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Replacing Sex with Gender

Jonathan Rekstad

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I. Introduction

Sex and gender are two distinct concepts.[1] Academics have pondered the contours of sex and gender and documented their ruminations in myriad written contributions to society's conversation on gender and sex.[2] Other than the notion that gender and sex are unique, people hardly agree on how to use the terms across a variety of issues confronting society.[3] In the face of this discussion, American courts use sex and gender interchangeably.[4] When courts apply the narrow definition of sex—that which is assigned at birth—courts affirm and perpetuate the gender binary, that of male and female.[5] The gender binary excludes nonbinary individuals—those that do not identify as male or female.[6] This exclusion is impermissible because it violates the Equal Protection Clause of the Fourteenth Amendment.[7] Without a standard approach to the statutory interpretation of sex and gender, courts reach inconsistent decisions when faced with similar facts.[8] This paper argues that

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[1] 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, 4 (1995) ("'Sex refers to the anatomical and physiological distinctions between men and women; 'gender,' by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions.").

[2] See Jessica A. Clarke, They, Them, and Theirs, 132 HARV. L. REV. 894 (2019) (discussing gender nonconformity); Andrea Meryl Kirshenbaum, "Because of . . . Sex": Rethinking the Protections Afforded Under Title VII in the Post-Oncale World 69 ALB. L. REV. 139, n.8 (2006) ("Some courts define sex in the narrowest of terms as a biological distinction. . .Other courts have looked to a more holistic definition of sex to include gender identity."); Francisco Valdes, Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," Gender," and "Sexual Orientation" in Euro-American Law and Society, 83 CALIF. L. REV. 3, 22 (1995).

[3] See Melinda D. Anderson, The Resurgence of Single-Sex Education, THE ATLANTIC, December 22, 2015 (discussing "the benefits and limitations of schools that segregate based on gender"); Dan Levin, North Carolina Reaches Settlement on 'Bathroom Bill', N.Y. TIMES, July 23, 2019; Vanessa Fuhrmans, What #MeToo Has to Do With the Workplace Gender Gap, THE WALL ST. J., Oct. 23, 2018 ("The #MeToo movement has thrown a glaring spotlight on the gender gap in the workplace."); Malika Andrews, How Should High School Define Sexes for Transgender Athletes?, N.Y. TIMES, Nov. 8, 2017 (explaining how "widespread disagreement over where the line should be drawn between sexes for purposes of athletic competition" is particularly challenging at the high school level); Keri Blakiner, Can We Build a Better Women's Prision?, The Washington Post Magazine, Oct. 28, 2019 (explaining that American prisons were built for men, and women have a different incarceration experience and if we want to see different outcomes, then we'd best incorporate different practices).

[4] Infra Section II.b; Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("[F]or purposes of [Title VII], the terms 'sex' and 'gender' have become interchangeable.")

[5] Infra Section IV.c.

[6] See Naomi Schoenbaum, The New Law of Gender Nonconformity, 105 MINN. L. REV. (forthcoming 2020) (quoting Kimberly A. Yuracko, Soul of A Woman: The Sex Stereotyping Prohibition at Work, 161 U. PA. L. REV. 757, 795) (explaining that "partial gender nonconformers [] 'reject discreet aspects of their prescribed gender code while maintaining conformity with others"').

[7] U.S. CONST. amend. XIV § 1.

[8] Infra Section II.b, Part III.

courts' interchangeable use of gender and sex assigned at birth leads them to make decisions based on sex stereotypes and deny gender nonconforming individuals equal rights; thus, courts should interpret sex assigned at birth as gender.

This paper proceeds in six parts. Part II defines sex and gender and examines courts' use of the two terms. It looks to various cases across several areas of law to show that the Supreme Court, and all lower courts, use sex and gender interchangeably. This part concludes by explaining how the lack of uniformity leads to inconsistent opinions and such inconsistency results in the denial of justice. Part III establishes that the interchangeable use of sex and gender impermissibly limits the protections afforded to citizens of the United States. This part shows the harms of sex stereotyping, and how the courts have come to rely upon it. It explains that courts' reliance on sex assigned at birth, and sex stereotypes limit gender nonconforming individuals' access to justice. Part IV suggests that a remedy to the harms resulting from the inconsistent use of sex and gender is interpret "sex" as gender. This part admits that establishing this standard will not revolutionize American law. Because of the current inconsistencies, not all decisions have impermissibly excluded gender nonconforming individuals. However, as this part discusses, currently, the courts rely on the presumption of a gender binary. It examines the exclusionary effect of courts' use of sex on gender nonconforming individuals and suggests that a standard interpretation of sex as gender would remedy this exclusion. This part concludes by clarifying the distinction between sex-based gender stereotypes and gender discrimination. Part V addresses potential counter arguments to the suggestion that courts interpret sex as gender to interpret statutes. It summarizes several arguments against interpreting sex as gender and highlights the importance of equal treatment of the laws. This part also responds to the ubiquitous support for sex segregated spaces—primarily bathrooms—by reminding readers that the assumption that same-sex segregated spaces are no-sex

spaces is rooted in the lie of the unanimity of heterosexuality. As such, sex segregation in such private and intimate spaces does not serve to protect the privacy of those spaces. Finally, this paper concludes by recognizing that at times, the law already affords equal protection to individuals irrespective of their sex assigned at birth conceptually but standardizing the interpretation of sex as gender will insure equality and justice for all.

II. Sex and gender are not the same, but courts use them interchangeably

This part seeks to clarify the distinction between sex and gender and show why it is important that the courts recognize that distinction. Through inconsistent approaches and treatment of these two concepts, the courts deny legal protections based on historic notions of sex and gender identity,[9] which no longer retain their past significance.[10] The Supreme Court has acknowledged that sex stereotyping is "made on the basis of gender,"[11] however the Court remains inconsistent in its recognition of the distinction between sex and gender. This failure to distinguish sex and gender has led the Court to limit its application of the law to only the traditional male and female identities, which is underinclusive of the spectrum that gender represents. This under inclusiveness results in decisions and laws that deny justice to individuals whose gender identities do not match the traditional sexes—male and female.

a. Distinguishing sex from gender

In order to understand the harm that stems from a lack of uniform treatment of sex and gender, one must first understand that sex and gender are distinct concepts. Sex is the more traditional of the two and is generally assigned to an individual at their birth based on their

[9] Infra Sections II.b, III.a.
[10] See Sessions v. Morales-Santana, 137 S. Ct. 1678, 1689 (2017) (noting that the relevant statues were "from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are").
[11] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

perceived anatomy.[12] '"[S]ex refers to the anatomical and physiological distinctions between men and women; 'gender,' by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions."[13] Gender is an individual's "socially constructed roles, behaviors, expressions and identities . . . There is considerable diversity in how individuals and groups understand, experience and express gender through the roles they take on, the expectations placed on them, relations with others and the complex ways that gender is institutionalized in society."[14]

