2012

Transgenderless

Stevie V. Tran

Elizabeth M. Glazer
Maurice A. Deane School of Law at Hofstra University

*TRANS*GENDERLESS

STEVIE V. TRAN*
ELIZABETH M. GLAZER**

INTRODUCTION

Legal protection from discrimination on the basis of gender identity has been reserved for perfect gender-nonconformists.[1] These are plaintiffs such

* J.D. Candidate, 2013 and Hofstra LGBT Rights Fellow, Maurice A. Deane School of Law at Hofstra University; B.A., Political Science, Arizona State University, 2009.

** Associate Professor of Law and Co-Director of the Hofstra LGBT Rights Fellowship, Maurice A. Deane School of Law at Hofstra University. The authors wish to thank Sacha Coupet and Ilana Rubin for offering helpful insights about the ideas contained in this Article.

[1] In this Article, unless otherwise indicated, "sex" refers to "the anatomical and physiological distinctions between men and women," while "gender" refers to "the cultural overlay on those anatomical and physiological distinctions." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995) [hereinafter Case, *Disaggregating Gender from Sex and Sexual Orientation*]. On the basis of its definition of "gender," this Article defines "gender-nonconforming" as the failure of an individual to behave in conformity with the cultural expectations associated with that individual's sex (or the sex that others assume applies to that individual). In addition, this Article employs the term "transgender" to describe the "broad range of people 'whose gender identity or expression does not conform to the social expectations for their assigned sex at birth.'" Sue Landsittel, Commentary, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 NW. U. L. REV. 1147, 1151 (2010) (quoting Paisley Currah, Richard M. Juang & Shannon Price Minter, *Introduction* to TRANSGENDER RIGHTS vii, xiv (Paisley Currah et al. eds., 2006)). The term "transgender" has been used as an "umbrella term" that "encompasses . . . many different ways of being." *Id.* at 1152; *see also* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 264–73 (2005) (describing a wide range of transgender identities and experiences). Thus, someone who is gender-nonconforming could be considered transgender, but someone who is transgender may not necessarily be considered gender-nonconforming. This Article honors the apparent preference of transgender advocates that the term be assigned a broad meaning by using "transgender" as an umbrella term. *See* Elizabeth M. Glazer & Zachary A. Kramer, Trans*itional Discrimination*, 18

as Jimmie Smith[2] and Phelicia Barnes,[3] who were able to state actionable claims under Title VII's prohibition against employment discrimination on the basis of sex because they were perfectly gender-nonconforming men[4]—that is, individuals who behave like women but who are "really" (according to the courts that decided their cases) men.[5] Relying on the Supreme Court's decision in *Price Waterhouse v. Hopkins*—which expanded the scope of Title VII's prohibition against sex discrimination to cases in which plaintiffs experienced discrimination for failing to conform to stereotypical norms about masculine and feminine behavior[6]—the *Barnes* and *Smith* courts offered protection to transgender victims of employment discrimination.[7] The protection of what this Article calls "perfect" gender-nonconformists such as Smith and Barnes is an important step toward protecting transgender people from discrimination.

TEMP. POL. & CIV. RTS. L. REV. 651, 652 n.8 (2009) (defining the term "transgender" broadly). The abbreviated term, "trans," is used as broadly as this Article's definition of transgender. The term "transsexual," however, is narrower, and this Article defines it as "a person who desires to alter bodily sex characteristics through hormone treatment or sex reassignment surgery." Landsittel, *supra*, at 1152 (citing Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of your First Transgender Client*, 66 TEX. B.J. 558, 558–59 (2003)); *cf.* Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 2 (2003) (using "transsexual" to "refer to people who *identify as [transsexual]* and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status, which is an even narrower definition because of the self-identification requirement) (emphasis added). Finally, for a discussion of the prevalence of "notes on terminology"—such as this one—in legal scholarship relating to sex and gender, see Elizabeth M. Glazer, *Sexual Reorientation*, 100 GEO. L.J. (forthcoming Apr. 2012).

[2] Smith v. City of Salem, 378 F.3d 566, 578 (6th Cir. 2004) (holding that Jimmie Smith, a pre-operative male-to-female transsexual who alleged that he was penalized for expressing feminine qualities at work, could state a valid cause of action for sex discrimination).

[3] Barnes v. City of Cincinnati, 401 F.3d 729, 737–38 (6th Cir. 2005) (affirming the *Smith* principle on the same grounds of sex discrimination against Phelicia Barnes, a pre-operative male-to-female transsexual who was denied a promotion to sergeant in the Cincinnati Police Department because she transgressed masculine stereotypes).

[4] An actionable discrimination claim is predicated upon an individual's fitting within the class protected by the antidiscrimination statute. *See. e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 217–18 (2d Cir. 2005) (explaining that because homosexuals do not comprise a protected class under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), a lesbian plaintiff could not "satisfy the first element of a prima facie case under Title VII," which requires that a plaintiff be a member of such a class).

[5] *See Barnes*, 401 F.3d at 373 ("Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes."); *Smith*, 378 F.3d at 572 ("Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.").

[6] 490 U.S. 228, 250–51 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

[7] 401 F.3d at 741; 378 F.3d at 571–73.

However, the prevalence of the perfect gender-nonconformist in the relatively short history of protecting individuals against discrimination on the basis of gender identity has coincided with the notable absence from this history of the "imperfect" gender-nonconformist. As we define this term, imperfect gender-nonconformists are individuals who would be unable to produce evidence of a diagnosis of Gender Identity Disorder (GID)[8] or whose behavior fails to conform to the norms stereotypically associated with the sex that is the "opposite" of their birth sex (assuming that there are only two sexes). Imperfect gender-nonconformists might act somewhat masculine and somewhat feminine, or they might reject gender entirely.

This Article argues that failing to protect imperfect gender-nonconformists may hinder efforts to protect against transgender discrimination. This argument is based on an analogy between the absence of the imperfect gender-nonconformist from the current movement for transgender rights and the absence of the same-sex copulating couple from the movement for gay and lesbian rights[9] in the years preceding the Supreme Court's announcement of the unconstitutionality of state sodomy bans in *Lawrence v. Texas*.[10] The absence of same-sex copulation from the history of gay and lesbian rights litigation was notable because, as Mary Anne Case observed, such copulation was "exactly what gay men and lesbians may want to do and what troubles society when they try to do it."[11]

Similarly, the absence of imperfect gender-nonconformity from the history of transgender rights litigation is notable because such imperfect gender-nonconformity is what troubles society about transgender individuals. Ultimately, this Article argues that what troubles society most about trans-

---

[8] As Kim Yuracko notes in a forthcoming article, GID is the Diagnostic and Statistical Manual of Mental Disorders's (DSM) way of labeling the disorder of transsexualism. Yuracko also notes that such a diagnosis is essentially a requirement for protection against discrimination on the basis of gender identity. *See* Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, U. PA. L. REV. (forthcoming 2012) (manuscript at 3 n.4) (on file with authors) (explaining that "[t]ranssexualism first appeared as a condition in the third edition of the [DSM] published in 1980," in which the DSM identified its features as "'a persistent sense of discomfort and inappropriateness about one's anatomical sex' accompanied by a 'persistent wish to be rid of one's genitals and to live as a member of the other sex.'" The fourth edition of the DSM, published in 2000, replaced the term transsexualism with GID but retained the same diagnostic criteria for the two conditions, as did the revised edition of the DSM, which was published in 2004) (quoting and citing AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 261–62 (3d ed. 1980); AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535–37 (4th ed. 2000); AM. PSYCHIATRIC ASS'N., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION – TEXT REVISION 576, 581 (4th ed. rev. 2004)).

