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SOMETIMES IT GETS WORSE: BULLYING OF LGBTQ INDIVIDUALS IN THE WORKPLACE

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I. INTRODUCTION

In response to several publicized cases of bullying against lesbian, gay, bisexual, transgender, and queer (LGBTQ) teens, famous U.S. personalities from Ellen DeGeneres to President Obama are compiling messages of hope, proclaiming the campaign’s message: “It gets better.” The sad reality is that for many LGBTQ individuals, while bullying in school may end, it may pick up with a new fierceness once those individuals enter the workplace and may get worse still if a legal battle ensues.

U.S. jurisprudence and identity discursively and materially collide in many places. One such collision site involves anti-discrimination jurisprudence and transgender identity in the physical spaces of the workplace and courtroom and in the discursive space of judicial opinion. The rhetorical strategies courts employ in the processes of denying civil rights and anti-discrimination protections to transgender employees situate anyone whose gender identity and perceived biology clash outside the realm of reason, rationality, and intelligibility.\(^2\) As Currah and Minter poignantly argued, no one single discourse, judicial opinion, or legislative measure could “account

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\(^1\) This project is an extension of my Master’s Thesis *Bosses are Really Mean These Days: The Discursive Politics of Representation and Blame in Workplace Bullying*. It also represents the culmination of research begun in 2008 that examines the particularities of Lesbian, Gay, Bisexual, Transgender and Queer legal subjects in the arena of U.S. Civil Rights jurisprudence.

for—and thus provide a simple means of remedying—the historical exclusion of transgender people from equal protection in the courts.” Part of the solution, then, requires the solution to come in parts.

I seek in this project to advocate for incorporating a metric of dignity in our workplaces. I do that in part by engaging in kitchen-sink politics. I try to avoid perpetuating false dichotomies that might suggest if not this solution, then nothing. This work will not locate itself above or in place of any other attempt to reduce violence and promote dignity and the free expression of identity. I hope, instead, to locate my perspective beside other theories and practices. “Beside,” notes Queer theory scholar Eve Sedgwick, is both an important and “interesting preposition...because there’s nothing very dualistic about it; a number of elements may lie alongside one another, though not an infinity of them...Beside comprises a wide range of desiring, identifying, representing, repelling, paralleling, differentiating, rivaling, leaning, twisting, mimicking, withdrawing, attracting, aggressing, warping and other relations.” In the spirit of multiplicity and open space, I will propose an additional intervention beside Title VII jurisprudence. I advocate for the adoption of the Healthy Workplace Bill, a bill directed at the elimination of bullying/status-blind harassment in the workplace as one way of reducing violence against transgender individuals and expanding access to legal relief. This bill, however, is only one tool, one intervention point, one mechanism for

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3 Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37, 73-74 (2000). See also Lloyd, supra note 2, at 154 (quoting Currah & Minter and explaining that courts have inconsistently applied legal doctrines to exclude transgender individuals from finding protection and seeking relief under the existing legal structure).


5 Id.

6 Professor David Yamada, in concert with the Workplace Bullying Institute and Gary and Ruth Namie, drafted a model bill that would create a cause of action for workplace bullying. For the full text of the bill, see David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMPLOYEE RTS. & EMP. POL.’Y J. 475 app. at 517
encouraging and promoting dignity for all and helping to make sure that “it” really does get better for everyone.

Section II explores the current civil rights umbrella, primarily focusing on Title VII of the Civil Rights Act of 1964. The existing framework is primarily a negative rights approach where the law proscribes certain kinds of acts done to certain kinds of people for a limited number of reasons. The holes in that umbrella exposing transgender employees to violence and discrimination for which there is little relief or redress are wide and scattered. I will discuss some of the strategies plaintiffs currently use to try to fit their claims and identities under the existing Title VII scheme. Conformance to those legal norms often comes at a price, however. The reconfigured claims and plaintiffs may still fail to access relief and overcome the barriers and hazards inherent in such an identity-based framework.

In Section III, I discuss the legal constructions of (trans)gender identity evinced in case law. For the purposes of this discussion, I use “transgender” as “an umbrella

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[hereinafter Yamada, Crafting a Legislative Response]. See also, Workplace Bullying Institute, http://www.workplacebullyinglaw.org [hereinafter Workplace Bullying Institute].


8 This note deals primarily with the concerns of transgender employees who work for organizations encompassed under Title VII, mainly due to my own experiences volunteering in a free legal which has seen a dramatic increase in the number of transgender individuals with complaints of workplace harassment, bullying and abuse because of their transidentities. For the most part, these particular employees are less concerned with the potential to use their identities as politically resistive tools and instead are focused on maintaining a level of employment that will enable their survival. I write with them in mind.

9 See discussion infra Section III.

10 I am not marking an unawareness of the distinctions, both material and discursive, among queer, transgender, transsexual and gender variant identities. However, a discussion of the political struggles within queer, critical disability, feminist, transsexual, and transgender theories to grapple with the topic of identity as a tool lies outside the scope of this project. For in-depth analyses of the multiplicity of perspectives and debates on trans studies, see Patricia Elliot, Engaging Trans Debates on Gender Variance: A Feminist Analysis, 12 SEXUALITIES 5 (2009).
term for those who do not identify with the gender they were labeled at birth,”

and as a way of referring to “anyone whose gender identity or expression differs from conventional or stereotypical expectations of sex, including all pre-operative, post-operative, and non-operative transgendered people.” I employ discourse analysis in this section as a tool for examining several infamous cases involving transgender plaintiffs and claims of violence and/or discrimination in the workplace.

As Richard Storrow illuminates, a close reading of “because of sex” employment discrimination cases shows several common problems: (1) the miscategorization of transsexualism as a matter of sexual orientation; (2) the conflation of the terms “biological,” “anatomical,” and “chromosomal;” [and] (3) the misprision of the relation between “sex” and “gender.” The analysis will show how the law situates transgender people outside the realm of intelligibility, rendering them subhuman.