Even at this simple stage of biological physical characteristics, individuals do not always fit neatly into the binary and those that do not are disadvantaged in our binary-centric legal system.[15] Equal treatment of the laws is denied to individuals because they are different when the law only recognizes male and female sexes. When an individual's sex does not match their gender, they are gender nonconforming. In cases of gender nonconformity, courts still look to an individual's sex,[16] furthering the confusion and inconsistency on how courts are to treat gender and sex.

b. Courts use sex and gender interchangeably

Courts have remained inconsistent with their use of gender and sex over the years.[17] Without a clear understanding of how the Court defines sex and gender, it is difficult to understand

[12] Valdes, supra note 2, at 47.
[13] Case, supra note 1, at 10.
[14] Canadian Inst. of Health Research, What is gender? What is sex?, https;//cihr-irsc.gc.ca/e/4862.html (last updated Apr. 4, 2020). Throughout this paper, I refer to gender and gender identity interchangeably.
[15] INTERACT ADVOCATES FOR INTERSEX YOUTH, interactadvocates.org (last visited Apr. 26, 2020) ("There are many possible differences in genitalia, hormones, internal anatomy, or chromosomes, compared to the usual two ways that human bodies develop. . . . About 1.7% of people are born intersex. . . . [One] in 2,000 babies (0.05% of humans) are born with genital differences that a doctor might suggest changing with unnecessary surgery."); see generally Clarke, supra note 1.
[16] See Schoenbaum supra note 6 (explaining that gender nonconformity doctrine is based on sex, and illustrating how that is problematic for transgender individuals specifically).
[17] Kirshenbaum, supra note 2, at n.8 ("Some courts define sex in the narrowest of terms as a biological distinction. . .Other courts have looked to a more holistic definition of sex to include gender identity.")

and apply various laws that rely on sex or gender identity, for both litigants and lower courts.[18] Without a consistent application between the use of gender and sex, the Court's decisions remain unpredictable and capricious. If the Court were to use gender instead of sex when interpreting laws, they could cure this inconsistency and protect and promote justice.

Some courts hold fast to the congressional intent of sex, that which is defined by biological characteristics.[19] While others are more willing to recognize the importance of gender identity when dealing with Title VII's "because of . . . sex."[20] In either situation, the lower courts are simply left to their own devices in determinations and definitions relating to the decision of sex or gender. But in Price Waterhouse v. Hopkins, the Court correctly refers to the plaintiff's projection of feminine and masculine attributes as her gender.[21] The Court takes care to note, that while this employment discrimination lawsuit is under Title VII's "because of . . . sex" language, the plaintiff's anatomy and corresponding sex assigned at birth are not at issue.[22] Rather, it is the plaintiff's gender that is the source of the litigation—and more specifically, it is her failure to conform her gender performance to her employer's expectations.[23] But the Court has yet to mandate a standard, resulting in a fractured and incoherent legal system.[24]

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[18] See Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 342 (7th Cir. 2017) (outlining the various interpretations of Title VII as it relates to sex discrimination and sexual orientation discrimination).
[19] Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701 (7th Cir. 2000) ("Congress intended the term sex to mean biological male or biological female, and not one's sexuality or sexual orientation.") (internal quotations omitted).
[20] See Nichols v. Aztec Rest. Enters., 256 F.3d 864 (9th Cir. 2001) (holding that harassment for failure to conform to "gender-based stereotypes" is actionable discrimination "because of . . . sex" under Title VII).
[21] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (explaining that Anne Hopkins was treated differently because she was a woman acting in a manner her peers only expected and wanted men to act). However, the court still conflated sex and gender throughout the opinion but are consistent in their belief that Hopkins' sex assigned at birth is not the problem here.
[22] Id. at 256.
[23] Id.
[24] See Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 342 (7th Cir. 2017) (Noting that the current system "creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.") (internal citations omitted). The court goes on to explain that Loving v. Virginia, 388 U.S. 1 (1967), made it clear that when "a person who is discriminated against because of the protected characteristic of one with

Even throughout the course of a single case, litigants and lower courts interchangeably use sex and gender. In United States v. Virginia, Virginia sought to continue excluding women from their all male school under the theory that women could not withstand the rigors and challenges of what made the school unique, nor would women want to withstand them.[25] The arguments for admitting women were based on the Fourteenth Amendment[26] and the Equal Protection Clause.[27] Thus Virginia had to demonstrate that as the "party seeking to uphold government action based on sex [they] must establish an 'exceedingly persuasive justification' for the classification."[28] Additionally, the reliance on the classification must "serve[] important governmental objective[s] and the discriminatory means employed [must be] substantially related to the achievement of those objectives."[29]

Since the relevant applicable laws did not specify gender or sex, the courts' and the litigants' employed various uses of sex and gender through the procedural journey that brought the case to the Supreme Court. Virginia sought to highlight the "pedagogical benefits" afforded by "single-sex education,"[30] while "[t]he District Court made 'findings' on 'gender-based' developmental differences."[31] At the appellate level, the Fourth Circuit found that "two single-sex programs" served Virginia's goal of "single-gender education."[32] Throughout the litigation, courts and litigants both interchangeably used sex and gender to primarily mean gender. They were

whom she associates is actually being disadvantaged because of her own traits." Hively, 853 F.3d at 347. Because of this, the court reasons that "it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex." Id. at 351. Because the Court has not set forth a comprehensive and workable standard, the circuits continue to reach different results when considering similar facts under the same law.

[25] United States v. Virginia, 518 U.S. 515, 540 (1996).
[26] U.S. CONST. amend. XIV § 1.
[27] Virginia, 518 U.S. at 524.
[28] Id. at 524 (internal quotes omitted).
[29] Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 (1982).
[30] Virginia, 518 U.S. at 535.
[31] Id. at 541.
[32] Id. at 546.

discussing the "social generalizations"[33] attributable to gender, rather than the students' sex assigned at birth.

Discussing the broad spectrum of characteristics and identities that compose gender makes the discussion much less black and white than the dichotomy of binary sex would. Whether it be across terms and cases, or at various levels of the litigation pathway, courts inconsistently use sex and gender. Such inconsistent treatment excludes individuals who are not a part of the gender binary that the inconsistent treatment promotes.[34] Here too, the Court did not land on a consistent or standardized application or use of sex or gender, to the detriment of all.[35]

However, in some instances the Court returns to past decisions to reframe the issues of sex and gender. In Nguyen v. I.N.S., the Court discussed the transfer of citizenship to nonmartial children born outside the United States.[36] Throughout the opinion, the Court references the gender of the parents, but in this instance, they mean sex. The Court is discussing biological characteristics as they relate to pregnancy, not identities and behavior of the individuals. Several years later, the Court revisits the issue of the transfer of citizenship to nonmarital children born outside of the United States in Sessions v. Morales-Santana.[37] The Court explains that the law is rooted in gender stereotypes, because even though it deals with the sex of the parents in their reproductive roles,

[33] Robin Dembroff et al. What Taylor Swift and Beyonce Teach Us About Sex and Causes, 14 L. & SOC'Y DISCRIMINATION J. 1, 3 (2020).
[34] The inconsistent use of sex and gender throughout various opinions across all levels of the judiciary allow the court to limit gender to the binary of male and female. While gender is more expansive than sex—even with this binary understanding, this understanding of gender fails to include any individuals not part of the binary.
[35] Throughout United States v. Virginia, 518 U.S. 515 (1996) the Court (along with the lower courts and litigants) interchangeably used sex and gender.
[36] Nguyen v. I.N.S., 553 U.S. 53 (2001).
[37] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1690–91 (2017) (noting that the pertinent legislation and opinions were supported by "two once habitual, but now untenable, assumptions" that the husband was dominant and that women where "natural and sole guardian[s] of a nonmarital child").

the law does not recognize science, but notions of propriety based on sex-based gender stereotypes[38] that the Court refuses to uphold.

