Changing Definitions of Sex under Title VII

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Introduction

Since Title VII was passed as part of the Civil Rights Act of 1964 more than fifty years ago, American attitudes about sexual minorities[1] have changed dramatically.[2] This change has been hard-won by activists, medical professionals, social scientists, and others who have advocated for greater tolerance and social inclusion of sexual minorities in society. As is often the case, jurisprudence has slowly, but steadily, reflected changing popular opinion. Federal and state courts, as well as the executive branch, have recently recognized crucial rights for sexual minorities under equal protection principles, including the right to privacy in sexual relations in *Lawrence v. Texas*[3] and the right to marriage in *Obergefell v. Hodges*.[4]

Progress toward full legal equality for sexual minorities has been piecemeal and significant gaps in protection remain. One of the most important gaps is the exclusion of sexual minorities from Title VII's prohibition against employment discrimination "because of such indi-

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1. This article uses "sexual minorities" to describe persons whose sex, gender, sexual orientation, or other sex-based characteristics do not match those of the statistical majority. This includes gay and transgender individuals who comprise approximately 3.5% and 0.3% of the American population, respectively. Gary J. Gates, Williams Inst., *LGBT Demographics: Comparisons Among Population-Based Surveys*, at 4 (2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/lgbt-demogs-sep-2014.pdf; Gary J. Gates, Williams Inst., *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, at 1 (2011), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf. Mr. Gates' 2014 demographic analysis reviewed the National Survey of Family Growth, 2006–2010; the General Society Survey, 2008, 2010, 2012; the National Health Interview Survey, 2013; and the Gallup Daily Tracking Survey, 2014. Gates, *LGBT Demographics*, *supra*.

2. For example, the percentage of Americans who find homosexuality "morally acceptable" rose from 38% in 2002 to 63% in 2015. Following this trend, the percentage of Americans supporting gay marriage rose from 35% in 1999 to 60% in 2015. Jeffrey M. Jones, *Majority in U.S. Now Say Gays and Lesbians Born, Not Made*, Gallup (May 20, 2015), http://www.gallup.com/poll/183332/majority-say-gays-lesbians-born-not-made.aspx. Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, Gallup (May 19, 2015), http://www.gallup.com/poll/183272/record-high-americans-support-sex-marriage.aspx.

3. 539 U.S. 558, 578 (2003).

4. 135 S. Ct. 2584, 2607 (2015).

vidual's . . . sex."[5] For decades, courts and federal agencies have relied upon a blend of plain language statutory construction, congressional intent, and so-called common sense to hold that discrimination "because of sex" does not include discrimination against gay or transgender individuals.[6] Employment discrimination jurisprudence is not impervious to larger trends in society, however. There is a growing movement to reinterpret Title VII precedent and the statute's language to bring sexual minorities within its protection.[7] In making this doctrinal shift, or, more frankly, reversal, courts and federal agencies have revisited the fundamental question of how to define "sex" itself.

Part I of this article briefly explains definitions of sex used in medical and social science to establish an independent context for concepts discussed thereafter. Part II examines the evolving definition of sex in Title VII doctrine, beginning in Part II.A by looking at how the Supreme Court and the Equal Employment Opportunity Commission (EEOC) have understood the relationship between sex and gender. Part II.B discusses the way both authorities have construed the related, but distinct, connection between sex and sexual orientation. Part III addresses the apparent limits of an expanding definition of sex as the law evolves.

I. Definitions of Sex in Medical and Social Science

To determine what "sex" is in the context of the law, it is helpful to start with widely accepted definitions currently used by medical, social science, and activist communities. In these fields, sex comprises a set of biological and physiological characteristics, such as reproductive organs and hormonal chemistry with which all human beings (and most animals) are born.[8] While common perception recognizes two sexes, male and female, there is also a third sex, "intersex," that describes people born with physiological characteristics that are both male and female.[9]

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5. 42 U.S.C. § 2000e-2(a)(1) (2012). For an overview of Title VII issues related to LGBT employees, see Lisa J. Banks et al., Katz, Marshall & Banks, LLP, *Developing Law on LGBT Rights in the Workplace* (2015), http://www.kmblegal.com/sites/default/files/Lisa%20Banks_Nov%202015_Developing%20Law%20on%20LGBT%20Rights%20in%20the%20Workplace.pdf.

6. *See e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984).

7. *See* discussion *infra* Part II.

8. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 20–21 (1995); *GLAAD Media Reference Guide–Transgender Issues*, GLAAD, http://www.glaad.org/reference/transgender (last visited July 29, 2016) [hereinafter *GLAAD Guide*].

9. *See Comprehensive* List of LGBTQ+ Vocabulary Definitions*, IT'S PRONOUNCED METROSEXUAL, http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/ (last visited July 29, 2016) [hereinafter *LGBTQ+ Vocabulary*].

Gender comprises a set of socially determined behaviors, attitudes, and norms assigned to people based on their sex at birth.[10] As with sex, there are two generally recognized genders: masculine and feminine. In recent times, activists have advocated for the recognition of a wider spectrum of nuanced gender identities within and outside of these two basic categories.[11] A category that is currently gaining more attention is "transgender," which describes a person whose experienced or expressed gender does not match the one assigned at birth.[12] Its counterpart is "cisgender," which describes a person whose sex and gender assigned at birth match throughout their lives.[13] Another addition to the traditional masculine/feminine binary is "gender fluid," which describes a person who experiences and expresses both masculine and feminine gender in varying degrees or different contexts.[14]

"Sexual orientation" is the nature of one's emotional and sexual attractions to others, as defined by the biological sex of the partners.[15] Heterosexual people are emotionally and sexually attracted to people of the opposite sex; homosexual people are emotionally and sexually attracted to people of the same sex.[16] Here, as with sex and gender, recognition is growing of a richer diversity of human behavior than is captured by these two traditional categories—bisexuality comprises attraction to both opposite and same-sex people; asexuality comprises no sexual attraction to others of either sex, etc.[17] In addition to these concepts of sex, gender, and sexual orientation, there is an ongoing effort to develop and refine additional terms to describe the great variety of emotional and sexual connections between people and how we identify ourselves.[18]