[9] *See generally* Mary Anne Case, Commentary, *Couples and Coupling in the Public Sphere: A Comment on the Legal History of Litigating for Lesbian and Gay Rights*, 79 VA. L. REV. 1643 (1993) [hereinafter Case, *Couples and Coupling in the Public Sphere*] (highlighting the notable absence of the same-sex copulating couple from the history of gay and lesbian rights litigation).

[10] 539 U.S. 558 (2003).

[11] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1643.

gender people is that they make choices about aspects of their gender that society believes are not their choices to make. This Article, however, does not object to the protection of plaintiffs such as Jimmie Smith and Phelicia Barnes. Both of them suffered discrimination because they made such a choice related to their gender. What this Article argues is that courts do not currently recognize the full range of choices that an individual may make regarding one's gender.[12] Smith and Barnes were able to prevail in court because the opposition between their "real" sex and the gendered nature of their behavior allowed the courts that decided their respective cases to detect the plaintiffs' gender-nonconformity.[13]

It is important for the advancement of transgender rights to protect plaintiffs such as Smith and Barnes. But it is equally important for the advancement of transgender rights to protect imperfect gender-nonconformity. Such imperfect gender-nonconformity appears, for example, in plaintiffs who were born female and identify as women but who exhibit characteristics or behaviors not traditionally associated with that gender,[14] as well as in potential plaintiffs who do not identify with a particular established gender category, such as male or female, or who do not identify with gender at all.

To be sure, this Article does not seek to offer a litigation strategy. The strategic rationale of transgender rights' advocates in bringing cases on behalf of perfect gender-nonconformists is clear. Nevertheless, there is a considerable disparity between this strategy and the purpose of protecting transgender people, which appears in mission statements such as the Sylvia Rivera Law Project's—"to guarantee that all people are free to self-determine [their] gender identity and expression"[15]—or in expansive definitions of "transgender" used by organizations such as the Transgender Law Center, which uses the term "to represent all of the innumerable genders and forms of gender expression that fall within and outside of stereotypical gender norms,"[16] and by various scholars who have advocated for the protection of transgender rights.[17]

---

[12] *See* cases cited *supra* note 5.

[13] *See* cases cited *supra* note 5.

[14] The case of Nikki Youngblood serves as one example of this form of gender nonconformity. *See* Appeal on Behalf of Appellant/Plaintiff Nicole Youngblood, Youngblood v. Hillsborough Cnty. Sch. Bd., No. 01-15924-CC (11th Cir. May 5, 2003). Nikki Youngblood appealed the district court's dismissal of her sex discrimination case against her local school district, which required that she wear a "stereotypically feminine" drape that would "bare her shoulders, neck, and a portion of her chest" for her senior portrait). *Id.* at 2–3. The brief describes Nikki as "masculine, or . . . a 'mannish' woman" and notes that she "has not worn stereotypically feminine clothing since grade school and would be extremely uncomfortable, to the point of anguish, if forced to do so." *Id.* at 3.

[15] *See* SYLVIA RIVERA LAW PROJECT, http://srlp.org (last visited Apr. 3, 2012).

[16] *Transgender Law Center*, THE LESBIAN, GAY, BISEXUAL COMM' & TRANSGENDER COMM'Y CTR., http://www.gaycenter.org/node/4657 (last visited Apr. 7, 2012) (including mission statement).

[17] *See* sources cited *supra* note 1 (indicating the trend among scholars advocating for transgender rights to use the term "transgender" to include a wide array of gender-nonconformists).

This Article's main contribution is to highlight the disparity between strategy and purpose in the movement for transgender rights. While such a disparity is reasonable so as to ensure the protection of some transgender rights rather than none, it is also potentially dangerous if it remains unnoticed. On the basis of this Article's insight that society's anxiety with transgender individuals stems from their making choices about gender—rather than from their making the specific choice to behave in accordance with a script imposed by society for a gender different from the individual's own—this Article hopes to offer a broader conception of the harm of discrimination on the basis of gender identity. The hope is that such a broader conception may inspire new litigation strategies for imperfectly gender-nonconforming plaintiffs, but this Article's focus is on the theoretical basis for transgender harm rather than its practical application.

In two Parts, this Article argues that transgender discrimination should be understood more broadly to include discrimination on the basis of making choices about gender even when those choices do not generate perfect gender-nonconformity. First, Part I demonstrates the importance of perfect gender-nonconformity by describing the current requirements for protection on the basis of gender identity discrimination. Part I also considers imperfect gender-nonconformists, whose gender identities are more difficult to understand from a binary perspective, and who would likely fall outside of the protection of federal civil rights law in its current formulation of gender nonconformity as sex discrimination. To conclude, Part I looks to the example of a genderless school in Sweden to acknowledge at least one context—albeit a narrow context, and one situated abroad—in which individuals are encouraged to exist in a state of genderlessness or imperfect gender-nonconformity.

Next, Part II argues that transgender rights must be understood more broadly as encompassing the right to choose one's gender entirely rather than to choose to act like a gender that is exactly the opposite from the gender one is perceived to occupy. Part II puts forth this suggestion on the basis of the insight from the gay and lesbian rights movement that a social movement must protect the right for its constituency to do that which troubles society most. Stated otherwise, Part II argues that the protection of transgender rights must include not only the protection of perfect gender-nonconformists but also of imperfect gender-nonconformists.

I. Perfecting Nonconformity

This Part seeks to explain why transgender discrimination requires perfect gender-nonconformity, and to demonstrate that imperfect gender-nonconformists also exist. Part I.A describes the current requirements for protection against discrimination on the basis of gender-nonconformity. Part I.B recounts a story of an individual who would be unable to demonstrate

such perfect gender-nonconformity. Finally, Part I.C describes one possibility for—and acknowledges the controversy associated with—a model of genderlessness that could exist if individuals were not forced to choose between gender conformity and perfect gender-nonconformity.

A. Sex, Gender, and Their Transitional Counterparts

Legal protection against transgender discrimination derives from the protection against sex discrimination. The protection against sex discrimination—in Title VII,[18] as well as the protection against sex discrimination that derives from the Fourteenth Amendment Equal Protection Clause[19]—depends upon an understanding of sex that incorporates two assumptions. The first assumption is that there are only two sexes. The second assumption is that each individual can occupy only one of these two sexes. Andy Koppelman's summary of the sex discrimination argument for sexual orientation discrimination demonstrates the incorporation of both assumptions:

> Any action that singles out homosexuals facially classifies on the basis of sex. If a business fires Ricky, or if the state prosecutes him, because of his sexual activities with Fred, while these actions would not be taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against on the basis of his sex.[20]

In order to demonstrate that discrimination occurred because of an individual's sex, the individual must prove that s/he would not have been treated in a particular way had s/he been a member of the opposite sex.[21] For this reason, a sex discrimination claim depends upon a bifurcation between the sexes. Without such a bifurcation, an individual claiming to have experienced sex discrimination would be unable to argue that the individual's treatment would have been different had the individual been a member of the opposite sex.

The expansion of sex discrimination protection in *Price Waterhouse v. Hopkins* was made possible by this same set of assumptions. In *Price*

---

[18] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

[19] *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197–99 (1976) (applying intermediate scrutiny to state classifications on the basis of gender).

[20] Andrew Koppelman, *Sexual Disorientation*, 100 GEO. L.J. (forthcoming Apr. 2012) (manuscript at 5) (on file with authors).

[21] *Cf.* Price Waterhouse v. Hopkins, 490 U.S. 228, 244–245 (1988), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994):

> [O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only proving that it would have made the same decision even if it had not allowed gender to play such a role. . . . [T]he plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision.