This part has shown that courts use sex and gender inconsistently. This inconsistent and unforeseeable application of these distinct words leads only to uncertainty and the denial of justice. At times, the Court correctly applies gender and sex, but they have yet to establish a standard binding the lower courts to uniformity. The next part will explain how the inconsistent use harms individuals who do not align with the Court's traditional notion of sex.

III. The interchangeable use of sex and gender impermissibly limits the protections of the law

While the previous parts have shown that sex and gender are distinct concepts, and courts use sex and gender unpredictably and inconsistently, this part demonstrates how the interchangeable use of sex and gender harm individuals. First, the Court's failure to use gender in the place of sex has led it to create subcategories of sex discrimination relating to gender in order to protect certain individuals. This approach leads to sex stereotyping which undermines the rights of gender nonconformers.[39] Additionally, the Courts' reliance on traditional male and female gender identities when appropriately discussing gender alienate individuals who do not identify as binary. The part concludes by accepting that Courts occasionally do correctly use sex and gender, but the lack of a standard use of sex or gender leads to inconsistent and competing opinions that fail to afford every individual equal protection under the laws.

[38] The court's use of gender in this instance is akin to Price Waterhouse, rooting gender discrimination in presumptions based on an individual's sex. This paper suggests that sex be removed from gender entirely, and that is why this sex-based gender understanding is only a step in the right direction, rather than an example worth emulating.

[39] Schoenbaum, supra note 6.

a. Sex stereotyping is gender-based, but still referred to in terms of sex

Price Waterhouse v. Hopkins laid the foundation for sex stereotyping claims.[40] Anne Hopkins was denied partnership at Price Waterhouse and she claimed that it was sex discrimination.[41] The practice at Price Waterhouse was once a name was submitted for partnership, current partners who knew the individual would submit written comments on the candidate to an Admissions Committee who makes a recommendation to the Policy Board, then the Policy Board decides whether to submit the candidate for a vote by the entire partnership.[42] After she was denied partnership, a member of the Policy Board explained to Hopkins that her chances for partnership would increase if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[43] In addition, comments submitted about Hopkins mentioned that she was "macho," "that she 'over compensated for being a woman,'" and "advised her to take 'a course at charm school.'"[44] The court explained that abrasiveness and subpar interpersonal skills are acceptable characteristics to mention and consider when reviewing an individual as a senior manager.[45] But the court concluded that these observations were made because Hopkins was a "*woman* manager."[46] Eventually the court held that when a plaintiff can prove that their "gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[47]

[40] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).
[41] Id. at 232.
[42] Id. at 233.
[43] Id. at 235.
[44] Id. (internal citations omitted).
[45] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989).
[46] Id.
[47] Id.

Another instance of gender stereotyping came before a court in in Jespersen v. Harrah's Operating Co., via a dress code.[48] However, the court refused to consider the gender-based implications as such because men and women were affected by the policy.[49] The plaintiff, Darlene Jespersen unsuccessfully attempted to use the Price Waterhouse prohibition on sex stereotyping to invalidate her employer's policy requiring women to wear make-up.[50] Jespersen claimed in relevant part that the policy discriminated against women by forcing them to conform to a sex-based stereotype.[51] The majority distinguished Jespersen's situation from that in Price Waterhouse by explaining that Hopkins was clearly the victim of sex-stereotyping because the traits that were holding her back from advancement were lauded in her male coworkers.[52] Here, the court found that the dress code at issue applied equally to both men and women, did not impede workers from doing their job, and most importantly was not motivated by stereotypes.[53] Rather than addressing undeniable stereotypes that support the notion that women need to wear makeup and men cannot wear makeup, the court analyzed the attendant burdens of the policy.[54] The court concluded that overall, the policy was reasonable and did not unduly burden women.[55]

Courts are hesitant to extend the Price Waterhouse prohibition to situations involving sexual orientation to find actionable discrimination because of sex. The court's reasoning suggests that the connection between sex and sexual orientation is too attenuated.[56] In Simonton, the court explained that perhaps it would be possible to claim sexual orientation-based discrimination and

[48] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2005).
[49] Id. at 1109 ("While [the dress code's] requirements differ according to gender, none on its face places a greater burden on one gender than the other.")
[50] Id.
[51] Id. at 1108.
[52] Id. at 1111.
[53] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1114 (9th Cir. 2005).
[54] Id. at 1111.
[55] Id. (affirming the lower court's grant of summary judgement regarding Jespersen's unequal burden claim).
[56] Simonton v. Runyon, 225 F.3d 122, 127 (2d Cir. 2000).

for it to be actionable under Title VII because of a failure to conform to gender norms.[57] But the court refused to consider the argument by finding that Simonton failed to plead the facts sufficiently to make such a claim.[58]

The Ninth Circuit embraced the minority position in deciding that when "verbal abuse [is] closely linked to gender" it is because of sex and actionable under Title VII in Nichols v. Aztec Restaurant Enterprises.[59] Antonio Sanchez was an effeminate man who did not meet his coworkers' "views of a male stereotype."[60] After relentless taunting and abuse because of his failure to conform to the traditional male stereotype, Sanchez was fired.[61] Relying heavily on Price Waterhouse, the Ninth Circuit found that this abuse was based on sex because it was primarily sex-stereotyping.[62] The court goes to great lengths to show that the taunting, and the name calling, and the derogatory comments, were based on Sanchez's gender.[63] Sanchez's "male co-workers and one of his supervisors repeatedly reminded [him] that he did not conform to their gender-based stereotypes . . . [a]nd, the most vulgar name-calling . . . was cast in female terms."[64] But the determination of the harassment being based in gender is not part of the decision, the court still relied on the narrower definition of sex.[65] After finding that this is gender-based discrimination, the court stated that "[u]nder Price Waterhouse, Sanchez must prevail"[66]—even though Price Waterhouse proscribes sex-stereotyping. And while these sex-stereotypes are indeed rooted in

[57] Id.
[58] Id.
[59] Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001).
[60] Id. at 869.
[61] Id. at 871 (Sanchez was fired for walking off his shift to escape abuse).
[62] Id. at 875.
[63] Id. at 874 ("At its essence, the systematic abuse directed at Sanchez reflected a belief that Sanchez did not act as a man should act.").
[64] Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001).
[65] Id. at 875 (holding that the verbal abuse "occurred because of sex").
[66] Id. at 875.