It is important to note that the distinctions between and within sex, gender, and sexual orientation are often tied to history and culture.[19] While it might appear that new identities have emerged overnight, understandings of sex, gender, and sexual orientation have always shifted over time and have varied drastically in different

10. *See* Valdes, *supra* note 8, at 21–22.
11. *See, e.g.*, *id.*; *GLAAD Guide*, *supra* note 8.
12. *GLAAD Guide*, *supra* note 8. The label commonly used in the past, "transsexual," has recently been used more specifically to describe people who change their physiological and biological sex characteristics from one sex to another (through surgery, hormone therapy, etc.). *See id.* Because many transgender people are not able or do not want to undergo these physical changes, the broader, more inclusive term "transgender" is generally preferred. *See id.*
13. *LGBTQ+ Vocabulary*, *supra* note 9.
14. *Id.*
15. *Id.*; Valdes, *supra* note 8, at 22–23.
16. *LGBTQ+ Vocabulary*, *supra* note 9.
17. *See, e.g.*, *id.*
18. *See id.*; *GLAAD Guide*, *supra* note 8.
19. *See* Kevin Barry et al., *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. Rev. 507, 515 (2016).

cultures around the world.[20] Many cultures have long recognized gender fluidity or transgender, for example, as part of the spectrum of sexual identity.[21] More importantly, it is vital to recognize that while we struggle to describe or define accurately these very intimate, subjective aspects of human life, the underlying diversity of experience to which the words relate has always existed. Only the vocabulary is new.

Social and medical science, and sexual minorities themselves, have been developing increasingly precise definitions for sex, gender, and sexual orientation over the past few decades in part to better understand and protect people whose sex or gender identities do not fit conventional norms and who often struggle to explain how their appearance, behavior, desires, or psychology depart from traditionally-recognized categories.[22] Experts and activists have sought to clarify that sex is not synonymous with such categories as gender, sexual orientation, and relationship preferences, although it is obviously related.[23] The law, however, has moved much more slowly to disentangle these concepts, often conflating them or drawing hazy, even inconsistent, distinctions among them.[24]

II. Defining Sex in Title VII Jurisprudence

While social attitudes, political views, and legal doctrine are all moving toward increased recognition and protection of sexual minorities, the law has taken a unique path to a more sophisticated conception of sex, gender, and sexuality.[25] Legal doctrine has always been imprecise when engaging with sex-related concepts, often with the result (and perhaps motive) of denying legal protections to sexual minorities.[26] Unlike sociology and medicine, which are developing more granular definitions for behavior and identity, legal advocates have recently had significant success taking the opposite tack by arguing for a more capacious understanding of the fundamental concept of "sex."[27] As the law moves toward a more inclusive application of equal protection, the focus has not been on emphasizing distinctions

20. *See id.*

21. *See id.* (historical sources that recount practices in a wide variety of cultures that we now deem transgender, transvestism, or other non-conforming gender behavior).

22. *See Understanding Gender*, GENDER SPECTRUM, https://www.genderspectrum.org/quick-links/understanding-gender/ (last visited Nov. 26, 2016).

23. *See, e.g., Definitions Related to Sexual Orientation and Gender Diversity in APA Guidelines and Policy Documents*, AM. PSYCHOLOGICAL ASS'N, https://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (last visited Nov. 26, 2016).

24. *See* discussion *infra* Part II.

25. *See generally* Valdes, *supra* note 8.

26. For an in-depth analysis of this topic, see Valdes, *supra* note 8. Valdes argues that the conflation of these concepts has historically served to favor heterosexual males and its "impact on life and law is neither natural, nor neutral, nor benign." *Id.* at 8.

27. *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

between sex, gender, and sexual orientation, but rather on articulating how these concepts are interrelated.[28]

The reason for this is, in part, an accident of history. When Title VII was passed as part of the Civil Rights Act of 1964, legal and popular culture did not yet have a conception of "sex" that clearly distinguished between biological and social factors. Generally speaking, "sex" and "gender" were used interchangeably to categorize people as simply men or women.[29] It was only in the decades after 1964 that activists, medical experts, social scientists, and theorists articulated distinctions between physical biological sex, socially determined gender, and sexual orientation that came into mainstream use.[30] Prior to these developments, the word "sex" was effectively synonymous with "gender," and there was little acknowledgement of the difference between biology and behavior.[31] At its inception, "sex" in Title VII was an amorphous term, laden with interrelated, but distinct, concepts.

A. Sex and Gender

Because the relationship between sex and gender was muddled at the passage of Title VII, courts have historically struggled to parse the difference between the two when construing the statute.[32] Twenty-five years after Title VII became law, the Supreme Court articulated a construction of "because of sex" that explicitly included the concept of gender in *Price Waterhouse v. Hopkins*.[33] The Court held that "sex stereotyping," such as deeming a female employee's behavior inappropriate solely because she was a woman displaying "masculine" qualities (such as aggressiveness, etc.), was prohibited under Title VII.[34] The Court's reasoning in *Price Waterhouse* is clumsy by modern theoretical

28. *See* Stephen F. Befort & Michael J. Vargas, *Same-Sex Marriage and Title VII*, 56 Santa Clara L. Rev. 207, 213–19 (2016).

29. Eric S. Dreiband & Brett Swearingen, Jones Day, *The Evolution of Title VII—Sexual Orientation, Gender Identity, and the Civil Rights Act of 1964*, at 3 (2015), http://www.jonesday.com/files/Publication/07f7db13-4b8c-44c3-a89b-6dcfe4a9e2a1/Presentation/PublicationAttachment/74a116bc-2cfe-42d2-92a5-787b40ee0567/dreiband_lgbt.authcheckdam.pdf.