Finally, in Section IV, I look to the expanding study of workplace bullying to illustrate how the adoption of status-blind prohibitions against workplace violence may not close the gaps in Title VII, but may instead offer an additional umbrella, one that centers on a metric of dignity rather than on a proscribed set of behaviors.

Removing identity as a component in the cause of action may offer broader protections to LGBTQ people in general, and to transgender individuals specifically. The Healthy Workplace Bill or similar laws could provide other means for seeking relief under the law for pervasive and recurring violence while maintaining a broad space for identities-as-resistance to struggle against normative structures. Additionally, such laws

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12 Carolyn E. Coffey, Celebrating Student Scholarship: Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and in the Legislatures, 7 N.Y. CITY L. REV. 161, 161.
14 Yamada, Crafting a Legislative Response supra note 6, at 517.
might help signal or push a shift in jurisprudence to a framework that centers on the concept of a dignity as a goal rather than as a fringe benefit.

II. THE TITLE VII UMBRELLA

In the ten years since Laurie Rose Kepros published her student work on the cutting edge topic of Queer theory and the law,15 the courts continue struggling to catch up to 1999. The “field” of Queer theory, meanwhile, has expanded exponentially over the last decade to include analyses of the disidentifactory possibilities of particular drag performances,16 the construction of the thought/feeling divide in relation to previously “private” states,17 and the role and effect of sexuality in structuring citizenship and creating citizens.18 Many courts, however, still continue the semantic struggle over the meaning of the word “sex.”19

The cases attempting to define and limit the kinds of behaviors, motivations and identities covered by Title VII reveal confusion over the concepts of sex, gender, sexuality and sexual orientation and over whether transgender employees qualify for protection under Title VII at all.20 In Voyles, one of the earliest federal cases alleging discrimination on the basis of transgender identity, the plaintiff was fired for

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15 Laurie Rose Kepros, Note, Queer Theory: Weed or Seed in the Garden of Legal Theory? 9 LAW & SEXUALITY 279, 294 (1999).
19 See infra notes 28-34: The relevant portion of Title VII of the Civil Rights Act of 1964 states, that it shall be impermissible “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C.A. § 2000e-2(a)(1).
20 See infra notes 28-33
undergoing “sex conversion surgery.” The Court dismissed the case at summary judgment, in part, “upon the ground that the complaint fails to state a claim upon which relief can be granted,” opining, “employment discrimination based on one’s transsexualism is not, nor was intended by the Congress to be, proscribed by Title VII.”

In the case of Karen Ulane who sued alleging she was fired after she transitioned to Karen from Frank, the Court concluded, “[U]nless otherwise defined, words should be given their ordinary, common meaning.” The prohibition against sex-based discrimination, then, “implies that it is unlawful to discriminate against women because they are women and against men because they are men” but is not “a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.” Based on this opinion, sex is biological and “discontent” with biology constitutes a sexual identity disorder.

A. SEX BY ANY OTHER NAME

The question remains, what is sex and what is its relationship to gender? In this lexical war, the law and Queer theory clearly collide. Justice Scalia reasoned that gender “has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is

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22 Id.
23 Id. at 458.
25 Id.
26 Id.
27 Id.
28 See Coffey, supra note 12, at 163 (states the general principle that the term ‘‘sex’ is used in reference to a person’s biological identity, while ‘gender’ usually refers to culturally ascribed or socially constructed characteristics of masculinity and femininity.”)
to sex as feminine is to female and masculine to male.”

Queer theorists, on the other hand, position gender as “primary to sex.” Storrow and others argue that since Title VII seeks to remedy social disparities and does not seek remedies on “a biological level, Title VII is not aimed at sex at all, in either its traditional or nontraditional sense, but is in fact aimed at preventing irrelevant distinctions based on gender from being the basis of employment decisions.”

Juridically speaking, however, what exactly does discrimination on the basis of sex include? In Medina v. Income Support, a heterosexual woman sued for sex discrimination and sexual harassment by her supervisor, an openly lesbian woman. The main question was whether or not Title VII extended to adverse employment practices motivated by sexual orientation. The Court held “Title VII’s protections ... do not extend to harassment due to a person’s sexuality.” The Medina court and others have decided there are differences between the concepts of “sex” and “gender” and that Title VII should only prohibit discrimination based on those differences and not on sexual orientation or gender identity. One of the first decisions to reach this conclusion, specifically in relation to a transgender person, was Holloway v. Arthur Anderson & Co.” In that case, the Court held that sex and gender are separate categories and that the meaning of sex should be limited to the “traditional notions of

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30 Storrow, supra note 13, at 318.
31 Id.
33 Id. at 1135.
34 Id.
35 Coffey, supra note 12, at 172.
36 Id. at 173. See also Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).
sex.” 37 The Court looked to the dictionary rather than to any scholarship for guidance on the definition of sex, concluding in a footnote:

Sex is defined as “1 : either of two divisions of organisms distinguished respectively as male or female 2 : the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females 3a : sexually motivated phenomena or behavior b : SEXUAL INTERCOURSE.” Gender is defined as 1 : SEX 2a : any of two or more subclasses within a grammatical class of a language.” 38

Certain expressions of gender identity, under the right circumstances, do fall under the juridical constructions of “sex,” however. The discomfort delving into sex creates engenders a certain inconsistency in the interpretations of what behaviors, appearances and performances fall under the category “sex.”