gender, the courts and the legislatures continue to use and understand sex in the narrowest legal sense.

b. Relying on sex assigned at birth and traditional ideas of gender excludes nonbinary individuals

Some courts try to further the cause of equality and adapt with the times but end up negatively impacting the progress with their reliance upon incorrect gender stereotypes. For instance, in 2001, a Florida court had to decide how a marriage statute affected a couple in which one of the individuals was transgender.[67] At the time, same-sex marriage was illegal so the analysis hinged on the legal sex of Michael Kantaras, an individual assigned female sex at birth, who later successfully completed sex reassignment surgery.[68] After the surgery, Michael married Linda in 1989 then adopted Linda's son from a previous relationship, as Linda's husband. [69] In 1992, Linda had a daughter after she was artificially inseminated with Michael's brother's sperm.[70] In 1998, Michael filed for divorce and sought custody of the children.[71] Linda responded by claiming that the marriage was never legally valid as it violated Florida's ban on same-sex marriage.[72] Similarly, the adoption contravened Florida's prohibition on homosexual adoption, and Michael was not the biological father of the daughter.[73] After considering the facts, and looking to the best interest of the children, the trial court found for Michael, and the appellate court reversed.[74]

In their factual findings, the trial court focused on Michael's gender, explaining that "Michael in his appearance, characteristics and behavior was perceived as a man."[75] In addition,

[67] Kantaras v. Kantaras, 884 So. 2d 155, 155 (Fla. Dist. Ct. App. 2004).
[68] Id.
[69] Id. at 156.
[70] Id.
[71] Id.
[72] Kantaras v. Kantaras, 884 So. 2d 155, 156 (Fla. Dist. Ct. App. 2004).
[73] Id.
[74] Id. at 161.
[75] Id. at 156.

he had other legal documents before his marriage license that identified him legally as a man.[76] The trial court found this sufficient to hold that legally Michael was a man, and therefore the marriage was valid and thus they could properly grant a divorce and award custody in the best interest of the children. [77]

In reversing, the appellate court looked to cases in Texas, Ohio, and Kansas to justify their holding that sexual performance is the final indicator of sex.[78] Even though Michael had surgically removed all of his female sex organs and had grown a penis,[79] he was not sufficiently male in the eyes of the court. The court did note that while the majority approach was to deny the right to marry to transgender individuals, "when a transsexual person has successfully undergone sex-reassignment and can fully function sexually in the reassigned sex, then the person could marry legally as a member of the sex finally indicated."[80]

The court explained that this was a matter of public policy.[81] Their understanding was that the legislature had made it clear that the marriage laws were not to apply to transgender individuals because the common use of male and female did not include transgenders.[82] For marriage, the courts may only look to the individuals' "sex determined by their biological sex at birth" regardless

[76] Id. (The court notes that Michael had "been accepted as a man in a variety of social and legal ways, such as having a male driving license; male passport; male name change; male modification of his birth certificate" as well as fulfilling the traditional male role in the lives of his children.)
[77] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004). (The appellate court notes that their ruling does not take into account the best interests of the children even though the "trial judge went to great lengths to determine" their best interests.)
[78] Id. at 160.
[79] Id. at 157.
[80] Id. at 160.
[81] Id. at 161 ("Whether advances in medical science support a change in the meaning commonly attributed to the terms male and female as they are used in the Florida marriage statutes is a question that raise issues of public policy that should be addressed by the legislature.")
[82] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

of societal or scientific advancements.[83] In short, the court determined that the laws at issue were only to apply to individuals that fit into traditionally accepted notions of male and female.

Even in more recent terms, the Court uses gender to discuss sex and continues to limit gender to the traditional binary of male and female. Over several cases the Court opined on the constitutionality of separate qualifications for unwed men and women regarding their ability to transmit their citizenship to their children.[84] Initially, the Court found the sex discrimination warranted.[85] The Court reasoned that Congress passed the law to ensure that only children who had strong ties to the United States would receive citizenship when born to only one citizen parent outside the nation's borders.[86] It was clear to the Court that a woman who just gave birth to a child would know that it was hers, a bond would be formed, and the mother would take care of the child and teach it about America for the next eighteen years.[87]

However, determining the biological parenthood of the father is not as simple in the eyes of the Court, and this distinction is sufficient to warrant unequal treatment.[88] The point is that a man can be a father and never know, but the Court posits that it is impossible for a woman to not know when she is a mother, because she must give birth.[89] Because a man must take more steps to prove that a child is his, it makes sense that he should have a higher burden to satisfy before passing on his citizenship status to his child.[90] The assumption that the Court makes with this holding is

[83] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).
[84] Nguyen v. I.N.S., 553 U.S. 53, 56 (2001) ("Title 8 U.S.C. § 1409 governs the acquisition of United States citizenship by persons born to one United States citizen parent and one noncitizen parent when the parents are unmarried and the child is born outside of the United States or its possessions. The statute imposes different requirements for the child's acquisition of citizenship depending upon whether the citizen parent is the mother or the father.").
[85] Id. at 62.
[86] Id. at 65.
[87] Id. at 62.
[88] Id.
[89] Nguyen v. I.N.S., 553 U.S. 53, 66–67 (2001).
[90] Id.

that women will bond immediately with their children because they are mothers, and fathers need more time to forge the adequate bond with their child to ensure the child is sufficiently American.[91] The Court concludes by explaining that "the difference between men and women in relation to the birth process is a real one and the principle of equal protection does not forbid Congress to address the problem . . . in a manner specific to each gender."[92]

Sixteen years later, the Court changed its mind.[93] Relying heavily on past decisions, the Court comes to the conclusion that "lump characterization of [traditional gender roles as they relate to child rearing], however, no longer passes equal protection inspection."[94] The Court explains that the relevant statues were "from an era when the lawbooks of our Nation were rife with overbroad generalizations about the way men and women are."[95] The Court realized that their assumptions about the actions of individuals based on their gender "cannot withstand inspection under a Constitution that requires the Government to respect the equal dignity and stature of its male and female citizens."[96] Looking to the intent of Congress when passing this legislation, the Court decided that the outcome most in line with the congressional intent was to abolish the exception for unwed mothers and institute an identical policy for all children born outside of the United States.[97] This opinion was more of a temporary fix in that the Court concluded that "Congress may address the issues and settle on a uniform prescription that neither favors nor disadvantages any

[91] Id. The Court points that this is especially true in light of all the military men deployed overseas and the increase in overseas travel. While women can control where the child is born, men can impregnate women and leave being none the wiser.
[92] Id. at 72.
[93] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (holding "that the gender line Congress drew is incompatible with the requirement that the government accord to all persons the equal protection of the laws").
[94] Id. at 1695.
[95] Id. at 1689.
[96] Id. at 1698.
[97] Id. at 1700.

person on the basis of gender."[98] Even while accepting that rights cannot be denied on the basis of gender, the Court continues to limit gender to male and female.