30. *See Timeline: Milestones in the American Gay Rights Movement*, PBS, http://www.pbs.org/wgbh/americanexperience/features/timeline/stonewall/ (last visited Sept. 10, 2016).

31. To the degree that the distinction between sex and gender was acknowledged, it was nearly always done in relation to those whose behavior did *not* comport with their physical sex and who were therefore labeled as deviant. *See* Valdes, *supra* note 8, at 47–51. The notion of the "unnaturalness" of a masculine woman or a feminine man is based on the premise that biological sex and conditioned gender should be consistent (female/feminine; male/masculine). *See id.*

32. Befort & Vargas, *supra* note 28, at 213.

33. 490 U.S. 228, 241–42 (1989).

34. *Id.* at 235, 250, 258. *Price Waterhouse* was not a unanimous decision, but the minority justices differed only on whether Title VII mandates a but-for causation standard. The dissenters did not challenge the majority's sex stereotyping theory. *Id.* at 258–95 (Kennedy, J., dissenting). The dissent openly conceded that "Hopkins plainly presented a strong case both of her own professional qualifications and of the presence of

standards, conflating sex and gender so completely that it purported to find reference to gender "on the face of the statute," although its own citation clearly indicated that "gender" did not appear in Title VII's text:

> Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute. In now-familiar language, the statute forbids an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment," 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 . . . sex." We take these words to mean that gender must be irrelevant to employment decisions.[35]

Notwithstanding this equivalence of sex and gender, the Court's articulation of the appropriate Title VII causation standard evinced an effort, albeit confused, to describe the relationship between the two concepts:

> In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman. In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.[36]

In these passages, the Court's articulation of sex-based concepts differs from our current understanding in two significant ways. First, the Court wholly conflates sex and gender by using the two terms as synonyms.[37] Second, the Court coins the term "sex stereotyping" for what is, in essence, our modern concept of gender (behaviors expected because of a person's biological sex).[38]

Price Waterhouse established a nascent awareness, which now appears relatively crude, that sex and gender interrelate. With our more precise contemporary sense of these concepts, we can clarify *Price Waterhouse* in this way: "sex stereotyping," i.e., holding individuals to standards of conduct based on gendered norms, is discrimination "because of sex" because gender itself is defined by expected behaviors

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discrimination in Price Waterhouse's partnership process." *Id.* at 295 (Kennedy, J., dissenting).

35. *Id.* at 239–40 (citation omitted).

36. *Id.* at 250 (footnote omitted).

37. *See id.* at 239–40.

38. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

based on one's biological sex.[39] This analysis—which concludes that "sex" in Title VII includes related characteristics, identity, or status for which sex is an essential component—has been the emerging legacy of *Price Waterhouse* in recent EEOC and federal court opinions concerning gender identity and sexual orientation.[40] In the current period between increasing protection for sexual minorities throughout law and society[41] and the inevitable day when the Supreme Court will rule directly on the question of sexual minorities under Title VII, *Price Waterhouse* is fueling the shift toward greater inclusivity in lower court and agency rulings.[42] While some decision-makers have rejected this application of *Price Waterhouse*,[43] the opinion has prompted important Title VII doctrinal developments.[44]

One of the most significant effects of *Price Waterhouse* has been growing recognition that transgender discrimination constitutes sex discrimination.[45] In 2000, the Ninth Circuit became the first federal appeals court to hold that *Price Waterhouse* mandates the inclusion of transgender individuals in the protected class of sex and gender in *Schwenk v. Hartford*,[46] which interpreted the Gender Motivated Violence Act (GMVA).[47] The court noted that following *Price Waterhouse*, "the terms 'sex' and 'gender' have become interchangeable" under both Title VII and the GMVA and held that transgender discrimination is, in essence, sex stereotyping discrimination.[48] Four years later, in *Smith v. City of Salem*,[49] the Sixth Circuit also held that discrimination on the basis of transgender identity is unlawful sex stereotyping under *Price Waterhouse*.[50] In 2011, the Eleventh Circuit joined the emerging consensus when it held in *Glenn v. Brumby*[51] that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender" because "[a] person is defined as transgender precisely

39. *See id.* at 228. In a sense, gender itself *is* "sex stereotyping," in that it is defined as the behavior, appearance, and character taught to and expected from a person's physical sex at birth. To the degree these expectations are static and imposed irrespective of a person's characteristics or preferences, they are arguably stereotypes.

40. *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000); Macy v. Holder, EEOC Doc. No. 0120120821, 2012 WL 1435995, at *5 (EEOC Apr. 20, 2012).

41. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

42. *See, e.g.*, *Schwenk*, 204 F.3d at 1201; *Macy*, 2012 WL 1435995, at *5.

43. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1223–24 (10th Cir. 2007).

44. *See, e.g.*, *Schwenk*, 204 F.3d at 1201.

45. *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

46. *Id.* at 1201–03.

47. *Id.* at 1192; 42 U.S.C. § 13981 (2000).

48. *Schwenk*, 204 F.3d at 1201–02.

49. 378 F.3d 566 (6th Cir. 2004).

50. *Id.* at 574–75.

51. 663 F.3d 1312 (11th Cir. 2011).

because of the perception that his or her behavior transgresses gender stereotypes."[52]

The EEOC has arguably been the most active tribunal, relying on *Price Waterhouse* in recent years to expand statutory protections; the agency's Title VII jurisprudence for federal employees illustrates the evolution toward a more comprehensive definition of "because of sex." For nearly thirty years, the EEOC's position was that "sex" did not include transgender status.[53] Five years before *Price Waterhouse*, the EEOC decided *Casoni v. USPS*,[54] which appears to be its first opinion involving a "transsexual" employee. It held that "nothing in the legislative history of Title VII indicates that such claims were intended to be covered by its provisions."[55] Even after *Price Waterhouse* was decided in 1989, the EEOC declined for many years to extend the logic of that case's sex and gender analysis to claims of transgender discrimination.[56]

In 2012, however, the EEOC issued a Strategic Enforcement Plan (SEP) that included "coverage of lesbian, gay, bisexual and transgen-

52. *Id*. at 1316–17. The Eleventh Circuit noted that several federal district courts also found that *Price Waterhouse*'s sex stereotyping analysis extended sex discrimination protection to transgender persons. *Id.* at 1317–18 (listing cases from federal trial courts in Pennsylvania, New York, the District of Columbia, and Texas); *cf.* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1223–24 (10th Cir. 2007) ("transsexuals" are not *per se* a protected class under Title VII, while acknowledging that some courts have permitted claims to proceed under *Price Waterhouse*'s sex stereotyping theory).

