identity determinations, judicial discretion is perhaps the only option.<sup>238</sup>

*b. Proof problems*

In terms of practical problems, perhaps the most obvious challenge involves the changes to proof methods that will inevitably result from a shift in focus to traits rather than groups. Under existing doctrine, a plaintiff may make out a prima facie case of discrimination by showing “(1) he was within the statute’s protected class; (2) he was qualified for his position; (3) he was subjected to adverse employment action; and (4) he suffered from disparate treatment because of membership in

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<sup>236</sup>See Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELEY J. EMP. & LAB. L. 299, 341 (2012) (“[E]xpert testimony should be allowed—and even encouraged—in cases involving discriminatory language... [C]ourts should be open to hearing the opinions of linguists, anthropologists, sociologists, and psychologists who spend their careers researching the development and meaning of language and its relationship to the culture in which it is used.”); see also Susan T. Fiske & Eugene Borgida, *Standards for Using Social Psychological Evidence in Employment Discrimination Cases*, 83 TEMP. L. REV. 867 (2011); Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context: Social Cognitive Science in Employment Discrimination Cases*, 4 ANN. REV. L. & SOC. SCI. 123, 125 (2008); Jane Goodman & Robert T. Croyle, *Social Framework Testimony in Employment Discrimination Cases*, 7 BEHAV. SCI. & L. 227, 229–31 (1989); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 48–49 (2009).

<sup>237</sup>I expect that this type of trait-based approach will elicit criticism about the potential essentialization of race and sex if courts begin to identify traits that are “racial” or “gendered.” As Yuracko points out, when courts determine which traits deserve protection, that process may itself be harmful to minorities: allowing courts to define “traits as integral to group identity... serves to essentialize and define what it means to be a group member... These traits may not be authentic to the group in any deeper sense. Moreover, and more importantly, they may not be traits that group members do or should want to retain.” See Yuracko, *supra* note 224, at 384. At the same time, however, an adherence to the case-specific approach to protected traits articulated above will alleviate this danger of essentialization and reification of race or sex. In essence, I contend that we can allow individual plaintiffs to prove the race- or sex-related nature of a trait without imposing that determination on all people who bear those traits.

<sup>238</sup>See Rich, *supra* note 21, at 1170–71.

the protected class.”<sup>239</sup> To establish the fourth element, that the adverse action resulted from discriminatory treatment, “a plaintiff may point to a similarly situated comparator who was not discriminated against,” but “the comparator must be nearly identical to the plaintiff to prevent courts from second-guessing a reasonable decision by the employer.”<sup>240</sup> Of course, the “similarly situated comparator” method is not the sole way to demonstrate disparate treatment, but it has become nearly ubiquitous in discrimination cases, with courts often concluding that the absence of a valid comparator dooms the plaintiff’s case.<sup>241</sup> The very notion of a similarly situated comparator depends upon the first prong of the prima facie case—that is, the plaintiff’s membership in a protected group—because a comparator will be assessed based on his or her similar position in the company, similar qualifications, and membership in a *different* identity group. For example, in a case involving a black man alleging race discrimination, the court will expect to see evidence that a nonblack man who held a similar job in the workplace and had similar skills did not face discriminatory treatment. Absent such evidence, the court will be reluctant to allow the case to proceed to trial.<sup>242</sup>

Given the dominance of the *McDonnell Douglas* rubric in discrimination cases, some critics may point to the difficulty that plaintiffs will have in using similarly situated comparators under a trait-based approach. When a plaintiff alleges discrimination based on possession of one or more protected traits, rather than membership in a protected group, to whom should he point as a comparator? Recall the multiracial plaintiff in *Walker* who self-identified as “a multiracial person of Black, Native American, Jewish, and Anglo descent.”<sup>243</sup> The court rejected his claim as “impracticable” because his identity was so “self limiting” that all of his co-workers could be possible comparators,

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<sup>239</sup>*Caraway v. Sec’y, U. S. Dep’t of Transp.*, 550 F. App’x 704, 709 (11th Cir. 2013) (citing *Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002)).