Waterhouse, Ann Hopkins argued successfully that because she had experienced discrimination at work for failing to behave in accordance with stereotypical notions about female behavior, she had experienced impermissible sex discrimination under Title VII.[22] But Hopkins's claim also depended upon her ability to demonstrate that if she had been a man instead of a woman, she would not have suffered discrimination.[23] Without demonstrating the truth of this counterfactual, Hopkins would have been unable to demonstrate that the discrimination she suffered was "because of sex," which Title VII explicitly requires.

Transgender individuals have been successful in securing rights by arguing that they have experienced discrimination on the basis of their gender-nonconformity.[24] An argument based on gender-nonconformity "presupposes that a transgender person's sex and gender are fixed traits."[25] Only by making this assumption could a transgender person argue that his or her sex failed to conform to his or her gender. Furthermore, these cases of transgender discrimination—like *Price Waterhouse* and the sex discrimination jurisprudence that its holding expanded—depend upon the assumptions that there are only two sexes and that every individual can occupy only one of them.

For example, in the case *Smith v. City of Salem*, Jimmie Smith was suspended from her[26] job as a firefighter after she informed her supervisors that she intended to transition from male to female.[27] Prior to her suspension, Smith was a lieutenant in the Salem Fire Department in a small Ohio town. She had worked "for several years without any negative incidents."[28] Prior to meeting with her supervisors to explain her transition, Smith was already "expressing a more feminine appearance on a full-time basis," attracting the notice of her coworkers.[29] After learning of her plan, Smith's supervisors conspired to get rid of her—not by terminating her directly, but by requiring her to submit to three separate psychological evaluations, which they hoped would prompt Smith either to resign or to refuse to follow the

---

[22] *Id.* at 244–36, 255, 258 (1988).

[23] *Cf. id.* at 244–45; *id.* at 258 (questioning whether the firm partners who denied the plaintiff's promotion "would have criticized her as sharply (or criticized her at all) if she had been a man.").

[24] *See* Glazer & Kramer, *supra* note 1, at 654–60 (demonstrating, through the progression of transgender employment discrimination precedent from 1984 to 2008, that a claim of discrimination on the basis of gender-nonconformity was the only reasonably reliable basis upon which transgender employees could bring successful sex discrimination claims).

[25] *Id.* at 665.

[26] Although Jimmie Smith and her attorney decided to use male pronouns for Smith throughout Smith's litigation, this was a strategic choice made by Smith's transgender attorney, Miranda Bernabei, who understood that Smith could never be seen by a court composed of non-transgender people as a woman. Telephone Interview with Miranda Bernabei, Attorney for Jimmie Smith (Mar. 20, 1999).

[27] Smith v. City of Salem, 378 F.3d 566, 568–69 (6th Cir. 2004).

[28] *Id.* at 568; *see also* Glazer & Kramer, *supra* note 1, at 657.

[29] *Smith*, 378 F.3d at 568; *see also* Glazer & Kramer, *supra* note 1, at 657.

order, thereby allowing Smith's supervisors to terminate her for insubordination.[30] Smith became aware of the department's plan and hired a lawyer, who informed the department of her legal representation and the potential legal consequences of their plan.[31] The department then suspended Smith.[32]

Smith brought a sex discrimination claim under Title VII against the fire department, resting her claim on the gender-nonconforming theory of sex discrimination recognized in *Price Waterhouse*. Smith alleged that she was discriminated against on the basis of "conduct and mannerisms which . . . did not conform with h[er] employers' and co-workers' sex stereotypes of how a man should look and behave."[33] Departing from precedent that was unfavorable to transgender plaintiffs,[34] the *Smith* court held that "Smith's transgenderism did not prevent her from raising an actionable claim."[35] The court noted that these older cases had been "eviscerated" by the Supreme Court's decision in *Hopkins*, so that now "employers who discriminate against men because they . . . 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."[36]

These wins are undoubtedly important, but they have not offered to transgender employees a stable basis upon which to state actionable sex discrimination claims.[37] Perhaps the movement for transgender rights has sought to counteract this instability by clinging tightly to a theory of gender binarism that has offered some measure of success.

In Part II, this Article suggests that transgender plaintiffs as well as their advocates may be unwilling to let go of the gender binary that has been necessary to obtaining such relief. Although not unreasonable, the decision to require perfect gender-nonconformity as a condition for obtaining relief in the event of gender identity discrimination may have contributed to the disenfranchisement of the transgender rights movement's youngest members, whose needs it has failed to meet at least thirty-three times,[38] as well as other

---

[30] *Smith*, 378 F.3d at 568; *see also* Glazer & Kramer, *supra* note 1, at 657.

[31] *Smith*, 378 F.3d at 569–70; *see also* Glazer & Kramer, *supra* note 1, at 657.

[32] *Smith*, 378 F.3d at 569; *see also* Glazer & Kramer, *supra* note 1, at 657.

[33] Smith v. City of Salem, 378 F.3d 566, 568–69, 572 (6th Cir. 2004); *see also* Glazer & Kramer, *supra* note 1, at 657.

[34] *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086–87 (7th Cir. 1984) (concluding that Title VII's prohibition against "sex" discrimination does not cover discrimination based on transsexualism); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (same); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661, 663–64 (9th Cir. 1977) (same); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 456–57 (N.D. Cal. 1975) (same), *aff'd*, 570 F.2d 354 (9th Cir. 1978); *see also* Kirkpatrick v. Seligman & Latz, Inc., 636 F.2d 1047, 1050–51 (5th Cir. 1981) (declining to determine whether Title VII protects transsexual people because the complaint failed to allege discriminatory conduct).

[35] Glazer & Kramer, *supra* note 1, at 657 (citing *Smith*, 378 F.3d at 577–75).

[36] *Smith*, 378 F.3d at 573–74; *see also* Glazer & Kramer, *supra* note 1, at 657.

[37] *See* Glazer & Kramer, *supra* note 1, at 665–67.

[38] *See* THE PRICE OF HATE, http://thepriceofhate.blogspot.com (last visited Apr. 2, 2012) (a blog whose "purpose is to list the children who commit suicide or are killed

members who have experienced discrimination on the basis of their transgenderism rather than gender-nonconformity.[39]

B. Protecting the Theme but Not Its Variant

This is the story of how Marlow, a young child, became Marla, as told by Stephanie Brill, the therapist who worked with Marlow's family, and Rachel Pepper, Brill's coauthor:

> Marlow has always preferred feminine forms of expression, but his parents found different degrees of comfort with his nature. For example, they would let him have long hair, but only to a certain length. They allowed him to play with Kim Possible dolls™, but not Barbies™. They allowed him colorful clothing, but no dresses. When he was 4 they bought him his first baby doll. Their son was ecstatic. The parents realized it wasn't a big deal—why not? It's just a doll and kids should be able to play with whatever they want, right? So they allowed him more options. Soon he was wearing clothes from the girl's [sic] department. Still no dresses, but pants, fabrics, and patterns reserved in our culture for girls. Others were perceiving him as female. His parents allowed him to wear his hair however he wanted it. It grew long and he started to wear barrettes.
>
> Throughout all this time, he never said he felt like a girl. In fact, he would correct anyone who referred to him as female. He

---

because of their sexual orientation, or their perceived sexual orientation," and contains thirty-three entries—one for each such child or young adult—posted between 2010 and February of 2012). Although sexual orientation and gender-nonconformity are not the same, they often overlap. *See, e.g.*, Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1384 n.30 (2008) (suggesting that courts do not always distinguish between sexual orientation and gender-nonconformity when determining whether expressive content qualifies as obscenity); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988) ("[T]he censure of homosexuality cannot be animated merely by a condemnation of sexual behavior . . . [but also] because it violates the prescriptions of gender role expectations."). The overlap between sexual orientation and gender-nonconformity played a regrettable role in the events leading up to fourteen-year-old Jamey Rodemeyer's suicide. *See* Elaine Quijano, *The Real, Deadly Toll of Bullying Gay Kids*, CBS NEWS (Sept. 21, 2011, 6:53 PM), http://www.cbsnews.com/stories/2011/09/21/eveningnews/main20109797.shtml ("[The bullying] really just started with all the boys, cause [sic] all the girls just loved him and they always defended him, but all the boys would say, 'Geez you're such a girl. Why are you hanging out with all those girls? What are you, a girl? Oh, you must be gay.'") (quoting Jamey's mother Tracy); *see also* Michael J. Higdon, *To Lynch a Child: Bullying and Gender Nonconformity in Our Nation's Schools*, 86 IND. L.J. 827, 836 (2011) ("The sad reality is that '[t]hose young people whose gender expression challenges society's sex role expectations are particularly targeted for violence.'") (quoting Joyce Hunter, *Introduction: Safe Passage*, 19 J. GAY & LESBIAN SOC. SERVICES, NO. 3/4, 1, 2 (2007)).