53. *See, e.g.*, Kowalczyk v. Brown, EEOC Doc. No. 01942053, 1994 WL 744529 (EEOC Dec. 27, 1994); Casoni v. U.S. Postal Serv., EEOC Doc. No. 01840104, 1984 WL 485399 (EEOC Sept. 28, 1984).

54. *Casoni*, 1984 WL 485399.

55. *Id.* at *2.

56. Most EEOC cases between 1984 and 2012 offered little independent rationale for their holdings. *See, e.g.*, *Kowalczyk*, 1994 WL 744529, at *2 (summarily rejecting transsexualism and homosexuality as grounds for sex discrimination claims). These cases often simply cited the pre-*Price Waterhouse* case, Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984), without further elaboration. *Id.* In *Ulane*, the Seventh Circuit held that Title VII did not provide discrimination protections to "transsexuals" because Congress did not intend "such a broad sweeping of the untraditional and unusual within the term 'sex' as used in Title VII." *Ulane*, 742 F.2d at 1086. Reversing the lower court, which found that transsexual discrimination *was* "because of . . . sex," *Ulane* took shifting positions that evinced discomfort with the social implications of protecting sexual minorities. *See id.* at 1084. The court first claimed to construe Title VII according to "ordinary, common" meanings of the statutory words, but then focused on the legislative intent of the sex discrimination provision without much explanation. *Id.* at 1085. Citing Congress's failure to pass amendments to Title VII that specifically protect homosexuals and transsexuals (two groups the court purported to see distinctly while nonetheless discussing together throughout), the court determined that Congress had implicitly rejected extending Title VII to these individuals. *Id.* at 1085–86. *Ulane*'s analysis of the congressional intent behind including sex as a protected classification rested on the premise that "sex" was added to the statute as a joke or scuttling tactic that merited no serious intent or debate. *See id.* For a refutation of this standard account, which is almost ubiquitous in legal writing, see Robert C. 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 (1997).

der individuals under Title VII's sex discrimination provisions" as one of the agency's national priorities.[57] Just a few months later, the EEOC fulfilled that promise in *Macy v. Holder*.[58] Reaching past its own more recent precedents to rely heavily on *Price Waterhouse*, the EEOC held that sex discrimination under Title VII includes discrimination on the basis of gender identity.[59] *Macy* observed that *Price Waterhouse* and subsequent federal decisions established that "sex" and "gender" are "used interchangeably to describe the discrimination prohibited by Title VII."[60] The EEOC noted

> That Title VII's prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.[61]

The agency went on to conclude:

> When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision."[62]

Macy thus reflects distinctions between sex and gender that have long been well established outside the law and provides a straightforward analysis of how the two fundamental concepts relate in the context of discrimination: because bias against gender identity, i.e., transgender status, is based on attitudes about how people should behave

57. U.S. Equal Emp't Opportunity Comm'n, Strategic Enforcement Plan FY 2013–2016 (2012), https://www.eeoc.gov/eeoc/plan/upload/sep.pdf.

58. EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

59. *Id.* at *5–11.

60. *Id.* at *5.

61. *Id.* at *6.

62. *Id.* at *7 (citing Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)). The EEOC's evolving sophistication about sexual minorities is also apparent in the shift from *Casoni*'s discussion of "transsexuals" to *Macy*'s discussion of the larger "transgender" community. *Compare* Casoni v. U.S. Postal Serv., EEOC Doc. No. 01840104, 1984 WL 485399, at *2 (EEOC Sept. 28, 1984) *with Macy*, 2012 WL 1435995, at *7.

based on their biological sex, disparate treatment on this basis is gender discrimination.[63] Under *Price Waterhouse*, gender discrimination is included within sex discrimination and is therefore prohibited by Title VII.[64] As an EEOC decision, *Macy* is not precedential authority for federal courts, but the opinion has bolstered extension of *Price Waterhouse* by its persuasive force.[65] Since *Macy*, the EEOC has pursued federal court claims on behalf of private sector transgender employees and has settled several such cases.[66] While *Macy* was ostensibly grounded in a purely logical application of *Price Waterhouse* and the basic concepts of sex and gender, *Price Waterhouse* had been precedent for twenty-three years when *Macy* was decided. In that time, as discussed above, many federal courts and the EEOC itself had not found that *Price Waterhouse* required the inclusion of transgender status within "sex."[67] The fitful development of the law indicates that routine application of precedent alone is not shaping the emerging definitions of sex under Title VII. Instead, legal decision-makers are revisiting long-standing precedent and finding that general principles can be transformative (maybe even radical) if taken to their fullest logical extent to protect some sexual minorities under Title VII.

Some observers might protest that these developments reveal a willingness to bend the law into whatever ideological direction certain groups might prefer. Yet these developments can also be viewed as the delayed vindication of equal protection principles mandated by Title VII's language. As the EEOC acknowledged in *Macy*, it is almost certain that Congress did not contemplate transgender individuals during the passage of Title VII.[68] *Macy* notes, however, that the Supreme Court has made clear that the content of a statutory provision must ultimately guide its interpretation:

> To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972 were likely not considering the problems of discrimination that were faced by transgender individuals. But as the Supreme Court recognized in *Oncale v. Sundowner Offshore Services, Inc.*: "[S]tatutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably com-

63. *See Macy*, 2012 WL 1435995, at *7.