This part examined courts' interchangeable use of sex and gender across a variety of cases and an assortment of laws. It established that there is no discernable reason for the courts' varying use of the distinct words, however, it did show the unequal and arbitrary impact on individuals. Because the Court has not defined gender and sex, especially as they relate to stereotypes, they continue to issue inconsistent and unforeseeable opinions. The next part suggests that the solution is for courts to focus on gender rather than sex when interpreting laws.

IV. Applying the new standard

This part suggests that courts should always interpret sex as gender. Gender is more precise than sex in this context, because courts are already occasionally looking to gender when the law uses the language of "sex."[99] Additionally, gender identity is more inclusive than sex assigned at birth. This new policy furthers the democratic notions of our nation: liberty and justice for all.

a. The new standard

When the courts are presented with problems of inequality arising from disparate treatment because of sex, it is largely actually because of gender. Because the distinction between gender and sex is commonly misunderstood, gender-based stereotyping is misidentified as sex-based stereotyping.[100] Even though Title VII[101] and other sections of the Civil Rights Act of 1964[102]

[98] Sessions v. Morales-Santana, 137 S. Ct. 1678, 1701 (2017).
[99] See discussion supra Section II.b.
[100] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989) (holding that sex-stereotyping is impermissible under Title VII).
[101] 42 U.S.C. § 2000e-2 et seq.
[102] Civil Rights Act of 1969, 42 U.S.C. §§ 1981–2000h-6 (2018).

clearly state that the alleged discrimination cannot be "because of. . . sex,"[103] since the impermissible discrimination is based on how the plaintiffs are presenting themselves,[104] or how they are perceived[105] rather than their sex assigned at birth based on their perceived genitalia, it is actually stereotypes based on gender rather than sex. Thus, once the law recognizes gender in place of sex, the expansive and justified prohibitions on gender-based stereotypes set forth in Price Waterhouse[106] will be expanded beyond discrimination based on sex assigned at birth and there will be equal protection under the law for individuals regardless of their conformity to the traditional gender binary.

When faced with determining sex and gender a district court in California first noted that "the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."[107] The court "finds that sexual orientation discrimination is a form of sex or gender discrimination."[108] The court does not differentiate between sex and gender because they see the line as being too blurry—to the point of being indistinguishable.[109] Determining where sex ends and gender begins would be less important if the law recognized gender instead of sex. Because gender identity is more expansive and encompasses more expressions than sex assigned at birth, legal rights and protections would not depend on splitting hairs.

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[103] 42 U.S.C. § 2000e-2(a)(1); 20 U.S.C. § 1681 et seq.
[104] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (plaintiff was fired for refusing to wear makeup in compliance with a new dress code).
[105] Simonton v. Runyon, 225 F.3d 122 (2d Cir. 2000) (in which an employee is harassed because his coworkers thought he was gay).
[106] Price Waterhouse, 490 U.S. at 258.
[107] Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (Cal. Dist. 2015).
[108] Id.
[109] Id. ('"the line between discrimination based on gender stereotyping and discrimination based on sexual orientation is blurry, at best'. . . the distinction is illusory and artificial") (internal citations omitted).

While it is true that sex assigned at birth, and sexual orientation are unique and distinct attributes belonging to an individual, they are inexplicably linked.[110] Generally speaking, sex (the physical attributes of an individual) is a component of attraction. This attraction then informs sexual orientation. When an employer fires an employee for the employee's sexual orientation, they are fired because they are not conforming to the expectations and presumptions the employer has formed based off of their assessment of the employee's gender. In this way, the employee is fired impermissibly because of sex. Such mental gymnastics would not be required if Title VII were to read "because of . . . gender" rather than "because of . . . sex."

Using gender rather than sex is not to be relegated solely to the courts. Already some progressive states have drafted legislation that uses gender identity rather than the traditional sex.[111] One legislative effort—that intentionally disregards sex assigned at birth—is California Senate Bill 826.[112] The bill mandates that at the end of 2019, every public corporation whose principal executive offices are located in California must have at least one female on their board.[113] Then, by 2021, the company's board must have an appropriate male to female ratio as set forth by the bill.[114] As far as the bill is concerned, '"female' means an individual who self-identifies her gender as a woman, without regard to the individual's sex designated at birth."[115] California's reasoning is reminiscent of bona fide occupational qualification logic.[116] According to various

[110] See Valdes, supra note 2, at 10.
[111] See N.J. Stat. §26:8–40.12 (Known as the Babs Siperstein Law, this allows for individuals to change their name and gender on birth certificates to male, female, or undesignated/non-binary).
[112] Cal. Corp. Code § 301.3.
[113] Id.
[114] Cal. Corp. Code § 301.3(b)(1-3) (For corporations with six or more directors, they shall have at least three female directors. A board of five directors needs at least two females, and a board of four directors needs only one female.)
[115] Cal. Corp. Code § 301.3(f)(1).
[116] See United States Equal Employment Opportunity Commission, EEOC COMPLIANCE MANUAL, 915 (1981) (explaining that a bona fide occupational qualification (BFOQ) is a "narrow exception [to Title VII that] applies only in situations where all or substantially all members of a protected class are unable to perform the duties of the job in question"); Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (finding that being male in a maximum-security

studies and reports that the bill cites, increasing the number of women on the corporate boards will "boost the California economy" and increase equality generally.[117] Essentially, they are saying that only women can do this job, because they are women. But the purpose of the act is to increase gender equality.

The law is clear that sex assigned at birth is not what matters, rather it is a person's gender identity. The state believes that this diversity of genders on corporate boards is going to increase the economic performance of the state. The bill claims that "publicly held companies perform better when women serve on their boards of directors,"[118] and women are more likely to create more sustainable futures for the corporations.[119]

The law highlights a key difference between sex and gender. Sex is assigned; individuals and society inform the individual of how their physiology defines them. Gender identity is embraced and developed in recognition of autonomy and liberty. Even though either iteration of the law would ensure that women are more fully represented on corporate boards, what purpose does the California legislature achieve by intentionally using gender rather than sex? By using gender, the legislature accepts that sex assigned at birth is not as controlling as it once was.

Currently there is confusion and inconsistencies in courts' use of sex and gender. Courts are unsure of where to draw the line and are struggling to apply these meaningful distinctions.[120] A lack of clarity and uniformity can make the related subjects of sex and gender confusing and

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male prison was a BFOQ for the prison guards because a woman's success as a prison guard would be "directly reduced by her womanhood").

[117] 2018 Cal SB 826 § 1(a).

[118] 2018 Cal SB 826 §1(c).

[119] 2018 Cal SB 826 §1(c)(3).

[120] See Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 346 (7th Cir. 2017) (explaining that the line between a gender nonconformity claim and a sexual orientation claim is "gossamer-thin"); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151, 1159 (Cal. Dist. 2015) (explaining that the line between sex, gender, and sexual orientation is illusory),

unpredictable. Since courts use gender sometimes and sex others, a standard mandating the use of gender when dealing with "sex" in the law will not completely upend the current system.

b. The new standard will not change everything

Not all of the conclusions of the cases above would change if sex were replaced with gender, which provides a degree of continuity in the Court's precedent. But it is still a necessary one in order to promote and protect rights that are thus far bound to the binary of sex. Ideally, using gender in place of sex will reduce the legal use of stereotypes that the sex framework perpetuates.