[39] *See* Glazer & Kramer, *supra* note 1, at 665–67 (explaining that legal remedies based on an individual's gender-nonconformity are not equivalent to legal remedies based on an individual's transgenderism).

felt strong in his male identity; he just liked the presentation and appearance typically thought of as female. Over time, he began to show distinct signs of anxiety when people would visibly recoil upon finding out he was a boy. He began to dread going out in public. He would cry to his family about why he couldn't look the way he wanted and be a boy, why everyone thought he was a girl or wanted him to be one. He was feeling social pressure to conform. While his internal sense was already firmly male, social gender rules were pressuring him to look like a boy. Over time, he became more comfortable not telling people he was a boy to avoid a negative reaction. Seemingly in response to this, he started to ask his parents not to correct strangers who perceived him as female. He didn't want to be a spectacle wherever he went; he just wanted to be himself.

Finally, in the middle of first grade, the pressure became too great and he decided to conform. He asked his parents to cut his hair, and it was cut much shorter, back to an acceptable long hairstyle for boys rather than down his back. He decided to dress in clothes purchased in the boys' department. He chose to keep his same toys, as that was personal and no one would have to know what he played with when he wasn't at school.

But what followed was a progressive depression. Six-year-old Marlow eventually became so withdrawn and sad that he would hardly communicate. At first his teachers were so relieved by the transformation in him. Marlow was no longer the object of ridicule—they no longer had to monitor the playground for older children teasing him. But over time, Marlow stopped participating in class. The sparkle went out of his eyes—in fact, he stopped making eye contact at all. He withdrew socially. Whereas he used to play with both girls and boys at lunch and recess, he took to sitting alone on a bench and reading a book. The teachers realized they had a serious problem on their hands.

Marlow's parents put some of his old bright, colorful clothes back in his drawers with the boy clothes. Marlow came screeching out of his room saying, "Don't do this to me. It hurts, it hurts. People don't love me when I dress in these clothes. But I don't love me when I dress in these clothes. I can't do this anymore. I just want to die."

Not knowing what else to do, with a potentially suicidal child on their hands, his parents and their family therapist started to do some research together. They came to the realization that though Marlow was not typically transgender, he was also not typically gendered. They decided to take a leap of faith and see if Marlow would prefer to live as a girl than as a boy. After many talks together as a family and with the therapist, they agreed that though

> Marlow didn't really feel he was a girl inside, he wanted to be able to be himself, and he had always liked the same things. Trying to dress and act like a boy to make other people more comfortable was making him miserable. Enough people had told him he had to be a girl to be the way he wanted, so he was ready. He was ready to be a girl.
>
> When Marlow became Marla and transferred to the public school in the next district, her whole world changed. The parents had their vibrant child back. They had essentially exchanged their son for a daughter, but nothing had really changed except the name and pronoun. Their child was still the same, only no longer anxious, depressed, or suicidal—this child was happy.
>
> Marla is living a cross-gender life. She finds it much easier as a girl. And now, at 8, she can't imagine living life as a boy. She says, "I never felt like a boy, I always felt like a girl. Finally other people understand me for who I am."[40]

But who is Marlow? Or, for that matter, who is Marla? The child formerly known as Marlow, who came to be known as Marla, has been classified in the leading handbook on transgender children as "gender-variant," which Brill and Pepper define as the nonconformity of an individual's social gender with the individual's "internal sense of gender."[41] If we take Mary Ann Case's definition of "gender" as a "cultural overlay" on physical differences,[42] the proposition that individuals experience an "internal sense of gender"[43] may seem oxymoronic. However, individuals can, and do, feel and act like men and women in rooms by themselves. It is unclear, and arguably indeterminable, exactly where individuals derive this internal sense of gender, but it seems highly likely that such an internal sense is informed by others' perceptions, at least to some degree.[44]

---

[40] STEPHANIE BRILL & RACHEL PEPPER, THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS 26–29 (2008).

[41] *See id.* at 26 ("Gender-variant children . . . have varying degrees of atypical expression and self-presentation—but it is primarily their social gender that is nonconforming rather than their internal sense of gender.").

[42] *See* Case, *Disaggregating Gender from Sex and Sexual Orientation*, *supra* note 1, at 10.

[43] BRILL & PEPPER, *supra* note 40, at 26.

[44] *See* Naomi Mezey, *The Death of the Bisexual Saboteur: A Response to Elizabeth Glazer*, 100 GEO. L.J. (forthcoming Apr. 2012) (manuscript at 8) (on file with authors) ("[O]ur self-identification is always the product of both the social categories available and the way we are hailed by others to fit within those categories.") (relying on the concept of "interpellation" in LOUIS ALTHUSSER, *Ideology and Ideological State Apparatuses*, *in* LENIN AND PHILOSOPHY AND OTHER ESSAYS 85, 117–20 (Ben Brewster trans., 1971)); *see also* Elizabeth M. Glazer, *Optimizing Orientation*, 100 GEO. L.J. (forthcoming Apr. 2012) (manuscript at 8) (on file with authors) [hereinafter Glazer, *Optimizing Orientation*] (discussing the extent to which interpellation can explain an individual's self-identification as bisexual).

Gender-variance, as opposed to transgenderism, requires the nonconformity to one's anatomical sex of one's social gender rather than one's internal sense of gender. An individual's social gender is the gender that society imposes on an individual. Marlow, therefore, was socially gendered as female because of his long hair, his colorful patterned clothes, and his tendency to play with dolls.[45]

Brill and Pepper offer Marlow's story to exemplify gender-variance.[46] They also state that "[m]ost gender-variant children are not transgender."[47] Transgenderism, according to Brill and Pepper, is different from gender-variance because it requires nonconformity of one's internal sense of gender.[48] And though most gender-variant children are not transgender, Brill and Pepper argue that "[s]ome of these children find that it is easier to be transgender than to be the gender-variant person that they are."[49] Thus, some children find that it is easier to be someone with a nonconforming internal sense of gender than to be someone whose social gender does not conform to societal expectations. Curiously, children such as Marla have found that it is easier to develop internal conflict about their identity than to be themselves. The development of such internal conflict helps to transform imperfect gender-nonconformists, such as Marlow, into perfect gender-nonconformists, such as Jimmie Smith or Phelicia Barnes.

Brill and Pepper classify Marlow as a gender-variant child who became transgender as a result of societal pressure.[50] Such societal pressure may have increased since Brill and Pepper wrote about Marlow's case in 2008, as indicated by a recent, noticeable rise in the amount of media attention devoted to the bullying of gender-nonconforming children and teenagers.[51] Marlow's story ended at least somewhat happily. He was able to become Marla and by doing so avoid depression, anxiety, and suicide.