64. *See Price Waterhouse*, 490 U.S. at 239–48.

65. *See, e.g.,* Roberts v. Clark Cty. Sch. Dist., 312 F.R.D. 594 (D. Nev. 2016); Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509 (D. Conn. 2016).

66. *See Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (July 8, 2016), http://www.eeoc.gov/eeoc/litigation/selected/lgbt_facts.cfm [hereinafter *EEOC LGBT Fact Sheet*] (noting three pending EEOC lawsuits on behalf of transgender employees and two recent settlements as of July 2016).

67. *See supra* text accompanying notes 53–56. Surprisingly, *Macy* lacks any discussion of these prior decisions by the EEOC and federal courts. *See* Macy v. Holder, EEOC Doc. No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

68. *Id.* at *9.

> parable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.[69]

Although the increased visibility of transgender persons is a relatively new phenomenon in American society, discrimination on the basis of transgender identity fits squarely within *Price Waterhouse*'s sex stereotyping analysis.[70] As the federal district court in *Fabian v. Hospital of Central Connecticut* noted, "There is nothing unplain, untraditional, unusual, or new-fangled about this understanding. It is simply attentive to what the words in the statute mean, and what they have meant since long before the statute was formulated."[71]

B. Sex and Sexual Orientation

While the relationship between "sex" and "gender" under Title VII has been complicated by the fact that the two words were used interchangeably for decades, the relationship between sex and sexual orientation in discrimination law has been complicated by courts' unwillingness to acknowledge any intrinsic connection between the latter two concepts. This refusal has been based, in part, on deeply held biases against homosexuality and judicial reluctance to protect gay and lesbian employees without explicit congressional instruction.[72]

The first Supreme Court Title VII case addressing sexual orientation, *Oncale v. Sundowner Offshore Services, Inc.*,[73] arose in complex factual circumstances that did not squarely require the Court to decide whether "sex" includes sexual orientation.[74] The male plaintiff in *Oncale* worked on an oil rig and had been targeted for aggressive harassment by other male employees, including physical assault "in a sexual manner" and threats of rape.[75] In a relatively short opinion, the Court held that same-sex harassment was actionable under Title VII if the plaintiff could show that the harassment was "because of sex."[76] *Oncale* both expanded and contracted the protections of Title VII by rejecting the per se rule barring same-sex harassment claims while

69. *Id.* at *9–10 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998); Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C, 462 U.S. 669, 679–81 (1983) (rejecting argument that discrimination against men does not violate Title VII while recognizing that discrimination against women was plainly the principal problem Title VII sought to combat)).

70. Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).

71. Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 526 (D. Conn. 2016).

72. *See* Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698 (7th Cir. 2016).

73. 523 U.S. 75 (1998).

74. *See generally id.*

75. *Id.* at 77.

76. *Id.* at 79–80.

simultaneously rejecting the per se rule that sexualized harassment was, in itself, sex discrimination.[77]

While the take-away headline from *Oncale* was that Title VII prohibited same-sex harassment, the ruling was more limited in its protections of gay and lesbian employees than it might have been. The Court carefully avoided expressly protecting employees on the basis of sexual orientation, focusing instead on the harasser's sexual orientation (consistent with the sexual desire model of opposite-sex harassment).[78] As a result, the opinion failed to provide meaningful protections for gay and lesbian employees in two ways. First, *Oncale* did not affirmatively recognize any cause of action for plaintiffs targeted for workplace humiliation and assault because of their actual or perceived sexual orientation.[79] Second, because the Court focused on the alleged harasser's sexual orientation, *Oncale* did not clarify whether the plaintiff could prevail on a Title VII claim if his co-workers actually identified as heterosexual and had used the threat of sexual violence only to bully the plaintiff.[80] In short, *Oncale* primarily applied the sexual desire model of sexual harassment to gay harassers, while giving some nominal mention of same-sex harassment motivated purely by sex-based animus. It did not, and did not purport to, address whether sexual orientation discrimination is sex discrimination.

Following *Oncale*, popular opinion about sexual orientation drastically changed and the Supreme Court issued three landmark decisions explicitly recognizing the privacy interests and marriage rights of gays and lesbians.[81] The Court, however, has yet to state that Title VII prohibits discrimination on the basis of sexual orientation. In the absence of such a ruling, courts have reached a variety of conclusions.[82]

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77. Before *Oncale*, most litigants and scholars assumed that all sexualized harassment was "because of sex" under Title VII. Following the decision, there was a distinct requirement to show that the conduct was motivated by the sex of the plaintiff, separate from its sexual nature. *See* David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PENN. L. REV. 1697, 1701 (2002).

78. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

79. *Id.*

80. *Id.* The extremely scant account of the facts in *Oncale* suggests that the Court did not want to delve into the specifics of the sexual orientation questions at issue. Single-sex environments that involve harassment and assault raise complicated issues of real and perceived gender identity and sexual orientation. It is perhaps unsurprising that the Court's analysis was as abstract as possible under the circumstances.

81. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 133 S. Ct. 2675 (2013); Lawrence v. Texas, 539 U.S. 558 (2003).