<sup>240</sup>*Id.* (citing *Wilson v. B/E Aerospace, Inc.*, 376 F.3d 1079, 1091 (11th Cir. 2004)).

<sup>241</sup>*See id.*; *see Goldberg, supra*, note 98, at 750; *see also Denny, supra* note 98, at 366.

<sup>242</sup>*See Caraway*, 550 F. App’x at 709; *Goldberg, supra* note 98, at 750; *Denny, supra* note 98, at 366.

<sup>243</sup>*Walker v. Univ. of Colo. Bd. of Regents*, Civ. A. Nos. 90-M-932, 92-M-372, 1994 WL 752651, at \*1 (D. Colo. Mar. 30, 1994).

an unwieldy proposition.<sup>244</sup> In the alternative, a person's mixed status could mean that he was a member "of each of the protected groups with which [he has] any significant identification," making it very difficult to point to a comparator who is a member of a different group for purposes of raising an inference of discrimination.<sup>245</sup> The trait-based approach offers the plaintiff the ability to allege discrimination based on his actual race and sex traits but the lack of a clear group to which he belongs makes it difficult to compare him to others who may have some but not all of his relevant identity traits.

However, despite the dominance of the similarly situated comparator model, it is by no means required by *McDonnell Douglas* or Title VII. First, as previously discussed, *McDonnell Douglas* was careful to note that the prima facie case it detailed was only an example of a possible successful claim.<sup>246</sup> In addition, even courts that reject claims because of a lack of a similarly situated comparator, generally point out that the plaintiff also failed to "otherwise allege facts giving rise to an inference of disparate treatment."<sup>247</sup> There are, of course, numerous other ways to demonstrate discrimination—biased comments, changes in treatment when a new supervisor arrives, lack of a legitimate reason for the adverse treatment, among others. The devotion to the similarly situated comparator approach is misplaced and overstated.<sup>248</sup> In fact, there is no shortage of scholars who would like to eliminate the *McDonnell Douglas* rubric entirely, seeing it as an overly rigid and cumbersome structure that distracts from courts' general ability to make common sense determinations about the existence of

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<sup>244</sup>*Id.*; see *supra* notes 99–103 and accompanying text (discussing *Walker*).

<sup>245</sup>*Walker*, 1994 WL 752651, at \*1.

<sup>246</sup>See *supra* notes 81–94 and accompanying text (describing protected class membership as one, but not the sole, approach to proving discrimination).

<sup>247</sup>*Caraway*, 550 F. App'x at 710 (11 Cir. 2013).

<sup>248</sup>See Goldberg, *supra* note 98, at 772 ("[C]ourts' unequivocal embrace of comparators overstates comparators' revelatory powers related to discrimination in two ways. First, the heuristic is overinclusive; it does not prove as much as it is often treated as proving, at least not without important additional assumptions from the factfinder. And second, the heuristic is underinclusive; a comparator's absence does not necessarily show that discrimination has not occurred.").

discrimination.<sup>249</sup> The fact that, in some cases, courts will have to make more general assessments of an inference of discrimination without similarly situated comparators should not be an obstacle to the use of a trait-based approach to discrimination.<sup>250</sup>

Second, from a practical perspective, some may argue that courts will be reluctant to change a deeply ingrained approach to proving discrimination, in part, because of the inevitability of categorization from a psychological perspective. Human beings are constantly categorizing people and things to help process information and determine how to act and react.<sup>251</sup> This psychological reality also impacts the way legal doctrine develops and courts' approaches to understanding the world. As Martha Minnow described, "Full acknowledgment of all people's differences threatens to overwhelm us. Cognitively, we need simplifying categories . . . . Ideas that defy neat categories are difficult to hold on to, even if the idea itself is about the tyranny of categories."<sup>252</sup> While this may be true psychologically, as our societal demographics continue to change, a model of discrimination that relies on increasingly irrelevant categories will itself become irrelevant. The change proposed herein

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<sup>249</sup>See, e.g., Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2311–20 (1995); McCormick, *supra* note 83, at 160–61; Sperino, *supra* note 3, at 95–96, 123–25.