---

[45] BRILL & PEPPER, *supra* note 40, at 26–28.

[46] *Id.* at 26 (including Marlow's story beneath the subheading "Gender-variant Children Who Feel More Comfortable Living a Cross-gender Life").

[47] *Id.*

[48] *See id.* at 5 (defining a transgender individual as "an individual whose gender identity does not match their assigned birth gender").

[49] *Id.* at 26.

[50] *See id.* ("It is hard to imagine how a society could pressure a child to be transgender . . . . Stephanie's work with Marlow's family comes to mind.").

[51] *See, e.g.*, Erik Eckhold, *In Suburb, Battle Goes Public on Bullying of Gay Students*, N.Y. TIMES, Sept. 13, 2011, http://www.nytimes.com/2011/09/13/us/13bully.html; Sabrina Rubin Erdely, *One Town's War on Gay Teens*, ROLLING STONE (Feb. 12, 2012, 10:55 AM), http://www.rollingstone.com/politics/news/one-towns-war-on-gay-teens-20120202; *Rafael Morelos, Gay Washington Teen, Commits Suicide After Reportedly Enduring Anti-Gay Bullying, Cyberbullying*, HUFFINGTON POST (Feb 6, 2012, 5:50 PM), http://www.huffingtonpost.com/2012/02/06/rafael-morelos-gay-washington-suicide_n_1258471.html; Richard Pérez-Peña, *More Complex Picture Emerges in Rutgers Student's Suicide*, N.Y. TIMES, Aug. 12, 2011, http://www.nytimes.com/2011/08/13/nyregion/with-tyler-clementi-suicide-more-complex-picture-emerges.html; *see also* sources cited *supra* note 38.

C. Pop, Storm, and Shock

Pop and Storm are very similar, even though they are four years apart and live on different continents.[52] Pop and Storm might not be of the same sex, but they might. Pop's parents, who have not been named publicly,[53] and Storm's parents, Kathy Witterick and David Stocker,[54] have refused to answer the question everyone undoubtedly asked about their children immediately after they were born—boy or girl?[55]

Pop's and Storm's respective families have received a great deal of international media attention because of their reluctance to disclose their children's respective genders.[56] Storm's parents, in particular, reported from Toronto in 2011 that their decision not to disclose Storm's gender "was met with stony silence" first and a "deluge of criticisms" later.[57] Pop's parents reported from Sweden in 2009 that their decision was met with mixed reactions.[58] Some of the positive reactions that Pop's parents received may have been influenced by the attention devoted to issues of gender in Sweden.[59] The Swedish government treats issues of gender equality very seriously, commonly employing "gender advisers" in schools and including as part of the national curriculum material intended to eliminate discrimination of all kinds.[60] In fact, just a year after the media reported on Pop's genderless

---

[52] *See, e.g.*, Lydia Parafianowicz, *Swedish parents keep 2-year-old's gender secret*, LOCAL (Sweden) (Jun. 23, 2009, 4:24 PM), http://www.thelocal.se/20232/20090623/ (reporting on Pop's family's decision not to disclose the toddler's sex); Jayme Poisson, *Parents Keep Child's Gender Secret*, STAR (Toronto), May 21, 2011, http://www.thestar.com/article/995112?sms_ss=twitter&at_xt=4ddbe2d6c29170b1,0.

[53] *See, e.g.*, Parafianowicz, *supra* note 52. "Pop" is a pseudonym used to protect the child's identity. Lisa Belkin, *Keeping the Gender of a 2-Year Old Secret*, N.Y. TIMES: MOTHERLODE: ADVENTURES IN PARENTING (Blog), (July 1, 2009, 12:53 PM), http://parenting.blogs.nytimes.com/2009/07/01/keeping-the-sex-of-a-toddler-secret/.

[54] Poisson, *supra* note 52.

[55] *See* Hazel Glenn Beh & Milton Diamond, *David Reimer's Legacy: Limiting Parental Discretion*, 12 CARDOZO J.L. & GENDER 5, 15 (2005) ("[A]t birth . . . everyone asks whether [a] child is a boy or girl . . . .").

[56] *See* sources cited *supra* notes 52–53.

[57] Poisson, *supra* note 52.

[58] Parafianowicz, *supra* note 52 ("But while Pop's parents say they have received supportive feedback from many of their peers, not everyone agrees that their chosen course of action will have a positive outcome.").

[59] *See* Darren Rosenblum, *Unsex Mothering: Toward a New Culture of Parenting*, 35 HARV. J.L. & GENDER 57, 108–14 (2012) (discussing the Swedish model of parental leave and comparing it to the Family and Medical Leave Act in the United States); Cordelia Hebblethwaite, *Sweden's 'gender-neutral' pre-school*, BBC NEWS (July 7, 2011, 7:57 PM), http://www.bbc.co.uk/news/world-europe-14038419 (reporting that Sweden "is often praised as being one of the most equal countries in the world when it comes to gender."). *But see Sweden's Transgender Sterilization Law Slammed by International Activists, Politicians*, HUFFINGTON POST (Jan. 20, 2012, 4:34 PM), http://www.huffingtonpost.com/2012/01/20/sweden-transgender-sterilization-law-activists_n_1219878.html (reporting that Sweden requires transgender people to be sterilized before their gender reassignment is formally recognized by the state).

[60] *See* Hebblethwaite, *supra* note 59.

identity, a school that seemed perfect for Pop opened in Sweden.[61] Egalia, a "taxpayer-funded preschool in the liberal Sodermalm district of Stockholm," aims to free children from stereotypical gender roles by avoiding the use of gendered pronouns, referring to the students as "friends" rather than "girls and boys," and integrating traditionally masculine and traditionally feminine forms of play.[62] Though at times the target of criticism,[63] Egalia boasts "a long waiting list" for admission, according to the school's director Lotta Rajalin.[64]

Of course, Sweden is not the United States. And this Article does not argue that genderless schools—or, for that matter, genderless parenting—is a perfect solution to situations such as Marlow's. Still, Egalia's model is one that the transgender rights movement could find instructive. Such a model of genderlessness is notably different from the model upon which transgender plaintiffs have been able to secure protection from discrimination they have suffered. Moreover, the fact that Storm's and Pop's parents' decisions were shocking enough to generate international news coverage suggests that a model of genderlessness would likely not be strategically viable. Nevertheless, such a model could incorporate the interests of imperfectly gender-nonconforming individuals such as Marlow while continuing to protect perfectly gender-nonconforming individuals such as Jimmie Smith and Phelicia Barnes.

II. Attracting Opposites, Preserving Destruction

Analogizing to the gay rights movement, Part II suggests that in focusing on gender binarism and perfect gender-nonconformity[65] as ways to obtain legal rights for transgender plaintiffs, the movement for transgender rights risks leaving some transgender people behind. As this Article acknowledges in Part II.A, the movement for transgender rights has not fit comfortably within the movement for gay rights. Still, the gay rights movement may be instructive to those individuals and organizations seeking legal reform for transgender individuals.

As Part II.B demonstrates, the gay rights movement faced a similar predicament in determining how best to secure rights nearly twenty years ago. Part II.B summarizes and assesses the debate that occurred within the gay rights movement with the hope that it may illuminate the questions and decisions that the movement for transgender rights now faces. Part II.C de-

---

[61] *See* Jenny Soffel, *Gender Bias Fought at Egalia Preschool in Stockholm, Sweden*, Huffington Post (June 26, 2011, 9:01 PM), http://www.huffingtonpost.com/2011/06/26/gender-bias-egalia-preschool_n_884866.html.

[62] *Id.*

[63] *See id.* (citing critics who consider Egalia's pedagogy tantamount to "mind control").