B. GENDER STEREOTYPING AS SEX DISCRIMINATION

In the landmark case Price Waterhouse v. Hopkins, decided twelve years after Holloway, Ann Hopkins, successfully sued her employer when she was threatened with termination unless she began to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.” 39 Price Waterhouse repeatedly conflated sex and gender but remains the only Supreme Court case to address gender stereotyping. 40 As lawyer and commentator Mari Newman observes, the “‘gender non-conformance’ legal theory has been successfully argued on behalf of gay and lesbian plaintiffs whose gender presentation is not defined by their

37 Holloway, 566 F.2d at 662.
38 Id. at n.4.
biological sex.” However, it is not a universally accessible theory, and it does not always yield successful results for the plaintiff. The courts are split on whether, for example, discrimination against transgender persons for their transgender identity counts as gender non-conformance under sex discrimination.

C. LEAVING MUCH TO BE DESIRED

In response to the confusion, some theorists argue that the time has come for Title VII jurisprudence to receive an overhaul to better “account for the reality of individuals who are both male and female, whether at the same moment in time or at different moments over time.” Over the last decade scholars, advocates and activists continued to lobby for protections for transgender, transsexual, genderqueer and queer folks within the existing frameworks of the legal system, focusing mainly on intervention “(1) by adding gender identity as a protected status to a list of already existing categories; (2) by incorporating transgendered people into the definition of sexual orientation already in a statute; or (3) by defining sexual orientation as including perception of gender identity.” Claims of discrimination and unequal treatment could theoretically succeed under federal civil rights statutes like Title VII if only courts would catch up with times and apply the appropriate analytical framework to the claims.

However, even with substantial changes to the conceptualization of categories within Title VII jurisprudence, the fundamental core of the jurisprudence is negative rights. Title VII proscribes particular kinds of behavior perpetrated against particular

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42 Storrow, supra note 13, at 318.
44 Coffey, supra note 12, at 160.
45 Id.
kinds of people because of their membership in a particular group that is protected by the law. With that proscriptive focus, Title VII is thus a system of reaction and redress once a recognizable violation has happened.

One of the principal struggles at the heart of every LGBTQ battle with the law, however, whether for equal treatment, accommodation, recognition, protection, or relief, is the clash between the complexity, fluidity and dynamism of identity and the rigid binary structure of the law, including Title VII. The law deals mainly in identity politics and thus has not eliminated the need for, or the trouble with, those identity based rights claims.

The process of establishing the legally cognizable harms itself often represents an added affront to the dignity of the person bringing the claim.

In addition to the more obvious hurdles identity-based rights claims such as those under Title VII pose, political science professor and feminist theorist Wendy Brown provides a useful analysis of additional hazards. Brown cautions against engaging in the politics of injury whereby particular, historical, and contextually specific harms form the foundation a politicized identity then used in claims to universal, ahistorical rights, such as the right of women to a workplace free from sexual harassment. According to Brown, when injury serves as the proxy for identity, the construction naturalizes the identity as victim and appeals to the state for validation,

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46 The goals of the diverse LGBTQ groups and individuals vary nearly as much as identity expression does. Equality is only one goal.
47 Kepros, supra note 15 at 283-284 (arguing Queer theory critiques constructions of identity produced by the reliance on fixed and closed categories and definitions).
49 Id.
protection, and liberation, then often serve to re-inscribe the very systems of oppression that the rights claims seek to resist and dismantle.\textsuperscript{50}

Furthermore, the required statutory reduction of the complexity of gender and sexual identity to a scripted narrative of sex or a pathological malcontent with one’s body may represent yet another form of violence perpetrated against transgender identities.\textsuperscript{51} The fact that many transgender and transsexual plaintiffs must subject their bodies and their identities to public legal scrutiny as the triers of fact and law re-define the plaintiffs’ identities as well as set precedent for the definition of other subjects denies a fundamental sense of agency, empowerment, dignity and choice that plaintiffs are often seeking to enhance through the legal process in the first place.

III. DEFINING SEX; VIOLATING DIGNITY; CONSTRUCTING TRANSGENDER

The law juxtaposes transgender identities against the “ordinary meaning” of the word sex.\textsuperscript{52} The discursive constitution of “ordinary” sex pulls together assumptions of the normal that are so pervasive they move beyond normal to obvious. In his book \textit{Law as Culture}, anthropologist and lawyer Lawrence Rosen contends that by deconstructing and analyzing the so-called “obvious” and unquestioned assumptions, principles and practices, observers can get a closer look at the relationships among law, culture and power.\textsuperscript{53} He posits, “[h]ow reasons are given in legal systems may, then, reveal much about the institutional history and the cultural meaning of which they partake.”\textsuperscript{54} In \textit{Law’s Corpus Delicti}, William MacNeil positions the Law as “first and foremost, a

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Lloyd, supra note 2 at 157 (“[L]egal recognition of the existence of rigid categories of normal sex and sexuality bullies transgender people into articulating their identities in a way that conflicts with their sense of self.”)
\item Ulane, 742 F.2d at 1085.
\item Lawrence Rosen, Law as Culture: An Invitation 144 (2006).
\item Id.
\end{enumerate}
\end{footnotesize}
linguistic form. Before it can be said to be anything else -- the Weberian monopolisation of force, the Althusserian repressive and ideological state apparatus, the surveillance systems of Foucauldian carcereality -- the Law is a signifier, a word.”55 These revelations allow for a deeper connection to and a critical understanding of the nuanced and discursively elusive material effects of law on individuals, groups and society. Applying critical discourse analysis then, to the law, to its literal words codified in case law, reveals the ambivalent position of the transgender subject simultaneously hailed by the performative body of rights jurisprudence and rendered abject56 through the legal adherence to normative, closed constructions of personhood vis-à-vis a troubled but reified sex binary.