<sup>250</sup>See Laura Grenfell, *Embracing Law's Categories: Anti-Discrimination Laws and Transgenderism*, 15 YALE J.L. & FEMINISM 51, 83 (2003) (examining the Canadian approach, which does not rely on comparators).

<sup>251</sup>See Eleanor Rosch, *Human Categorization*, in STUDIES IN CROSS-CULTURAL PSYCHOLOGY 1, 1–2 (Neil Warren ed., 1977); Eleanor Rosch, *Principles of Categorization*, in COGNITION AND CATEGORIZATION 27, 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978)) [hereinafter *Rosch Principles*].

<sup>252</sup>Martha Minnow, *Justice Engendered*, 101 HARV. L. REV. 10, 64 (1987); see also Nancy Levit, *Changing Workforce Demographics and the Future of the Protected Class Approach*, 16 LEWIS & CLARK L. REV. 463, 495 (2012) ("Despite the frailties of the protected class approach, Congress and the courts are unlikely to scrap or dramatically revise the categorical framework in the near term."); McCormick, *supra* note 83 at 164 (citing *Rosch Principles*, *supra* note 251; *Krieger*, *supra* note 3, at 1188–89). ("The things in our world contain infinite variations and if we were constantly confronted with having to process the impact of each variation we would not be able to function. To cope, we define categories of things, and then quickly sort that which we encounter into those established categories. We then use the definition of the categories to explain what the 'thing' we have encountered is, and how it is likely to act or be acted upon.").

may not come quickly but it should be seen as somewhat inevitable with time.

### 3. Theoretical Challenges

From a theoretical perspective, a shift to trait-based discrimination will likely draw criticism from those who advocate a pure antistatutory justification for antidiscrimination law. If the original and continuing justification for antidiscrimination law is the need to protect historically disadvantaged groups, a shift to trait-based discrimination will move away from this purpose and may end up protecting people who are not members of those original groups.<sup>253</sup> For example, as described above, a white man who is terminated for wearing clothing associated with African American culture may have a claim under trait-based discrimination but is not a member of a historically disadvantaged group that the law was created to protect.

Despite the continued importance of antistatutory theory, however, it is undeniable that antidiscrimination law has already moved away from a pure antistatutory approach and has embraced anti-classification principles in various ways.<sup>254</sup> The availability since the early days of Title VII of reverse race and sex discrimination claims is proof of that reality, as are recent statutory enactments and Supreme Court decisions.<sup>255</sup> Moreover, a shift to trait-based discrimination would continue to focus on the existing identity characteristics covered in Title VII that are a product of antistatutory principles. The application of a trait-based approach thus undoubtedly acknowledges the historical reality of group-based oppression that necessitated antidiscrimination law's creation. In addition, as with many aspects of discrimination law, it will be necessary to rely on judicial discretion to

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<sup>253</sup>See *supra* notes 161–65 (describing antistatutory theory and problems that result from moving away from this approach to discrimination).

<sup>254</sup>See generally Areheart, *supra* note 162 (arguing that the decision in *Ricci v. DeStefano*, 557 U.S. 557 (2009), along with the passage of the Americans with Disabilities Act Amendments Act, 42 U.S.C. § 12102 (2008) and the Genetic Information Nondiscrimination Act, Pub. L. No. 110-233, 122 Stat. 881 (codified in scattered sections of 26, 29, and 42 U.S.C.) (2008), demonstrate a turn away from antistatutory principles); see also Roberts, *supra* note 162.