[64] *Id.*

[65] *See supra* Introduction and accompanying notes.

scribes the particular risks that the transgender rights movement faces in employing a strategic emphasis on gender-nonconformity, as it threatens to leave behind those individuals who need protection most—individuals referred to in Part I as "imperfect" gender-nonconformists. Finally, Part II.D demonstrates that the purpose of the movement for transgender rights must be to challenge conventional ideas about gender by advancing the right to determine one's own gender.

A. The Homo Kinship Model

The movement for transgender rights developed, in part, due to the failure of mainstream gay and lesbian activists to acknowledge adequately the presence of transgender people in gay rights struggles from the beginning.[66] The gender-normative model of gay identity now works to "[dispel] the stereotypes that lesbians and gay men are all bull dykes and flaming fairies," resulting "in the increasing invisibility of transsexuals, cross-dressers, and drag queens."[67] The growing isolation of gender-variant and transgender people by the contemporary gay movement contributed to the growth of a distinct transgender community and movement.[68]

The emergence of an "expressly nontransgender, or gender-normative, model of gay identity" has contributed significantly to "the exclusion of transgender people from the contemporary gay movement."[69] Scholars such as Katherine Franke, Nancy Levit, and Marc Spindelman have explained this exclusion by noting that lawyers litigating for LGBT rights have tended to use the "'homo kinship' model or 'like-straight' logic to argue for parental rights or same-sex marriage."[70] As a result of this pragmatic strategy, in

---

[66] *Cf.* Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real About Transgender Inclusion*, *in* TRANSGENDER RIGHTS 142–43, 146–47 (Paisley Currah et al. eds., 2006) ("[D]issension over the relationship between sexual orientation and gender has been a central feature of gay politics since the homophile movement of the 1950s."); *see also* Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363, 1367 (1997) (arguing that transgender and gender-variant people "are attacked by lesbian and gay rights advocates who perceive their 'gender-crossing' practices and identities as too inauthentic, [and] dismiss[ ] them as too politically infeasible a constituency for mainstream gay rights groups . . . .").

[67] Minter, *supra* note 66, at 150 (internal quotation marks omitted).

[68] *Id.*

[69] *Id.* at 147.

[70] Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 22, 23 & n.7 (2010) (citing NAT'L GAY & LESBIAN TASK FORCE ET AL., MAKE CHANGE, NOT LAWSUIT (2008), *available at* http://www.thetaskforceaction fund.org/take_action/guides/change_not_lawsuits.pdf (urging strategic lawsuits)); *see also* Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006) (expressing concern that "the rights-bearing subject of the lesbigay [sic] rights movement has now become 'the couple'"); Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1368–75 (2005) (explaining the success of "like-straight" arguments in Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003)).

securing victories, LGBT rights advocates have "intentionally le[ft] parts of the community behind."[71]

The recent exclusion of transgender people from successive drafts of the Employment Nondiscrimination Act ("ENDA"),[72] on the theory that including transgender persons would prevent ENDA's eventual passage,[73] provides a notable example of the effects of the homo kinship model. In particular, the Human Rights Campaign ("HRC") infamously supported a noninclusive ENDA, which prohibited discrimination on the basis of sexual orientation but not on the basis of gender identity, because HRC concluded that a more inclusive ENDA would not survive a vote in the House of Representatives.[74] HRC received much criticism for its position on ENDA,[75] which it later reversed, explaining that its earlier opposition to a trans-inclusive ENDA was a "one-time exception" to its policy of inclusiveness.[76] Public support for a trans-inclusive ENDA ultimately pressured LGBT advocates to support the inclusion of gender identity as a form of prohibited dis-

---

[71] Levit, *supra* note 70, at 22 & n.6 (citing Cynthia Laird, *Tense Meeting with HRC over ENDA*, BAY AREA REPORTER, Jan. 10, 2008, http://www.ebar.com/news/article.php?sec=news&article=2589; *see also* Paul M. Secunda, *Transgender Inclusion May Spell Trouble for ENDA*, WORKPLACE PROF BLOG (Oct. 3, 2007), http://lawprofessors.typepad.com/laborprof_blog/2007/10/trangender-incl.html.

[72] *Compare* Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 4(a) (2007) (prohibiting employment discrimination on the basis of sexual orientation but not gender identity), *and* Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. § 4(a) (2003) (same), *with* Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. § 4(a) (2011) (adding protection against employment discrimination based on "gender identity"). *See also* Recent Proposed Legislation, *Employment Discrimination—Congress Considers Bill To Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity—Employment Nondiscrimination Act of 2009, H.R. 3017, 111th Cong. (2009)*, 123 HARV. L. REV. 1803, 1806 n.23 (2010) (noting history of ENDA and citing Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 9–12 (2009)).

[73] *See* Laird, *supra* note 71 ("While [the Human Rights Campaign] had previously gone on record as supporting only an ENDA that included both sexual orientation and gender identity protections, it abandoned that position once . . . lawmakers on Capitol Hill determined there were not enough votes for the inclusive ENDA to pass out of the House of Representatives.").

[74] *Id.*

[75] *See* Eliza Gray, *Transitions: What Will it Take for America to Accept Transgender People for Who They Really Are?*, NEW REPUBLIC, July 14, 2011, at 10, 17 (describing HRC's lack of support for ENDA's protection against discrimination on the basis of gender identity and remarking that "there was no question that the ENDA debate had exposed a rift" between those who support rights for transgender people and those arguing for gay rights). *See also* Jeremy Hooper, *HRC T's Up for More Peaceful ENDA Discourse*, GOOD AS YOU (Mar. 26, 2009, 8:24 PM), http://www.goodasyou.org/good_as_you/2009/03/hrc-ts-up-for-more-peace-enda-discourse.html ("Remember in 2007, when their failure to oppose a non-inclusive ENDA led many LGBT activists to Harangue/Ridiculue/Challenge [sic] HRC? Well happily, the future seems more Hopeful Regarding Cooperation on passing an inclusive measure . . . .").

[76] *HRC Finally Ready to Back Trans-Inclusive ENDA*, QUEERTY (Mar. 26, 2009), http://www.queerty.com/hrc-finally-ready-to-back-trans-inclusive-enda-20090326/ (internal quotation marks omitted).

crimination. Versions of ENDA were introduced in 2009,[77] as well as in the spring of 2011,[78] that would prohibit employment discrimination on the basis of sexual orientation and gender identity.[79]

B. Favoring Trouble over Kinship

The LGBT rights movement's reliance on a homo kinship model has been criticized not only for its disenfranchisement of transgender people. Nearly twenty years ago—and ten years before the Supreme Court decided that sodomy statutes were unconstitutional in *Lawrence v. Texas*[80]—scholars Mary Anne Case, Janet Halley, and Pat Cain disagreed over the extent to which lawyers arguing against the constitutionality of sodomy statutes should emphasize the details of gay sex. Case argued that doing so would lessen the opportunity for success in the arena of gay and lesbian rights.[81] Halley and Cain argued that doing so would promote the purpose of the gay and lesbian rights movement.[82] This earlier debate about difference in the gay rights movement centered on how best to preserve qualities of a discriminated minority group that make that group different. After all, the group's differentiating qualities were also the reasons that the group suffered discrimination and therefore the reason for the existence of the movement to advance the group's rights.

Halley and Cain both argued that gay rights advocates should focus on the details of individuals' sexual activity. Halley's goal was to create "alliances along [a] register of acts" instead of a register of identities.[83] She argued that an act-based alliance among individuals would highlight that sodomy—prohibitions against which were, at the time of her writing, not yet held to be unconstitutional—was an activity in which not only homosexuals but also heterosexuals engaged.[84] By creating an "alliance of sodomites,"[85] Halley hoped to "undermine [heterosexual identity] from within," which

---

[77] Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. § 4(a) (2009).