This topic of the transgender subject in law is not an uninvestigated one. In a student note in 2004 entitled, *Constructing the Trannie: Transgender People and the Law*, John Ohle provided a comprehensive compilation of articles and cases that have addressed the pursuit of rights and/or equality in the employment arena.57 Cases

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56 Judith Butler, Bodies that Matter: On the Discursive Limits of “Sex” 3 (1993). Lloyd, *supra* note 2, explains the Butlerian concept of the abject as “a discursive product, a domain of rejected subjects excluded from accepted subjects and cast into ‘‘those “unlivable” and “uninhabitable” zones of social life which are nevertheless densely populated by those who do not enjoy the status of subject.’’” (quoting Butler, *supra*).
involving transgender claims to rights appeared as early as the 1970’s with Voyles v. Ralph K. Davies Medical Center figuring prominently as one of the first federal cases addressing transgender employees and Title VII protections.\textsuperscript{58} One of the main themes that emerge in the cases beginning through the 1970’s and continuing into the present is the abject status of the transgender legal subject.\textsuperscript{59} In 2005, Abigail Lloyd looked to the collision of transgender identity and the law with the hopes of “bringing the phenomenon of dehumanization to the forefront.”\textsuperscript{60} Sadly, neither her nor Ohle’s work was irrelevant despite the 30-year gap between their writing and the Voyles decision denying legal protections to a transgender person.\textsuperscript{61}

The long line of subsequent post Voyles cases recasts the normalcy and necessity of the man/woman sex binary to the detriment and indignity of all those whose identities do not demonstrate conformity therewith.\textsuperscript{62} Since transgender bodies are both/neither male and/nor female, transgender subjects “theoretically cannot claim protection under Title VII.”\textsuperscript{63} Additionally, as Storrow explains, judges may, in their opinions, claim to decide the cases “on principles of justice, fairness, objectivity and adherence to stare decisis,” but ultimately, “transsexualism engenders judicial responses ranging from understanding and acceptance to disbelief and hostility.”\textsuperscript{64} Many of the cases achieve the reification of sex in part by depicting “transgender bodies as

\textsuperscript{59} Butler, supra note 56.
\textsuperscript{60} Lloyd, supra note 2, at 152.
\textsuperscript{61} Voyles, 403 F. Supp. at 457.
\textsuperscript{62} I have selected five cases as exemplars of the dehumanization discourse found within the broader scope of legal opinion. They are not all binding precedent as none is a U.S. Supreme Court Case. Rather, I selected the cases to speak to the generalized opinion of the transgender legal subject, looking to a variety of years and jurisdictions for examples.
\textsuperscript{63} Id.
\textsuperscript{64} Storrow, supra note 13, at 276.
monstrous and unnatural” and thus casting them into the realm of the abject.\textsuperscript{65} The casting also frequently relegates claims by transgender people outside the realm of legitimacy or actionability thus cutting off material intervention or relief to the people bringing the claims. As a result, the inhumanity of the transgender legal subject repeats and reiterates, growing more grotesque along the way.

\textbf{A. \textsc{Anything But Human}}

Lloyd points to three main archetypes that appear and re-appear in the judicial discourse: the animal, the facsimile and the fraud.\textsuperscript{66} Each trope fundamentally denies the dignity and humanity of the transgender subject under the law and in the workplace. The animal burst into the discourse in the late 1970’s with \textit{Ashlie}. The court denied relief to Jenell Ashlie who sought redress under a right to privacy for termination from her job as a schoolteacher. The Court reasoned:

\begin{quote}
It might just as easily be argued that the right of privacy protects a person's decision to be surgically transformed into a donkey. The transformation, by its very happening, would lose the quality of privateness. Certainly, those who had known the donkey as a man would detect the change, even though those acquainted only with the donkey might never have occasion to remark upon it. In addition, the change from man to beast might be just as devoutly wished, as psychologically imperative, and as medically appropriate as the change from man to woman, but the Constitution, I fear, could not long bear the weight of such an interpretation.\textsuperscript{67}
\end{quote}

The discourse analogizes Ashlie’s surgical transition to that of a man transforming into a donkey, concluding that anyone undertaking such a ridiculous transformation could hardly expect to hide it under the fiction of privacy. The Court’s opinion reduces the

\textsuperscript{65} Lloyd, \textit{supra} note 2, at 158.
\textsuperscript{66} \textit{Id.} at 160-166.
complexity of Ashlie’s identity to a simple animalistic one and denies her basic human dignity. Donkeys do not deserve privacy and clearly, neither did Ashlie.

In *Ulane v. East. Airlines*, Karen Ulane, was fired from her job as an airline pilot after she had undergone sex reassignment surgery. She sued for discrimination and won on the trial level. The Seventh Circuit overturned her case on appeal, however, further subjecting Karen’s identity to legal scrutiny. The Court opined, “that Congress never considered whether it should include or exclude transsexuals.” The Court’s language denotes a lack respect for the complexity of transgendered identities by reducing them to medical procedures and a singular manifestation of “discontent.”

In its concluding paragraph, the Court let its contempt become more apparent by stating that “even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.” The authoring Justice continued to deride the plaintiff and justify the discrimination writing if the employer did, in fact, “discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual-- a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”

Thus, the facsimile label appeared, marking a transgender body as one that only appears like the normal male or female body but is neither. It is a copy that crumbles under scrutiny much like a vampire exposed to sunlight combusts and turns to ash. Only women and men, not copies of women and men, warrant protection from discrimination.