<sup>255</sup>Areheart, *supra* note 162, at 957–58.

uphold the antidisubordination principles while interpreting the law flexibly to meet modern societal changes.<sup>256</sup>

## CONCLUSION

In 2015, it is beyond question that “traditional” conceptualizations of race and sex no longer apply to an increasing number of Americans.<sup>257</sup> The multicultural nature of American society and perhaps, in a hopeful turn, the decrease in obvious discrimination over the last five decades, have resulted in an increase in multiracial families and individuals.<sup>258</sup> At the same time, as *Time Magazine* made clear in a recent cover story, transgender Americans are more visible than ever before and are increasingly demanding equality in all aspects of their lives.<sup>259</sup> The increasing visibility and vocalness of multiracial and transgender individuals in society and their appearance as plaintiffs in discrimination suits must necessarily challenge the dated notions of race and sex that courts have been employing to interpret Title VII. These individuals make clear that it is not always possible (or preferable) to categorize a plaintiff as being a member of any one race or sex. And the very fact that multiracial and transgender individuals exist suggests a need to rethink the membership-based view of identity that has permeated Title VII jurisprudence.

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<sup>256</sup>See Rich, *supra* note 21, at 1170–71 (trusting judges to create a “fluid, responsive inquiry”).

<sup>257</sup>See Kramer, *supra* note 14, at 913–14 (challenging the idea that there ever was a “traditional” notion of sex); Enriquez, *supra* note 51, at 380–82 (challenging the same notion for race).

<sup>258</sup>See Kevin R. Johnson, *The Legacy of Jim Crow: The Enduring Taboo of Black-White Romance*, 84 TEX. L. REV. 739, 739–40 (2006) (reviewing ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, *DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND* (2005)) (positing that the increase in interracial relationships and the growing acceptance of interracial intimacy, mixed race identity, and transracial adoption over the past half-century have drastically altered “notions of race and races”; as a result, “racial mixture promises to transform the entire civil rights agenda in the United States”); see also Greene, *supra* note 22, at 101 & n.54.

<sup>259</sup>Steinmetz, *supra*, note 53; see also Ruth Padawer, *When Women Become Men at Wellesley*, N.Y. TIMES MAG. Oct. 19, 2014, at MM34 (exploring the struggle presented by increased gender fluidity at women’s colleges).

This article has considered the similarity of problems faced by those with fluid race and fluid gender identities and argued that a unified approach to reforming Title VII is the best way forward. Although prior scholarship has proposed targeted solutions to afford protection for multiracial or transgender plaintiffs, these proposals tend to view the problem as a narrow one affecting only a segment of society. It is evident that in 2015, our collective view of identity has changed in ways that are not limited to race or sex alone. The fluidity described in this article is the new social reality.

Admittedly, neither the statutory nor the interpretive proposal described above is without obstacles, practical and theoretical. Nevertheless, the status quo is unacceptable. Moving forward, Title VII must not be applied to withhold protection from those individuals who do not neatly fit into traditional categories or to force employees into an unnatural or uncomfortable identity to serve the current interpretations of the law. Rather, a larger rethinking of social identity under Title VII is required, and multiple options should be explored as a means of addressing the fluid identity problem.

Law has both practical and expressive value.<sup>260</sup> As a result, when the legal regime imposed by courts is out of synch with societal realities, until the law changes to conform with those realities, then one or both of these two results occurs—the law loses meaning and power, and individuals’ realities are buried in service of an anachronistic law. If the law continues to see society as a series of finite identity groups, the nuances of our lived experiences will be pushed out of the legal and cultural dialogue. A legal regime that is so drastically out of synch with the realities of modern identity cannot endure. Whether the way forward is through legislative change or judicial interpretation, the future of Title VII should incorporate the fluid nature of identity.

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<sup>260</sup>See Michael Ashley Stein et al., *Accommodating Every Body*, 81 U. CHI. L. REV. 689, 752 (2014) (“[L]aws ‘make statements’ and affect the way that people internalize certain values. Law thus has the capacity to change social norms.”); see generally Elizabeth S. Anderson & Richard M. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503 (2000); Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 MICH. L. REV. 373, 377 (2009); Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).