If the courts analyzed sexual discrimination claims through gender rather than sex, the outcome of Jespersen would be different.[121] If the courts used gender instead of sex, employees would not need to prove that the discrimination was rooted in sex stereotypes to be actionable. It would not matter if Harrah's policy was motivated by stereotype because it discriminates based on how employees present their gender identity in an unequal manner.[122] Jespersen lost her job because she refused to conform to the notions of traditional gender stereotypes.[123] Because she would not wear makeup, she could not be a bartender. But for her gender identity, she would still be a bartender at Harrah's at the end of the litigation.

Undoubtedly the policy did unduly burden women. The makeup requirements were quite extensive. The female employees had to purchase the makeup and then take time to apply the makeup. No similar requirement was placed on men. The court refused to address the unequal burden argument because Jespersen failed to submit "any documentation or any evidence of the

[121] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2005).
[122] Id. at 1118 (Kozinski, dissenting) (it is a "cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup.").
[123] See supra pp. 10–11.

relative cost and time required to comply with the grooming requirements by men and women."[124] The court explained that grooming standards are not facially discriminatory because they differentiate between the genders, and because Harrah's policy was reasonable.[125] When considering the entire appearance regulation scheme, they did not find it to be impermissibly motivated by stereotypes.[126]

While it is true that the court's failure to take judicial notice of the burden imposed by the makeup requirement hurt Jespersen's case,[127] it should not have doomed it. Judge Kozinski's dissent highlights the importance of gender in this case. The majority discounts Jespersen's claims that wearing makeup is "inconsistent with her self-image"[128] only because she is a woman, and society expects women to wear makeup. But it is completely reasonable for a man to find wearing makeup "burdensome and demeaning."[129] It is these gender stereotypes that have become ingrained in American society that uphold the majority's determination that an employer's dress code requiring women to wear makeup is reasonable. This is discrimination because of gender, and it should be illegal. This is not to say that there is no justification for employee dress codes, but the codes must not be based on something as arbitrary and capricious as stereotypes. Consider the requirement that construction workers wear hardhats while on jobsites.[130] Undoubtedly this is rooted in the safety of the employee, and this is a reasonable requirement placed upon an employee by their employer. But note that the safety-based requirement applies irrespective of perceived gender identity.

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[124] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1110 (9th Cir. 2005).
[125] Id. at 113.
[126] Id.
[127] Id.at 110.
[128] Id. at 1117.
[129] Id. at 1119.
[130] 29 C.F.R. 1926.100(a) ("Employees working in areas where there is possible danger of head injury . . . shall be protected by protective helmets.").

The analysis in United States v. Virginia did not hinge on the definition of sex or gender because either way the state was not in accordance with the equal protection clause in that they were not treating people equally by denying admittance to the school on an essentially arbitrary basis.[131] It is not relevant that many women do not desire the education offered at VMI. So too there are plenty of men who do not want it! The salient point is that those women who were interested, did apply, and they were denied admission because of their gender. The Equal Protection Clause does not circumscribe its protections based on an individual's identity. Rather, it mandates that "no state shall make or enforce any law which shall . . . deny to any person . . . the equal protection of the laws."[132] Undoubtedly this evidences that a more expansive definition of gender should be used in place of sex. The amendment does not read "deny any man or woman" or more classically just "deny any man." The plain meaning of the amendment is that equal protection is a constitutional right to every individual regardless of their sex, and more importantly, regardless of their gender identity.[133]

The crux of Virginia's argument is that these male attributes are what one needs to thrive in this environment.[134] They are not looking to sex, they are looking to the attitudes, the personalities, and the "social dimensions of personhood;"[135] this is a gender classification. At this point, this distinction is largely pointless in that the Fourteenth Amendment does not refer to gender or sex.[136] Indeed, here intermediate scrutiny was applied to analyze the actions and

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[131] See supra pps. 6–7.
[132] U.S. CONST. amend. XIV § 1.
[133] See J.E.B. v. Alabama, 511 U.S. 127 (1994) (Discrimination on the basis of gender violates the equal protection clause.); Sessions v. Morales-Santana, 137 S. Ct. 1678 (2017) (holding that gender distinctions affecting the transmission of citizenship at birth are a violation of equal protection).
[134] Compare United States v. Virginia, 518 U.S. 515 (1996) with Dothard v. Rawlinson, 433 U.S. 321, 334 (1977) (In both cases, the Court determined what women like, and how that should affect their opportunities in life, from education to employment.)
[135] Valdes supra note 2 at 21.
[136] U.S. CONST. amend. XIV § 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law

motivations of the school. Eventually, the Court held that the school was in violation of equal protection because having single-gender schools was not an important governmental objective and the gender discrimination was not substantially related to that objective.[137] Women could not be denied access to the "prestige" of the institution without a comparable alternative because of Virginia's "obligation to afford them genuinely equal protection."[138]

This is not to suggest that the Fourteenth Amendment was intended to shatter the law's dependence on the gender binary by using "person" rather than a series of gendered pronouns, as is the wont of legislatures. Congress, when ratifying the Fourteenth Amendment, was clearly not considering the spectrum of gender and the rights of gender nonconformists.[139] But, the use of person in the text is a strong indicator of the need for an expansive and pervasive reach of human rights and equal treatment of the laws.

The appellate court in Kantaras was so caught up in the stereotypes and dichotomy of sex, that even though they cited public policy as supporting their conclusion, it was actually in direct opposition of public policy.[140] The court in Kantaras accepts that their actions are in opposition to the best interest of the children involved.[141] In a post Obergefell[142] world, however, it is clear to see that the court acted in opposition of public policy. They denied a fundamental right to an individual based on their sex assigned at birth—regardless of the fact that Michael Kantaras had

which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[137] United States v. Virginia, 518 U.S. 515, 555–57 (1996).

[138] Id. at 557.

[139] See generally Clarke, supra note 2.

[140] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).

[141] Id.

[142] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

been successfully living as a man for several years. The court usurped his autonomy, and paternalistically decided how he should live his life based on who they decided he was.

Michael Kantaras's rights were impermissibly abridged because the court based their decision on his sex rather than his gender.[143] Even without the mandates of Obergefell, if the Kantras's compliance with the applicable marriage statute was viewed in light of the parties' gender rather than sex, their marriage would have to be found valid and legally recognizable. Linda's sex and gender were female.[144] When Michael was born, his sex was female. But at the time of the marriage, his gender was male. Everyone accepts that "in his appearance, characteristics and behavior [he] was perceived as a man."[145] At the time of the marriage, there was a man and a woman in compliance with the Florida statute.