82. *Compare, e.g.*, Smith v. City of Salem, 378 F.3d 566, 571 (6th Cir. 2004) (homosexual employee properly stated a Title VII sex discrimination claim where he alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind employer's adverse actions); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (same); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (claim for sex discrimination could be grounded in comments targeting gay man for "effeminate behavior," but dismissing

Just as the EEOC stepped out ahead of many federal courts on transgender protections under Title VII in *Macy*, the agency recently took a strong stance on sexual orientation discrimination in *Baldwin v. Foxx*.[83] In an exceptionally careful and comprehensive opinion, *Baldwin* held that "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII."[84] In the EEOC's view, "'[s]exual orientation' as a concept cannot be defined or understood without reference to sex," and sexual orientation discrimination is therefore "premised on sex-based preferences, expectations, stereotypes, or norms."[85] Consistent with the trend toward more detailed and precise theoretical explications of sex and gender, *Baldwin* articulated three descriptions of the "inescapable link" between sex discrimination and sexual orientation discrimination, all of which bring the latter within the protections of the former.[86]

First, "[s]exual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex."[87] The EEOC provided the example of a female employee who displays a photo of her female spouse and is suspended, whereas a male co-worker who does the same thing (displays a photo of his female spouse) faces no discipline.[88] In this scenario, the

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claim because sex stereotyping theory had not been advanced before trial court), *with* Spearman v. Ford Motor Co., 231 F.3d 1080, 1084–85 (7th Cir. 2000) ("Congress intended the term 'sex' to mean 'biological male or biological female,' and not one's sexuality or sexual orientation. Therefore, harassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII.") (citation omitted); Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) (no cause of action under Title VII for claim of sexual orientation harassment); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (discharge for homosexuality not prohibited by Title VII); Oiler v. Winn–Dixie Louisiana, Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002) (discrimination on the basis of sexual preference or orientation is not actionable under Title VII because it is not discrimination based on a person's "sex"); Mims v. Carrier Corp., 88 F. Supp. 2d 706, 714 (E.D. Tex. 2000) ("[n]either sexual orientation nor perceived sexual orientation constitute protected classes under the Civil Rights Act."); Broadus v. State Farm Ins. Co., No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 n.2 (W.D. Mo. 2000).

Due in part to the unsettled nature of the law in this area, many LGBT advocates have pursued explicit federal legislation to protect LGBT employees, such as the Employment Non-Discrimination Act and, more recently, the Equality Act, H.R. 3185, 114th Cong. (2015), which would remove the issue from judicial interpretation. These efforts are ongoing and it is not yet clear how they will overlap with or disrupt developments related to Title VII interpretation. *See The 2016 Election: Know the Facts About the Equality Act*, GLAAD, http://www.glaad.org/vote/topics/equality-act (last visited Oct. 15, 2016).

83. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

84. *Id.* at *5.

85. *Id.*

86. *Id.*

87. *Id.*

88. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).

female employee has been singled out for worse treatment simply because of her sex.[89] This conception of sexual orientation discrimination is not focused on the nature of sexual orientation as an extension of personal identity or any other theory of sexuality as an innately sex-based characteristic. Instead, the analysis is purely disparate treatment based: two workers who do the very same thing face different consequences because of their sex.[90] The EEOC noted that the same analysis would hold true if disparate treatment were directed at a straight employee disciplined for displaying a photo of a spouse and a gay employee was not.[91]

Second, "[s]exual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex."[92] Here, the EEOC drew on the Title VII associational discrimination analysis in the context of race discrimination claims in which an employee suffers adverse actions for associating with people of a certain race.[93] The EEOC reasoned that same-sex relationships are defined by association with others, and bias against such associations is clearly sex-based if derived from reactions to the sex of the people involved.[94]

Third, "[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes."[95] This rationale builds directly on *Price Waterhouse*, which held that Title VII prohibits discrimination related to gender stereotypes about what "feminine" behavior for women and "masculine" behavior for men entails.[96] The EEOC noted that discrimination against gay men and lesbians is "often, if not always, motivated by a desire to enforce heterosexually defined gender norms."[97] Bias against homosexuality is grounded in an idea of what "real" men and women are, or should be, and what behavior is acceptable from each with regards to sexual or romantic desire. Discrimination against gay men and lesbians therefore fits comfortably within the gender stereotyping behavior that the Supreme Court has already acknowledged is prohibited under Title VII.[98]

Baldwin explicitly stated that the EEOC was not crafting a new definition of "sex" to "create a new class of covered persons," but was

89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at *6.
93. Baldwin v. Foxx, EEOC Doc. No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).
94. *Id.*
95. *Id.* at *7.
96. *Id.*; Price Waterhouse v. Hopkins, 490 U.S. 228, 254 (1989).
97. *Baldwin*, 2015 WL 4397641, at *8 (citing Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).
98. *See Price Waterhouse*, 490 U.S. at 258.

simply logically applying the underlying principles of sex discrimination to the claims of gay and lesbian employees.[99] This explanation might be a strategic attempt to minimize controversy following the decision, which the EEOC acknowledged is contrary to district court decisions that have summarily rejected the theory that sexual orientation discrimination falls within sex discrimination.[100] However, the claim is consistent with the opinion's analysis. The three grounds of reasoning articulate separate, but related (and perhaps occasionally overlapping), bases for the legal conclusion cast within existing Title VII doctrines. The opinion makes no great contortions; if anything, the analysis is exceedingly simple and straightforward. Within *Baldwin*, any disparate treatment based on another person's conception of what sex or gender should mean constitutes, quite literally, sex discrimination. What pictures an employee may display at a workstation (such as that of a same-sex spouse), with whom the employee may associate during the employee's free time (such as a same-sex romantic or sexual partner), and what sex or gender the employee generally prefers for relationships are all distinctions turning on the employee's sex and consequent gender expectations.

Baldwin does not provide a complete definition of "sex" within the law and has limited persuasive authority.[101] At its heart, it holds that sexual orientation is intrinsically related to one's sex because we define orientation on the basis of the sexual identities of the people involved. In this conclusion, the EEOC adhered to Title VII's plain language and the fundamental concepts involved to arrive at an outcome consistent with the larger trend toward greater rights and protections for gay and lesbian employees. It is true, however, that the definition of sex under *Macy* and *Baldwin* is certainly broader than Congress contemplated in 1964 and that some courts have found since.

In an effort to shape the law in this area, the EEOC has increased its litigation efforts on behalf of sexual minorities in the private sector.[102] As of July 2016, the EEOC had one sexual orientation lawsuit pending in

99. *Baldwin*, 2015 WL 4397641, at *9.

100. *Id.* at 8–9.