68 Id. at 1082.
69 Id. at 1087.
70 Id. at 1084.
71 Id. at 1087.
72 Id.
73 Id.
The facsimile/fraud motif appeared again in an unpublished disposition in 1990.\textsuperscript{74} The Ninth Circuit summarily affirmed a district court’s denial of employment protections to Carrie Drake after Drake was fired. The Court referred to the defendant’s/appellee’s inability to have impermissibly discriminated on the basis of sex since the defendant was unaware of Drake’s sex. The Court found: “Appellant [Drake] never insisted upon being called ‘he or she.’ Moreover, the Department indicates that it was unsure of what sex assignment it should use.”\textsuperscript{75} In its one substantive footnote, the Court summarized the gist of the judicial position: “Of course, appellant is not actually a biological woman and cannot maintain this action as a biological women (sic)...Moreover, Title VII does not protect employees from discrimination against them because they are transsexuals rather than because they are male or female.”\textsuperscript{76}

Here too, in just a few words, the juxtaposition between a transgender subject and an actual woman/human reveals the inferior, subhuman positionality of the transgender identity as a failed copy of the legitimate/normal. The power of the legal word is evident in that one small sentence issued by one judge overrode any conclusions Drake formed about her own identity. Under the law of her jurisdiction, Carrie Drake’s definition of self was literally and figuratively stripped away as the judge/court/law told her she was not, despite her best efforts, a woman.

B. AN ISSUE OF SAFETY

The Tenth Circuit in 2007 affirmed that transsexuals are not members of a protected class per se, and that sex discrimination only encompasses sex as a category of men and women, thus excluding transgender individuals on the whole unless they can

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\textsuperscript{74} Drake v. Werdegar, No. 89-15342, 1990 WL 92585 (9th Cir. July 3, 1990).
\textsuperscript{75} Id.
\textsuperscript{76} Id.
\end{flushright}
conform their identities and claims into the traditionally recognized categories. The Court explicitly used the static sex binary to justify the limitation of sex discrimination:

In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.

The plaintiff, Etsitty, identified as a “pre-operative transgendered individual” who alleged she was fired when she began to appear more feminine than she had during the hiring process. She had explained to her supervisor that she planned to undergo surgery but had not yet done so. She was eventually fired under the defense that while the plaintiff’s biology was still technically male, she could not use female restrooms as she had been doing. The transit company for which she worked ultimately claimed to predicate her termination on the company’s inability to accommodate her restroom needs.

Unlike the language in many other cases, this Court acknowledged the limitations of its own understanding of “sex.” It did not engage in open, violent attacks against transgender individuals or the plaintiff. However, its opinion still situated transgender identity well outside of the realm of the knowable, the intelligible, and the legitimate and engendered the discourse of protection.

The Court stepped away from a chance to legally acknowledge the validity of multiple sex and gender identities and instead looked to interventions of “science” to alter traditional understandings of sex: “Scientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined

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77 Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1222 (10th Cir. 2007).
78 Id.
79 Id. at 1218.
80 Id.
categories of male and female.” 81 Until then, while the Court “may disagree with UTA [the defendant] that a male-to-female transsexual’s intent to use women’s restrooms should be grounds for termination before complaints have arisen,” 82 there is nothing to suggest that the “legitimate, nondiscriminatory reason for Etsitty’s termination” 83 is pretext, that is, a mask for discriminatory intent. The defendant’s policy requiring all employees to “use restrooms matching their biological sex” is not an example of either sex discrimination or sex or gender stereotyping because it “does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes.” 84 Additionally, the Court accepted the argument that the policy also ensured the safety of Etsitty and other employees. 85

In 2009, the Ninth Circuit similarly upheld safety concerns as legitimate grounds for dismissing transgender employees. 86 In affirming the lower court’s dismissal at summary judgment, the Court noted, “it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer’s expectations for men or women.” 87 However, the Court accepted the defendant’s reason that it banned the plaintiff, Kastl, a transsexual woman, from “from using the women’s restroom for safety reasons.” 88 Additionally, because the plaintiff

81 Id. at 1222.
82 Id. at 1226.
83 Id. at 1227.
84 Id. at 1225.
85 Id.
86 The Court’s brief factual summary states: “Kastl was an instructor for and a student of MCCC. Following complaints that a man was using the women’s restroom, MCCC banned Kastl, who is transsexual, from using the women’s restroom until she could prove completion of sex reassignment surgery. Kastl’s contract was subsequently not renewed by MCCC.” Kastl v. Maricopa County Community College Dist. Slip Copy, 2009 WL 990760 C.A.9 (Ariz.) 2009.
87 Id. See also Smith v. City of Salem, Ohio, 378 F.3d 566, 575 (6th Cir. 2004) (holding a transgender plaintiff’s claim of gender conformity and stereotyping actionable as sex discrimination under Title VII).
88 Id.
“did not put forward sufficient evidence demonstrating” that the move was motivated by Kastl’s gender rather than those legitimate safety concerns, Kastl’s “claim is doomed.”

_Etsitty_ and _Kastl_ do not analogize transsexuals to animals as _Ashlie_ did, nor do they accuse the plaintiffs of fraud or cheap imitation in the ways of _Ulane_. However, the two cases evince an equally problematic contemporary abjectification. Rigid adherence to a polarized sex and gender binary continues to situate transgender individuals outside the realm of legitimate persons with legitimate claims in much of the Title VII civil rights jurisprudence. Bathrooms divided by sex remain one of the most “obvious” and unquestioned facets of identity policing. The reification of the sex binary occurs as the courts use the socially and materially erected binary divisions of male and female restrooms to reiterate the normality of a sex binary that divides sex into two fixed, mutually exclusive categories of male and female and the constant guessing about and interrogation into a transgender person’s most private needs based on assumptions about their genitalia is a profound invasion of privacy and an affront to dignity.

Finally, in a move that might, at first glance, appear to be progressive, both defendants in _Kastl_ and _Etsitty_ premised the workplace problems on concerns for the potential violence against respective plaintiffs for their pre-operative transsexual identities. Once the plaintiffs had undergone surgery to assign their bodies to one or the other sex, that is, conformed their bodies to the traditional binary, then the restroom issue would no longer be a problem. The _Etsitty_ Court, for example, even pointed out that “[o]n the record of termination, [Etsitty’s supervisor] indicated Etsitty would be eligible for rehire after completing sex reassignment surgery.”