The court in Nichols[146] is no different than the court in Kantaras, in seeking to be progressive, they do more harm than good. If the court would have rooted their decision that Sanchez was harassed solely on the grounds that this was impermissible gender discrimination in violation of Title VII, they would have set a powerful precedent allowing for the prohibition of gender-based discrimination. Certainly, they needed to rely on Price Waterhouse to establish that the conduct of the coworkers was because of sex because it was gender-stereotyping. However, perhaps if they would have reduced the opinion's emphasis on Price Waterhouse, they could have more clearly crystalized a national understanding that sexual orientation discrimination should be protected by Title VII as an extension of its prohibitions on sex-based gender stereotypes. To be

[143] Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004).
[144] Id. at 155. The court never explicitly states Linda's sex or gender but assumes that she is female because she is pregnant and gives birth to children.
[145] Id. at 156.
[146] Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) (finding that harassment based on the employee's failure to conform to the harasser's gender assumptions was discrimination because of sex).

clear though, if the courts were using this new standard, the court would not have to look to Price Waterhouse. Under the new standard, the court could find that the plaintiff was fired because of his gender, which alone would be sufficiently actionable.

This new standard is not as extreme as it may initially sound. There are times when the Court recognizes the importance of gender and makes their decision in accordance with the distinction between sex and gender.[147] But still, there is uncertainty. The Court has shown that they know that gender is important, and America is far gone from the days where sex should be the basis of any decisions pertaining to legal rights. Even still, the Court has yet to make a rule; the Court has yet to say that sex is no longer the controlling factor. The Court has failed to end the marginalization and discrimination of gender nonconforming individuals. With all these cases of progress, the required result should not be uncertain when cases about sexual orientation and transgender discrimination arise.[148] That is why a standardized approach in which courts interpret sex as gender is important and necessary.

c. The binary presumption

The problem with sex in this legal sense is that it assumes a dichotomy between male and female and excludes anyone who falls somewhere else along the spectrum. Even if the Court were to accept that sexual orientation is included under Title VII's prohibitions on discrimination

[147] See supra pps. 14–16 (outlining the transition from Ngyuen v. I.N.S. to Morales-Santana).

[148] Two cases are before the Court right now are, Altitude Express, Inc. v. Zarda, 2019 U.S. Lexis 2931 (2019) (involving the termination of an individual because of their sexual orientation) and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 2019 U.S. Lexis 2846 (2019) (involving the termination of an employee for being transgender) the outcome of neither of these cases is clear. While it is true that gender and sexual orientation are distinct, if the Court were to interpret sex as gender (short of overturning precedent) the outcome of these cases would be clear; the plaintiffs would have to win if they can show that they were discriminated against because of their gender.

"because of . . . sex,"[149] and even if the Court conferred Title VII protections to transgender people,[150] anyone who does not identify as either male or female would face a more onerous task of proving actionable discrimination pursuant to the statute because they do not fit into the traditional binary of sex assigned at birth.[151]

It is reported that about half a million people in America have a nonbinary gender identity.[152] While discrimination against a nonbinary individual may fall afoul of Price Waterhouse, it would not be rooted in the narrow definition of sex that courts adamantly embrace. If the law instead were to forbid discrimination because of gender, then this would not be an issue. Gender "denotes the social constructions understood as "male" and "female" or "masculine" and feminine.'"[153] It is more expansive and inclusive than the narrow sex designated at birth that currently permeates the law. The Court refuses to apply gender in the place of sex claiming that such matters of public policy belong to the legislature, but Justice Scalia noted that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[154] As the Court in Oncale explains, male-on-male sexual harassment was "assuredly not the principal evil Congress was concerned with when it enacted Title VII" but that does not make it an unactionable claim as the lower court had held.[155] There is precedent for the court to rely upon in disregarding public policy to preserve human rights.[156]

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[149] Altitude Express, Inc. v. Zarda, 2019 U.S. Lexis 2931 (2019).
[150] R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 2019 U.S. Lexis 2846 (2019).
[151] See Schoenbaum supra note 6 (discussing the burden of a nonconformity discrimination claim); Dembroff supra note 39 (discussing society's role in the creation of gender).
[152] Clarke, supra note 2, at 896.
[153] Valdes, supra note 2, at 21.
[154] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[155] Id.
[156] See Id.; Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (overturning previous "separate but equal" standard by holding that separate is inherently unequal); Obergefell v. Hodges, 135 S. Ct. 1039 (2015) (holding that marriage is a fundamental right and cannot be denied to same-sex couples).

It may still seem as if the distinction between sex and gender is not the paragon of importance when balancing gender against traditional notions of male and female. But, if ever they did, Americans no longer unanimously accept the gender binary.[157] Fixing laws onto this arbitrary binary system impermissibly denies individuals who do not fit into the binary—for whatever reason—the equal protection of the laws.[158] This is why courts should only look to gender rather than sex when determining and applying the law. Great uncertainty and inconsistency follow (for parties and lower courts) the Court's indiscriminate use of sex and gender. Further, when courts do not consider gender, those individuals who do not conform to society's expectations associated with the individual's perceived sex are denied justice. Because the law's current gender discrimination jurisprudence is rooted in the language of Title VII's "because of . . . sex" even this legal understanding of gender stems from sex. Therefore, the law should cast off its dependence on sex and solely look to an individual's gender—their "social dimension of personhood,"[159] their "internal sense" of who they are.[160]

d. Clarifying discrimination because of sex, and discrimination because of gender

As evidenced in Price Waterhouse the "expectation of conformity" based on an individual's appearance or actions is barred.[161] Price Waterhouse made gender stereotyping a subcategory of sex discrimination, but with this definition, "gender stereotyping" is still rooted in

[157] See Molly Igoe, Gender Identity: Significant Partisan and Gender Divides Remain, PRRI (Apr. 27, 2020, 10:46 PM), https://www.prri.org/spotlight/gender-identity-significant-partisan-and-gender-divides-remain/ ("According to a 2019 PRRI Survey, just over half (55%) of Americans believe there are only two genders, including 43% who say they feel strongly about this.")
[158] Cf. Sessions v Morales-Santana, 137 S. Ct. 1678, 1686 (2017) (holing that "the gender line Congress drew is incompatible with the requirement that the government accord to all persons the equal protection of the laws").
[159] Valdes, supra note 2, at 21.
[160] See Clarke, supra note 2, at 897.
[161] Schoenbaum, supra note 6.

sex.[162] The previous cases illuminate this subtle but necessary distinction. Because the courts adamantly cling to the narrow definition of sex in order to provide deserved protections to gender nonconforming individuals, courts are forced to base the discriminatory actions on the sex of the plaintiff. This centers the issue on what society perceives the individual's sex to be and how stereotypes informed the defendant's expectations of the plaintiff's behavior or appearance.[163] While it is encouraging that the courts are trying to expand the protections of the law in such a way, they are still rooting these protections in the binary of sex as it is traditionally used. If instead, the law forbade gender discrimination outright, the plaintiff's sex would be irrelevant.