[78] Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. § 4(a) (2011) (introduced by Senator Jeff Merkley on Apr. 13, 2011); H.R. 1397, 112th Cong. § 4(a) (2011) (introduced by Representative Barney Frank on Apr. 6, 2011).

[79] *See* Recent Proposed Legislation, *Employment Discrimination*, *supra* note 72, at 1803 (analyzing the 2009 version of ENDA, which, like the 2011 version, included transgender people within the scope of its protection).

[80] 539 U.S. 558 (2003).

[81] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1689.

[82] *See* Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1619 (1993); Janet E. Halley, *Reasoning About Sodomy*, 79 VA. L. REV. 1721, 1770–72 (1993).

[83] Halley, *supra* note 82, at 1722.

[84] *See id.* at 1722, 1777–80.

[85] *Id.* at 1771.

would—in her estimation—end the metonymy of sodomy and homosexuality.[86]

Cain reconstructed the history of litigating for lesbian and gay rights, telling a story that demonstrated that it was the "hostility toward 'difference' [that] prevented the formation of any widespread gay or lesbian movement against anti-gay discrimination."[87] Cain lamented a "general shift in the movement away from the original concept of 'gay liberation,' towards a more conservative concept of 'gay rights.'"[88] By "gay liberation," Cain meant "a commitment to the deconstruction of the categories homosexual and heterosexual as . . . constructed by dominant forces in society."[89]

Cain shared Halley's concern that sodomy had become a metonym for homosexuality. In order to end this metonymy, Cain argued for a distinction between proven conduct and presumed conduct along with a directive to "those who litigate on behalf of gay men and lesbians to focus the court's attention on the details of the conduct their clients have engaged in."[90] She urged gay rights advocates to use substantive due process arguments because they "would allow us (lesbians and gay men) to argue independently about the value of intimate association, construction of self through relationship, and the authenticity of lesbian and gay love," and to "tell our stories of relationships in our own terms without forcing them to sound just like everyone else's."[91] Cain proposed more specifically that litigators "combine substantive due process claims that focus on conduct with equal protection claims that focus on status."[92] The substantive due process claim that Cain envisioned would "focus on the fundamental importance of lesbian and gay conduct," whereas the equal protection claim she envisioned would "attack the irrationality of the discriminatory classification."[93] She called this a "nonbifurcation strategy" and advocated the use of such a strategy because it would prevent courts from inferring conduct from status.[94] But taking a safe route in order to win some (but not all) civil rights battles, rather than none, was not unreasonable, even according to Cain, who conceded that she could tolerate a "limited bifurcation" strategy—one where "litigators should not consider it necessary to bifurcate status from *all* conduct," but could birfurcate it from all conduct except sodomy (because at that time sodomy was criminal).[95]

---

[86] *Id.* at 1722, 1737.
[87] Cain, *supra* note 82, at 1558.
[88] *Id.* at 1640 (citation omitted).
[89] *Id.*
[90] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1681 (citing Cain, *supra* note 82, at 1627).
[91] Cain, *supra* note 82, at 1639.
[92] *Id.* at 1619.
[93] *Id.* at 1633.
[94] *Id.* at 1619, 1927–28.
[95] *Id.* at 1624, 1633–34.

In responding to Cain's account of the history of litigating for gay and lesbian rights, Mary Anne Case observed that "[c]ourts accord the most favorable treatment to those gay men and lesbians involved in close, long-term relationships from which the sexual aspect has perforce been removed . . . ."[96] According to Case, gay rights advocates should not highlight the details of what was, at one time, referred to as "the behavior that defines the class" when litigating sodomy cases.[97] Case argued against Cain's suggestion that "gay rights advocates should focus more attention . . . on the specifics of one form of coupling—copulation."[98]

Case questioned the effectiveness of Halley's and Cain's increased focus on sexual acts on the basis of its lack of precedential support. She also argued that this increased focus on sexual acts presented substantial risks.[99] One risk was political: Case argued that Cain's proposal could "fracture the gay community into 'sodomites' and 'nonsodomites.'"[100] Though Case argued that Halley's proposal was less risky than Cain's—because Halley's proposal was not a strategy to be employed in litigation but instead a strategy to reorganize the bases for political alliances—she argued that Halley's proposal would, like Cain's, "divide the gay community," but along an axis even more controversial than the axis of identity that Halley sought to avoid.[101] Case argued that Halley's alliance "would benefit those whose sexual activity most closely resembles that of the majority of heterosexuals and exclude those most different from heterosexuals in their practices."[102] After all, an alliance based on acts would necessarily depend on the "identity or similarity between acts" performed by allies.[103] Another risk presented by an increased focus on sexual acts was legal: Case argued that forcing the legal system to confront the details of gay sex would "provoke a worse reaction"[104] from the legal system, deepening what Cain herself had characterized as the legal system's "negative judgment against all things homosexual."[105]

The debate among Case, Cain, and Halley exemplified agreement about the movement's purpose: to obtain the right for its constituents to exercise

---

[96] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1643–44.

[97] *Id.* at 1643; *see also id.* at 1643 n.2 (quoting Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) ("If the Court [in Bowers v. Hardwick, 478 U.S. 186 (1986)] was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.")).

[98] *Id.* at 1645. Although Case argued against both Cain's and Halley's suggestions that gay rights advocates focus on the details of sexual activity on the ground that "[n]either proposal w[ould] work," she was careful to circumscribe her commentary to the provision of insights rather than affirmative litigation strategies. *Id.* at 1682, 1694.

[99] *See id.* at 1688.

[100] *Id.*

[101] *Id.* at 1689.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] *Id.* (quoting Cain, *supra* note 82, at 1592).

their differences. However, Case disagreed with Halley and Cain about the appropriate strategy to be employed for the purpose of obtaining the rights to form pair bonds and to copulate. These two activities are the qualities of gays and lesbians that make them different; they are "exactly what gay men and lesbians may want to do and what troubles society when they try to do [them]."[106]

Because all three scholars agreed on the movement's purpose to protect the right to be different, they shared a second and related commitment to avoid the movement's fracture and division between those who seem most different from society from those who seem most similar to it.[107] In fact, the strength of Case's attack on Halley and Cain was in its irony. Case argued not only that Halley's and Cain's proposals would not achieve the purpose of the Gay Rights Movement, about which all three scholars agreed, but that their proposals would achieve the exact opposite of that purpose, namely the movement's fracture and division. Case demonstrated that the risk of highlighting gays and lesbians' differences was that doing so would likely generate benefits for gays and lesbians who were the least different from heterosexuals.[108] And of course, these individuals were also those within the movement who were the least likely to experience discrimination. A social movement must provide its constituents the right to do that which bothers society—and therefore, that which causes or is likely to cause them to suffer discrimination.

C. The Purpose of the Transgender Rights Movement

What bothers society most about transgender people is that they make choices about aspects of their gender that society believes are not their choices to make. For this reason, the purpose of the social movement for transgender rights cannot be limited to the right to fail to conform to one's gender identity by choosing to conform to the gender identity of the other sex within the gender binary. The movement's purpose must be to support

---

[106] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1643.

[107] *Cf.* Cain, *supra* note 82, at 1640 ("In arguing around *Hardwick*, litigators are . . . distancing themselves from issues of sexual conduct. This approach is sensible as a pragmatic, short-term strategy until *Hardwick* is reversed. But to the extent this approach rejects the centrality of sexual and affectional conduct to sexual identity, it presents certain difficulties.") (citing Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003)); Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1688 ("[A litigation strategy focused on sexual acts] may fracture the gay community into 'sodomites' and 'nonsodomites.' Gay and lesbian advocates have vehemently resisted other opportunities to divide the community into more and less acceptable subgroups so as to benefit the more mainstream while further excluding the rest."); Halley, *supra* note 82, at 1771 ("Gay men, lesbians, and bisexuals must organize insistently around their stigmatized identities in order to remain players in the social process of giving those identities meaning, and in order to consolidate a recognizably 'minority' movement in pluralistic politics.").