If these courts were to

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89 Id.
90 Etsitty, 502 F.3d at 1219.
apply their protective, “safety-first” approach to all other aspects of Title VII jurisprudence, markedly different results might emerge as the courts deviate from their negative rights approach. However, selectively couching discomfort with the concept of transidentities under the rubric of concern for the safety of all parties leads to the perverse result that the transgender plaintiffs are being excluded, fired and denied their agency—all for their own good.

IV. MAKING IT BETTER: TOWARD DIGNITY AND A HEALTHY WORKPLACE

One of the most obvious gaps in the civil rights protection scheme is its inability or unwillingness to account for the fluid, dynamic, complex nature of identity, particularly sexual and gender identity. Law professor and anti-bullying advocate David Yamada notes one hurdle to accessing protection under the rubric of sex discrimination is the “disaggregation,” in which many courts require sexually explicit behavior in order for a plaintiff to succeed on a sexual harassment claim of hostile working environment.91 Thus, while in theory, “Title VII comes into play before the harassing conduct leads to a nervous breakdown,”92 if the conduct is not clearly sexual in nature, it may not be able to rise to the level of sex discrimination. Furthermore, many courts follow the Oncale doctrine finding Title VII should not be conceptualized as a “general civility code” but instead should be “directed only at discrimination because of sex.”93 As the following discussion will illustrate, courts are split as to what precisely counts as discrimination

93 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (holding claims of same-sex harassment are actionable as sex discrimination under Title VII due to the sexually explicit harassment). See also Etsitty, 502 F.3d at 1222 (affirming Oncale as the appropriate standard for determining the scope of “sex” for purposes of Title VII).
on the basis of sex. Some will include gender identity (such as transgender identity) and
sexual orientation, but others will not. Many claims will find themselves dismissed
before they reach the trial stage if they land in the courtroom of a judge who does not
believe the claim sufficiently falls under the Title VII prohibitions.

The practice of requiring sexual harassment to be sexually explicit leaves many
LGBTQ people in a precarious position. First, they face enormous difficulty in
successfully arguing that whatever harassment has occurred happened because of their
sex. The additional burden of sexually explicit harassment seems likely to doom a claim
of sex discrimination if it had not sunk already. The hurdles leave LGBTQ plaintiffs with
little choice but to attempt to fit their identities and claims under the Title VII umbrella
or stand without much of a civil rights cover in the workplace. That choice might be
legally possible, but often requires a sacrifice of agency, values and dignity.

The kinds of malicious and problematic harassment and treatment transgender
employees encounter in work can include a litany of physically and sexually abusive
behaviors all too common in sexual harassment case law, as well as “not addressing a
person by her or his chosen name or pronouns, refusing to allow a person to use the
appropriate bathroom, and asking offensive questions about a person’s medical history
or genitalia.”\footnote{Coffey, supra note 12, at 166.} Despite the gross nature of the behavior, most suits against employers
fail because legal ground for plaintiffs to stand on is narrow and shaky at best.\footnote{Id.}

As noted in Section III, many scholars and practitioners\footnote{The two are not mutually exclusive categories.} have continued to
lobby for various gap-closing measures to better cover LGBTQ employees, despite the
many hurdles. Some call for creating sexual orientation as a suspect classification on the
federal level since many states already prohibit discrimination on the grounds of sexual orientation.97 Protected categories, or suspect classes, receive the heightened scrutiny review placing the burden on the defendant, rather than on the plaintiff, to show that their behavior or program was not impermissibly discriminatory, or if it was, that it was the least discriminatory option that would meet their legitimate business necessity.98 One potential snag is that sexual orientation would not necessarily cover all LGBTQ persons. Transgender, transsexual, queer and gender variant employees may not claim a particular sexual orientation as part of their identity and would thus continue to be left out of federal civil rights protections.99

Many hope for courts to continue the sporadic trend of interpreting sexual orientation, gender and sexual identity as part of “sex” for purposes of Title VII.100 Subsequently, anyone with a sexual or gender identity outside the realm of heteronormative standards could state a claim for protection under Title VII.101 One scholar argues that Title VII “jurisprudence must account for individuals who are male, female, or both. If courts interpret sex in a traditional way, then courts should recognize more than two sexes.”102 Still others find hope in the ADA and its reliance on medical standards to protect those with gender identity disorders.103 Many also advocate for utilizing existing tort law to resolve gross matters of violence or harassment.104

97 See Lloyd, supra note 2, at 190-191.
98 Id. at 191-192.
99 Lee M. Peterson, Workplace Harassment Against Transgender Individuals: Sex Discrimination, Status Discrimination, or Both? 36 Suffolk U. L. Rev. 227, 227 (2002) (arguing “Legislatures should expand laws and courts should interpret laws to protect transgender individuals from discrimination in the workplace on the basis of sex, perceived sexual orientation, and disability.)
100 Id.
101 Id.
102 Peterson, supra note 99, at 246.
103 Id. at 229-231.
104 Martha Chamallas, Discrimination and Outrage: The Migration from Civil Rights to Tort Law, 48 WM. & MARY L. Rev. 2115, 2178 (2007).
Which is the solution to the holes in the Title VII umbrella? There are dangers inherent to every approach for legal change. There are dangers in assuming the law is the primary or only way to affect social change.\textsuperscript{105} However, each approach also carries strategic value. Since, as Currah and Minter noted,\textsuperscript{106} there is no one doctrine to point to as the problem, it would stand to reason that no one approach will solve the problem on its own.