101. As noted above, EEOC decisions are not binding authority on federal courts. Burrows v. Coll. of Cent. Fla., No. 5:14-CV-197-OC-30PRL, 2015 WL 5257135, at *2 (M.D. Fla. Sept. 9, 2015) (denying a motion for reconsideration based on the EEOC's decision in *Baldwin*). One 2016 decision from a Mississippi district court even goes so far as to essentially deny *Baldwin*'s holding that federal agencies must process sexual orientation claims as sex discrimination claims. *See* Brown v. Subway Sandwich Shop of Laurel, Inc., No. 2:15-CV-77-KS-MTP, 2016 WL 3248457, at *2 (S.D. Miss. June 13, 2016) (asserting *Baldwin*, though "involving a discrimination claim based on sexual orientation, explicitly takes no position on the merits of the claim and resolves only timeliness and jurisdictional issues," without acknowledging that said "jurisdictional" issue was whether sexual orientation discrimination was sex discrimination).

102. *See EEOC LGBT Fact Sheet*, *supra* note 66.

federal district court in Pennsylvania,[103] relying on *Baldwin* and three lawsuits on behalf of transgender employees pending before federal district courts in North Carolina, Michigan, and Louisiana.[104] At the appellate level, the EEOC has filed numerous amicus briefs in the past two years, including cases before the Second, Fifth, and Eleventh Circuits, urging federal circuit courts to adopt its construction of Title VII.[105]

Baldwin may very well herald the future of Title VII jurisprudence for sexual orientation discrimination, but a recent opinion from the Seventh Circuit, *Hively v. Ivy Tech Community College*,[106] shows that some courts may remain reluctant to adopt the EEOC's conclusion that such discrimination is per se sex discrimination without direct guidance from Congress or the Supreme Court.[107] In *Hively*, the Seventh Circuit acknowledged that it could summarily dispatch a Title VII sexual orientation claim under precedent from *Ulane v. Eastern Airlines*,[108] an oft-cited case (pre-dating *Price Waterhouse*) that rejected sexual orientation claims under Title VII.[109] Mindful of the increasing chaos in sexual orientation case law, however, and of the potentially explosive impact of *Baldwin* on federal courts going forward, the court declined to take this route. Instead, it discussed at length how district and circuit courts have used sex stereotyping doctrine to reach some, but not all, discrimination against homosexuals, and concluded that *Price Waterhouse* alone cannot overturn precedents that rejected sexual orientation as a sex-based characteristic.[110]

Hively is a curious exercise in jurisprudence. It openly admits that the court is committed to a line of legal reasoning that grows ever more "arbitrary and unhelpful" and "paradoxical" over time, which it readily accepts might "not hold up under future rigorous analysis."[111] As for its view of *Baldwin*, the court also appears to acknowledge that the EEOC has staked a clear and cogent position by holding that sexual orientation discrimination is per se sex discrimination, but inexplicably stops short of joining district courts that have adopted this position.[112] Ultimately professing itself helpless against *Ulane's* holding that Title VII

103. EEOC v. Scott Med. Health Ctr., EEOC Doc. No. 2:16-cv-00225-CB (W.D. Pa. filed Mar. 1, 2016).

104. EEOC v. Bojangles Rests., Inc., EEOC Doc. No. 5:16-cv-00654-BO (E.D.N.C. filed July 6, 2016); EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., EEOC Doc. No. 2:14-cv-13710-SFC-DRG (E.D. Mich. filed Sept. 25, 2014); Broussard v. First Loan Tower LLC, EEOC Doc. No. 2:15-cv-01161-CJB-SS (E.D. La. filed Apr. 13, 2015).

105. *See EEOC LGBT Fact Sheet*, *supra* note 66.

106. 830 F.3d 698 (7th Cir. 2016).

107. *Id.* at 701–02.

108. 742 F.2d 1081 (7th Cir. 1984).

109. *Id.* at 1087.

110. *Hively*, 830 F.3d at 717.

111. Hively v. Ivy Tech Cmty. Coll., 830 F.3d 698, 712, 714 (7th Cir. 2016).

112. *Id.* at 702, 718.

does not protect sexual orientation, *Hively* makes multiple overt pleas to the Supreme Court and Congress to clarify the law.[113]

Two things become increasingly clear in light of *Hively* and the EEOC's continued pursuit of an aggressive litigation and amicus strategy on the issue of protection for sexual minorities. First, notwithstanding the Seventh Circuit's reluctance to take the first leap, some federal appellate courts will almost certainly adopt the agency's interpretation of Title VII and recognize sexual orientation and gender identity discrimination as cognizable claims. Second, as the EEOC's analysis builds momentum in the federal judiciary, the Supreme Court will soon address the reach of "sex" in Title VII.

III. The Limitations of Sex Discrimination under Title VII Going Forward

If recent trends in lower courts and the EEOC portend the future of Title VII doctrine, with *Price Waterhouse* leveraged on behalf of increasingly inclusive anti-discrimination doctrine, the question arises of how far Title VII's "because of sex" language will extend. How attenuated can a characteristic be from biological sex and still come within Title VII's protective reach? In the context of sexual orientation, for instance, is an asexual employee who openly identifies as having no sexual attraction to individuals of any sex or gender discriminated against "because of sex" if a supervisor believes asexuality is unnatural and terminates the employee? Under the recent application of *Price Waterhouse* in *Macy* and *Baldwin*, that employee's Title VII claim might prevail if the employee can show that the supervisor's animus was based on the sex stereotype that a "real woman" (or "real man")