[108] *See* Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1689.

its constituents in doing that which bothers society—and therefore that which causes or is likely to cause those within the movement to suffer discrimination when they succeed in doing it.[109] The following section posits that the purpose of the transgender rights movement is to assert the right to challenge conventional ideas of gender by determining one's own gender. This broader purpose—obtaining the right to determine one's own gender—avoids the key risks that accompany the narrower strategy through which protection for transgender people has been won in some cases. Such a narrow strategy risks leaving behind some transgender or genderless individuals.

In order to carry out this risk analysis, it is helpful to consider what, exactly, troubles society about transgenderism. Of course, the trouble caused by a particular group is also the reason that the group is different from society and would therefore merit protection. Transgenderism seems to trouble society for two reasons, the first relating to sex and the second relating to gender. First, transgender people could be thought to hide their "real" sex too well, which troubles a society that wants to know everyone's sex. Second, transgender people's expression of gender fails to meet the expectations society has for someone perceived to have their sex.

When applying these two reasons to the typical case of a gender-nonconforming transgender person such as Jimmie Smith, the firefighter suspended from her job as a result of her gender transformation,[110] her transgenderism seems troubling not in relation to sex (her employer clearly perceived her to be a man[111]) but in relation to gender. Assuming that transgenderism is protected based on a theory of gender-nonconformity, the holding in *Smith* is predicated upon a view that Smith's sex is male. Only by assuming that Smith's sex is male could the court determine that she had been discriminated against on the basis of her "gender non-conforming behavior."[112] The neat mismatch between sex and gender exhibited by a transgender person like Smith obscures the complexity of truly troubling cases of transgenderism. Relying exclusively on cases of perfect gender-nonconformity to determine when plaintiffs deserve protection from gender identity discrimination is risky because these cases obscure what is most troubling to society about transgender people (including Jimmie Smith). Smith made a choice about her gender, and it was this choice that troubled her employer. After all, the fire department conspired to get rid of Smith not when she actually began appearing more feminine, but instead when she communicated to her employer that she had a plan to transition from male to female.[113]

---

[109] *See supra* Part II.B.
[110] *See supra* Part I.A.
[111] *See* Smith v. City of Salem, 378 F.3d 566, 569 (6th Cir. 2004).
[112] *Id.* at 575.
[113] *Id.* at 568–69.

Requiring perfect gender-nonconformity would exclude from protection El'Jai Devoureau, a transgender man who was fired from his job as a part-time urine treatment monitor at Urban Treatment Centers in Camden, New Jersey—a job reserved for a man—after his boss said that she had heard that El'Jai was transgender.[114] Because El'Jai had "passed" as a man and was fired on the basis of information about his transgenderism, not on the basis of the fact that he was a gender-nonconforming woman,[115] it is impossible to determine what expectations would even apply to his gender expression, thereby making it unclear whether he could obtain relief on the grounds set forth by the *Smith* court.

But there are two particularly troubling cases that a court would be unable to determine on the basis of a requirement for perfect gender-nonconformity in exchange for protection from gender identity discrimination. First, Marlow (before transitioning to Marla) would escape the law's protective ambit. Marlow would not have acted effeminately enough to demonstrate perfect gender-nonconformity. Second, in comparison to Jimmie Smith, who was perceived as a man adopting traditionally feminine gender traits, and El'Jai Devoreau, who lived as a man and adopted masculine gender traits, Pop appears completely sexually androgynous, thereby causing both kinds of trouble that transgender people have the capacity to cause. If society is troubled by transgenderism because of the extent to which it challenges conventional ideas about gender and determining gender for oneself, Pop's hidden sex is the first way in which Pop challenges conventional ideas about gender: Pop is sexless, so a theory of gender-nonconformity would produce the metaphorical equivalent of an undefined error. Absent a sex on which to base one's gender, one's gender is arguably more troubling than even the most unconventional idea about gender, because it seems that Pop's gender does not exist.

It is important not to confuse a movement's strategic decisions with its purposes. While the former serve to protect the rights of those within the movement who can win rights most easily, the latter serve to ensure the survival of the movement itself. After all, a movement dedicated to strategy is likely to contain only those who are either unlikely to experience discrimination or are likely to obtain relief if they do. Winning is certainly fun, but a streak too good portends a movement's demise because once they have won, its members no longer differ so greatly from the rest of society and thus are less likely to suffer discrimination. Marlow and Pop are very different from the rest of society. Importantly, they are more different from the rest of society than are Jimmie Smith and Phelicia Barnes. And perhaps even more importantly, they share in common with Smith and Barnes the characteristic about these successful plaintiffs that caused the discrimination they exper-

---

[114] *See* Richard Perez-Peña, *A Lawsuit's Unusual Question: Who is a Man?*, N.Y. TIMES, Apr. 10, 2011, http://www.nytimes.com/2011/04/11/nyregion/11sexchange.html.

[115] *See id.*

ienced from their employers. This common characteristic—common to Marlow, Pop, Smith, and Barnes—is their audacity to make a choice about gender when the rest of society expects that people take their gender as it was given to them. A movement for perfect gender-nonconformity fails to capture this common characteristic. A movement for gender self-determination does not.[116]

CONCLUSION

Despite the fact that transgender people experience discrimination largely *because* they are opposed to the conventional gender binary, this Article observes that the transgender rights movement is unproductively tethered to gender, thus privileging strategy over purpose.

In distinguishing between strategic and purposive decisions, this Article draws on insights from a debate that is now nearly twenty years old about litigating for gay and lesbian (to the exclusion of bisexual and transgender) rights. The key insight from this debate is that a movement's purpose must be to secure rights for the movement's constituents to do that which makes them most different from the rest of society—to do that which "troubles society when they try to do it."[117] After all, this is the reason that the movement's constituents experience discrimination, and it is therefore the reason for the movement's existence.

Decisions made in order to achieve any other purpose risk the movement's fracturing.[118] Not only that, but the fracture caused by making decisions other than purposive decisions divides those who are most similar to those who have discriminated against the movement's constituents from those who are most different, including the former and excluding the latter from the movement.[119] And of course, those who are most similar to their discriminators are those who are least likely to experience discrimination.

Jimmie Smith and Phelicia Barnes were different from the employers who discriminated against them. But the differences between these transgender employees and their employers were limited in an important way. Smith and Barnes differed from their employers because they rejected their male gender in favor of a female gender while their employers presumably did not. But Smith, Barnes, and their respective employers all seemed to agree that there were only two gender options available to any individual, and that any individual could only occupy one of those two genders. Perfect gender-nonconformists such as Smith and Barnes certainly deserve protec-

---

[116] *See supra* notes 15–17 and accompanying text.

[117] Case, *Couples and Coupling in the Public Sphere*, *supra* note 9, at 1643.

[118] *See* Elizabeth M. Glazer, *Sodomy and Polygamy*, 111 COLUM. L. REV. *Sidebar* 66, 74–77 (2011), http://columbialawreview.org/assets/sidebar/volume/111/66_Glazer.pdf.

[119] *See* Glazer, *Optimizing Orientation*, *supra* note 44 (manuscript at 20) (arguing that the inclusion of bisexuals within the movement for LGBT rights is necessary but unstrategic).

tion, but only if imperfect gender-nonconformists such as Marlow can also obtain protection without having to perfect their gender-nonconformity. Though this Article recognizes and appreciates the strategic rationale for requiring perfect gender-nonconformity, this Article has attempted to cultivate an additional appreciation for gender-nonconformity's imperfections.