Professor Catherine Fisk argues, without a new framework that incorporates workplace bullying, a status-blind form of harassment, “the ‘equal opportunity harasser’—the supervisor who is abusive to employees irrespective of race, sex, or gender—is, at best, a problem for equal rights theorists and, at worst, a poster child for the excesses of antidiscrimination law.\textsuperscript{107} A viable legal theory that recognizes the severity, validity, and redressability of workplace bullying claims offers one large step away from a total reliance on the identity and motivations of the target and perpetrator, respectively, and toward a positive framework of creating less abusive work environments for all employees.

\textbf{A. AN OVERVIEW OF WORKPLACE BULLYING}

Professor Yamada offers a definition of bullying that would serve as the basis for a legal cause of action for anyone experiencing the particular sets of behaviors, regardless of their identity or the identity and motivations of the perpetrator. He defines bullying “as the intentional infliction of a hostile work environment upon an employee by a coworker or coworkers, typically through a combination of verbal and nonverbal

\textsuperscript{105} See Lloyd, \textit{supra} note 2, at 193-194.
\textsuperscript{106} Currah, \textit{supra} note 3.
behaviors.”108 The definition employs the traditional framework of sexual harassment jurisprudence under Title VII by looking to the creation of a hostile working environment.109 It also involves the element of intentionality found in tort claims of the intentional infliction of emotional distress (IIED).110 As Yamada explains, “those who are subjected to bullying behaviors grounded in discriminatory animus may have the proverbial two bites of the apple, finding possible avenues for redress in both IIED and statutory discrimination claims” such as Title VII.111 However, many of these kinds of claims fail, usually on the grounds that the behaviors involved fail to rise to the requisite level of intolerability.112 Anti-bullying laws could provide a much needed third bite at that elusive apple.

A 2007 study of 7,740 interviewees on the topic of workplace bullying found that 37% of U.S. workers interviewed acknowledged having been bullied, an estimated 54 million individuals.113 The statistics situate bullying behaviors as 4 times more prevalent than forms of illegal harassment such as sexual harassment.114 The study’s data does not include demographic information on the number of identified LGBTQ individuals, but the findings do indicate that more people experience bullying and harassment at work than previously imagined. Also in 2007, The National Coalition of Anti-Violence Programs reported an increase in the number of violent crimes against trans-identified

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108 Yamada, Crafting a Legislative Response, supra note 6, at 481.
110 The Restatement (Second) of Torts § 46 (1965) defines IIED in the following way: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress. The elements vary somewhat from state to state as tort law, the rubric under which IIED claims fall, is almost exclusively set and regulated by the state governments rather than by the federal government. Most states adhere to this four-prong formula, however.
111 Yamada, Crafting a Legislative Response, supra note 6, at 490.
112 Id.
113 See Workplace Bullying Institute, supra note 6 (publishes results of the study under the “Research” section).
114 Id.
individuals with approximately 12% of the 2,430 reported survivors of bias-motivated crimes.\textsuperscript{115} Tracking incidence of violence against transgender individuals at large and in the workplace is difficult, but given the difficulties, the statistics still tend to show an alarming trend of violence against transgender people and violence in the workplace overall.

Beginning in 2007, several states have proposed laws to ban bullying in U.S. workplaces.\textsuperscript{116} Yamada authored the template for such laws, the Healthy Workplace Bill, a comprehensive law establishing grounds for claims of workplace bullying.\textsuperscript{117} His bill seeks to “encourage the internal resolution of bullying disputes...protect workers who engage in peaceful self-help measures to address the problem [and] provide incentives to employers who respond fairly, promptly, and effectively.”\textsuperscript{118} He describes the new cause of action:

\begin{quote}
[T]he plaintiff must establish by a preponderance of the evidence that the defendant employer, its agent, or both, intentionally subjected the plaintiff to a hostile work environment. A hostile work environment is one that is deemed hostile by both the plaintiff and by a reasonable person in the plaintiff's situation. Employers are to be held vicariously liable for hostile work environments intentionally created by their agents.\textsuperscript{119}
\end{quote}

This bill has been considered by sixteen states but so far not adopted by any.\textsuperscript{120}

Since the law has yet to be enacted in any state, research into its effects, interpretation and ultimate efficacy remain open avenues for conjecture and criticism. \textit{Los Angeles Times} columnist Molly Selvin expresses concern that the new law would

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\begin{itemize}
\item The complete 2007 report on Victims and Survivors of Bias-Motivated Violence is available at: http://www.ncavp.org/.
\item See Workplace Bullying Institute, supra note 6, for a list of states considering the Healthy Workplace Bill.
\item Yamada, Crafting a Legislative Response, supra note 6.
\item David C. Yamada, Potential Legal Protections and Liabilities for Workplace Bullying, www.newworkplaceinstitute.org.
\item Yamada, supra note 6, at 481.
\item Workplace Bullying Institute, supra note 6.
\end{itemize}
“give workers grounds to sue their superiors for being, basically, jerks.”\textsuperscript{121} In other words, she, like many others, espouses the common ‘explosion of litigation’ fear. New laws, in theory, would create innumerable new cases for an already overburdened court system to face. However, as research on sexual harassment’s hostile working environment claims shows, only a small portion of cases ever reaches the courtroom.\textsuperscript{122} The threat of litigation is, by far, a more promising piece of leverage for employees. Yamada argues that courts will best interpret the meaning of the new laws through litigation and once the jurisprudential baselines are established, employers and employees alike would be able to look to the body of case law for direction and support.\textsuperscript{123}

B. THE METRIC OF DIGNITY

Anti-bullying laws have the potential to increase the levels of protection and recourse for trans and non-trans employees alike. The laws would respect the space and status protection created by Title VII but might create what \textit{Oncale} pejoratively referred to as a “general civility code”\textsuperscript{124} that would prohibit and punish behaviors, not the identities of the plaintiffs. The laws would not further complicate the debates surrounding identity, particularly trans-identities, as a form of resistance whose strength may be compromised as individuals conform their identities to normative frameworks to seek protection.