113. *Id.* at 718. The prevarication in *Hively* is particularly interesting in light of the Seventh Circuit's decision in 2014 to refrain, at the request of the EEOC itself, from categorically rejecting the *Price Waterhouse*-based rationale for sexual orientation discrimination. In *Muhammad v. Caterpillar, Inc.*, 767 F.3d 694 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014), the trial court rejected the plaintiff's Title VII sexual orientation discrimination claim on the ground that Title VII does not prohibit sexual orientation discrimination; the appellate panel affirmed. *Muhammad*, 767 F.3d at 697. When the plaintiff petitioned for rehearing, the EEOC wrote an amicus brief arguing that, regardless of its determination on rehearing, the panel should remove statements that Title VII's prohibition of discrimination on the basis of sex does not include discrimination on the basis of sexual orientation. Brief of U.S. Equal Emp't Opportunity Comm'n as Amicus Curiae in Support of Reh'g, Muhammad v. Caterpillar, Inc., 767 F.3d 694, 697 (7th Cir. 2014), *as amended on denial of reh'g* (Oct. 16, 2014), http://www.eeoc.gov/eeoc/litigation/briefs/caterpillar2.html. The brief argued that the court's conclusion on this issue was based on precedents overruled by *Price Waterhouse*. According to the EEOC, *Price Waterhouse* rejected the narrow definition of sex that characterized decisions from earlier Title VII cases involving sexual orientation. Brief of U.S. Equal Emp't Opportunity Comm'n, *supra*. Although the panel chose not to rehear the case, it amended the original opinion to remove its original statements regarding the scope of Title VII coverage and affirmed summary judgment for the employer on other grounds. *Muhammad*, 767 F.3d at 700.

must be sexually attracted to others. The argument is cogent, but does not fit as neatly into *Price Waterhouse*'s transgender or homosexuality analysis.

Even further attenuated might be the case of an employee who engages in sexual relationships that are nontraditional not by virtue of the sex or gender of the others involved, but because of the nature of the relationship itself—an openly polyamorous employee, for example, or perhaps even an employee who has non-consensually non-exclusive sexual partners, such as someone "cheating" on a spouse or partner. If a supervisor takes adverse action against the employee on the basis of such sexual practices, or if a co-worker engages in harassment because the co-worker believes the behavior is offensive, has the employee suffered discrimination "because of sex"? Does "because of sex" include not only gender and sexual orientation, but also sexual activity? Even with a broader interpretation of *Price Waterhouse* gaining traction, the answer is likely no. While "sex" in everyday speech can be shorthand for sexual activity, the distinction between sex-as-identity and sex-as-sexual activity has historical and conceptual significance that courts are not likely to abandon. Discrimination law has long distinguished between immutable characteristics and what might be deemed preferences or practices. The categories protected by Title VII—race, color, religion, sex, and national origin—are immutable, involuntary, or spiritual in character. And while gender identity and sexual orientation both fit at least one of these criteria, mere sexual activity, on its own, does not. Even under a broad reading of Title VII, a plaintiff who faced adverse action or harassment because of sexual activity would have no per se protections under the statute and could prevail on a sex discrimination claim only by showing that the treatment was different than that of other employees of another sex or was related to sex stereotypes about appropriate sexual behavior for people of a particular sex.

In sum, the most reasonable and realistic limits to the definition of "sex" under Title VII are characteristics relating to identity that are defined themselves in relation to a person's physiological sex. Under current understandings in medicine, social science, and human rights advocacy, these characteristics include any and all gender identities and sexual orientations. This more robust and more logical interpretation of "sex" remains rooted in the text of the statute and the anti-discrimination principles of Title VII.

Conclusion

In light the EEOC's decisions in *Baldwin* and *Macy*, it has become clear that the most significant expansion of the legal definition of "sex" occurred not in the 21st century, but at the close of the 20th with the 1989 Supreme Court ruling in *Price Waterhouse*. The consequences of that expansion were perhaps unforeseen, but followed organically

from the Court's language and concepts. Today, scientific and activist communities clearly distinguish between sex and gender. When *Price Waterhouse* was decided, however, the understanding of these concepts was less sophisticated, and the Court accepted, with little analysis, the notion that sex stereotyping (encompassed today within the concept of gender) could comprise sex discrimination. Because the link between sex and gender was established with a minimum of rhetoric or ideological precision, there is little in the opinion to prevent contemporary legal actors from filling in these broad ideas. If sex discrimination includes any disparate treatment that relates to someone's perception of an employee's sex or gender—including what they are allowed to do, how they should behave and dress, and with whom they should engage in sexual or romantic relationships—there is no logical basis for leaving any sexual or gender identity outside the bounds of protection because these distinctions are, like the ones already accepted, undoubtedly sex- or gender-based.

Title VII's plain language allows for and arguably invites a broad reading of the word sex because it prohibits discrimination "because of sex." To the extent that one's sex provides the basis for a number of other identity labels—feminine, masculine, transgender, homosexual, heterosexual, asexual, etc.—these concepts are inextricably linked to sex in the most basic sense. Indeed, our very idea of gender or sexual orientation only has meaning "because of sex" in relation to the perception of, and attitudes about, biological or physiological sex.

While these connections might strike some observers as too philosophical, or too far removed from Congress's original intent, or from popular opinion, the relationship among these ideas is fundamentally reasonable. In the last few decades, the Supreme Court, the EEOC, and federal and state courts have steadily expanded protection for sexual minorities and developed a more holistic understanding of how sex is the crucial conceptual origin for gender and sexual orientation. In effect, jurisprudence is moving toward the principle that biases fundamentally related to a person's sex, whether directly or indirectly through gender or sexual orientation, violate the spirit of equal protection and the principles of anti-discrimination laws. A good faith reading of this fundamental concept naturally results in expanding the claims courts will recognize.

Whether the law has improperly "expanded" its definition of sex, or has just become more sophisticated about understanding how sex anchors other characteristics of identity, is debatable. In terms of equal rights, equal protection, and equal dignity in the workplace and under the law, the trend has undeniably expanded the number of Americans who receive important workplace protections. The doctrinal shift currently underway has not come from the abandonment of common sense or traditional statutory construction. Beginning

with *Price Waterhouse*, it has instead come from a desire to accurately understand how sex manifests in different aspects of identity and our social relationships with each other. With more careful consideration of the realities of sexual identities, judges and agencies continue to develop a more just and intellectually honest approach to fulfilling the promise of Title VII's anti-discrimination principles.