Professor David Yamada convincingly reasons that an emphasis on dignity also

\textsuperscript{121} Molly Selvin, \textit{Is the Boss a Real Piece of Work?}, L.A. TIMES, Aug. 21, 2007.
\textsuperscript{122} See generally Marion Crain, Women, Labor Unions, and Hostile Work Environment Sexual Harassment: \textit{The Untold Story}, 4 TEX. J. OF WOMEN & L. 9, 22-24 (1995). See also Workplace Bullying Institute, \textit{supra} note 6 (despite the health harm, 40\% [of bullied employees] never report it. Only 3\% sue and 4\% complain to state or federal agencies).
\textsuperscript{123} Yamada, \textit{The Phenomenon, supra} note 91, at 533.
\textsuperscript{124} \textit{Oncale}, 523 U.S at 80.
would foster a more sustainable framework of workplace rights and “guide us toward developing legal safeguards for those who have been mistreated at work and a safety net for those who have lost their jobs.”

He argues that dignity as a metric has appeared more and more frequently throughout international jurisprudence, particularly in the arena of international human rights. Within the context of workplace rights, Yamada posits three principles have been emerging, that, when taken together, help point to a new understanding of dignity as a right and entitlement:

First, the law should encompass certain “positive” rights or obligations, to be effectuated by the state and perhaps by private actors. Second, the law should recognize that private actors, as well as the government, could engage in abuses of power against individuals. Third, the law should protect individuals against serious infringements upon their dignity motivated by bias due to intrinsic characteristics such as race or sex.

Yamada and many other scholars and practitioners in the areas workplace bullying and harassment unapologetically argue for embracing the paradigm of dignity, declaring that workers “should not have to check their dignity at the office or factory door.” Nobel Prize winner Amartya Sen, in his book *Development as Freedom*, encouraged a broadening of the understanding of the concept of freedom to include an awareness of both its intrinsic and instrumental value, as both a means and an end.

Dignity, too, could stand such an expansion. In an instrumental sense, a loss of dignity tends to signal a loss in morale and a diminished sense of security. Those losses, in turn, often lead to losses in worker productivity and employer profits. Systematically degrading behaviors, such as those that fall under the heading of workplace bullying, are

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126 Id. at 545.
127 Id. at 568.
unjust in their clear violations of personal dignity and autonomy, but they also generate additional costs. While Yamada (and I) would argue that dignity should be promoted purely because it constitutes the right and just principle, arguments that draw attention to the bottom-line, and how profits decline as dignity does provide an additional justification for adjusting the metric of workplace values to include a positive approach of encouraging dignity.

V. CONCLUSION: LAW AS A STARTING POINT

Ultimately, all of the avenues to reduce violence against transgender employees and promote dignity and the free expression of all identity offer sites of future research. Given that no anti-bullying laws have yet been enacted in the United States, the scope, interpretation, and enforcement of the laws, if passed, remain open for examination. Countries throughout the world are adopting and have adopted anti-bullying laws and may serve as examples for the U.S. Germany, Australia, Sweden, France, Canada, and Great Britain all have some variation of anti-bullying laws although the terminology varies from mobbing to moral harassment, non-sexual harassment and generalized workplace abuse. A more extensive examination of the language and applications of international law may reveal applicable and transferrable elements to inform the budding U.S. policies.

Within the U.S., a multi-level approach to providing greater access for LGBTQ employees to legal relief from workplace abuse and violence needs continued support. Outside of the law, whether employers are motivated by the human or organizational costs of bullying, harassment and discrimination, many are developing and enacting

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systems for preventing and redressing workplace violence. Employee-based organizations and groups advocate for healthier workplaces for all employees, regardless of their identities.

Within the jurisdiction of the laws, those who are bullied with an animus of sexual or racial discrimination can still find protection under the existing Title VII framework. However, for those who do not belong to a protected class or are unable to conclusively evince the intent of the perpetrator, the Healthy Workplace Bill may help to even the playing field. At the very least, the promise of status-blind workplace harassment laws will focus more on behavior, and less on the particular identities and motivations of the target and perpetrator, respectively.

In a 2004 panel on workplace bullying, Yamada argued for continued and focused attention on the systems of violence:

Ultimately, whether we are working with a discrimination model or the universal model - or both - we must think about how anti-harassment laws, and other legal and social initiatives, might be harnessed to identify and alter the underlying workplace structures that foster supervisor and co-worker abuse.

Legally prohibiting bullying alone will not automatically remedy workplace violence for LGBTQ people. However, additional status-blind prohibitions of violence, along with the expansion and support of existing policies and benefits will at least broaden the list of available options. As Chamallas noted, “For quite some time, scholars in diverse fields have envisioned a core concept of individual dignity that would find expression in

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132 Id.
133 Yamada, The Phenomenon, supra note 91.
every area of law, guaranteeing freedom from torture, humiliation, and outrage.” 135 Kepros argued that Queer Legal Theory could help the law achieve those goals because it carries the “potential to liberate judicial discourse with narratives, hide the identity politics ball when heterosexist society tries to reduce Queers to labels...provide somewhere for the unclassifiable to turn... [and] offer something much-needed in jurisprudence: a new conception of identity.”136

Until or unless the law can adopt and adapt to QLT perspectives on identity, especially transgender identities, a surprisingly queer move would be to take identity out of the equation, situating the violence, and not the transgender individual, outside the realm of normal and acceptable. Through a multi-faceted approach working within, around, beyond and beside the law to prevent and redress bullying in its many forms, we will be able to say with greater conviction to our LGBTQ youth that yes, “it gets better”— not on its own, but because we are working together to make it better.

135 Chamallas, supra note 104, at 2187.
136 Kepros, supra note 15, at 309.