This is most clearly illustrated in Jespersen.[164] Jespersen was fired for refusing to comply with her employer's dress code.[165] Remember that the court did not see this as sex discrimination because there was a dress code for both men and women.[166] However, if the law proscribed discrimination because of gender, it would not matter that there was a dress code for both men and women. "Jespersen introduced evidence that [wearing makeup] is inconsistent with her self-image and interferes with her job performance."[167] Irrespective of sex, Jespersen was fired for how she presented herself to the world; rather, she was fired for her failure to conform her image to the expectations of society. This is gender discrimination in its most basic form. And it is essential that we do not require an individual to base their harm in sex, for that promotes the notion that

[162] Price Waterhouse, 490 U.S. at 250 ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group").
[163] See Dembroff supra note 39 at 8 (explaining that individual-level traits will not explain why an individual was fired, because it is societal expectations that are the cause).
[164] Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006).
[165] Id. at 1106.
[166] Id. at 1111.
[167] Id. at 1117.

only the binary sexes are worth or deserving of protection.[168] This is why courts should use gender instead of sex, and this is why the distinction and clarity of language is important.

V. Responding to potential counter arguments

The substitution of gender for sex is not without its own complications. For instance, because gender is more comprehensive and inclusive than sex, it could make any distinction based on any trait related to sex-stereotypes illegal. Additionally, one could argue that this proposal will upend the current social structure in an unacceptable way by giving legal rights to individuals based on their perceptions of themselves. Further, and the reasoning most favored by the courts, using gender in place of sex is impossible because it is not what the legislatures intended, citing judicial restraint.[169] There are also the social concerns to contend with as well. It seems difficult to talk about gender without also discussing bathrooms as is evidenced by the bevy of material ruminating over the issue of sex segregation and its relevance to gender.[170] However, none of these concerns or arguments justify the discriminatory application and interpretation of law.

The use and application of gender identity in the law will not put an undue emphasis on individuality and the specific facts of each case. Already, claims of discrimination and inequality are heavily reliant upon the specific facts of the case. Presently claims of sexual inequality and discrimination focus on the individual being discriminated against themselves. But that is not to

[168] Cf. Schoenbaum supra note 6 (explaining that transgender discrimination is only sex discrimination if you base the discrimination on their sex and not their gender and that undermines the crusade for equal treatment).
[169] See supra Section II.b.
[170] Laura Portuondo, The Overdue Case Against Sex-Segregated Bathrooms, 29 YALE J.L. & FEMINISM 465, 470 (2018) (arguing that sex-segregated bathrooms perpetuate harmful stereotypes and do not serve the interest that purport to support the segregation); Marie-Amelie George, The LGBT Disconnect: Politics and Perils of Legal Movement Formation, 2018 Wis. L. Rev. 503, 516 (2018) ("It is not surprising that battles over LGBT rights are being fought over bathrooms, as these spaces have historically been a flashpoint for civil rights contests, with privacy and safety pitted against equality and dignity."); Understanding Transgender Access Laws, N.Y. TIMES, Feb. 24, 2017 (outlining state and federal legislation and polices regarding gender identification and access to spaces like bathrooms from 2012 to 2017) [hereinafter "Transgender Access"].

say that there will not be any changes to the system if the courts adopt gender in the place of sex. Primarily, and most importantly, access to justice and the courts will be increased by expanding the protections of the law beyond an assignment made at birth. The more expansive and permissive gender identity would sacrifice the administrative efficiency of the current binary sex standard in use. As legislatures get more comfortable with the Court's anti-stereotyping principle to allow for gender nonconformity, courts still cling to "sex-specific rules they regard as reflecting comfortable gender conventions [that have] a trivial impact on women[.]"[171] The Court has pointed out that even though stereotypes may hold true for the majority of a group, the fact that a single individual from that group does not conform to the stereotype proscribes the government from making laws based on the stereotype.[172]

Sex is only part of an individual's identity, so it should not be allowed to determine all of someone's rights. But this is not to say that all differentiation between sex and gender should be eliminated, as an androgynous society is neither practical nor desirable. Diversity is a strength and differences should be celebrated; however, they should not be the basis of legal decisions circumscribing rights.

While discussing making room for gender, Mary Anne C. Case fails to make room for the nonbinary, and it is her undoing. Case's goal is to disaggregate sex from gender in the hopes that eventually gender "may wither away."[173] Her understanding is that because gender is exclusively defined through sex, then mayhap these categories that we find imperative now will fail to stand

[171] Clarke, supra note 2, at 917 (internal quotations omitted).
[172] United States v. Virginia, 518 U.S. 515, 524 (1996) (explaining that the state needs an exceedingly persuasive justification substantially related to the important government objective it serves in order to discriminate based on sex).
[173] Case supra, note 1, at 76 n.261.

the test of time, much in the same way that we no longer discuss noble and common blood.[174] While it may be true that Case is correct in saying that "the world will not be safe for women in filly pink dresses . . . unless and until it is made safe for men in dresses as well,"[175] the issue is that Case insists on coding things as feminine and masculine, with no intention of ever removing sex from gender. For all this talk of disaggregating, there is little separation of gender identity and male and female.

Another reason that Case is hesitant to replace sex with gender, specifically in relation to Title VII is that there may be some jobs that remain gendered— "even in the ideal world."[176] Case wishes to protect that which is "traditionally feminine without . . . limiting it to women, or limiting women to it."[177] But why must these characteristics and traits be feminine? And in the same vein, why must aggressiveness, protectiveness, assertiveness and the like be coded masculine? Gender can be a spectrum without plunging the world into "a sort of idealized androgyny."[178]

Coincidently, this is an appropriate response to everyone who claims that America will be doomed if gender neutral bathrooms replace the current sex-segregated spaces. Replacing sex with gender is not an argument for a world that looks the same filled with individuals who identify and conform to one standard, rather it is an argument for inclusion. The rhetoric and arguments employed to support sex-segregation generally are no longer tenable or coherent. "As the awareness and acceptability of same-sex desire have increased, the assumption that same-sex spaces are "no-sex" spaces has withered." [179] In these intimate and private spaces, the focus should

[174] Id. (Case does not consider that nobility and class is still a big deal in other places.)
[175] Id. at 68.
[176] Id. at 76.
[177] Id. at 105.
[178] Clark, supra note 2, at 916.
[179] Clark, supra note 2, at 982.

not be on what other people look like anyway. As in other areas so to here, focusing on sex is a focus on the individual and in the context of bathrooms and locker rooms and other sex segregated spaces, the focus should be on the "safety and privacy of each individual,"[180] not their physiology. Already "cities including Austin, Tex.; Berkeley, Calif.; Philadelphia; Santa Fe, N.M.; and Seattle" are implementing legislation requiring gender neutral bathrooms.[181] This is feasible. This is practical. This is necessary. Our understanding of the human experience is expanding and being uncomfortable or unfamiliar with an idea or concept is not adequate justification to deny the corresponding legal recognition of that changed understanding.

VI. Conclusion

The law has limits, and this may be one of them. It seems unlikely that sexual distinctions will be erased in society—certainly not anytime soon. Undoubtedly there are biological differences between males and females.[182] And these differences are important outside of the law. Sex will retain its cultural significance and thus this does not require a sex-blind or gender-blind approach to the issues discussed herein. History proves that the furtherance of justice and equality is not achieved by blindness.[183] Rather the law should be defined and applied in terms of gender rather than sex to protect and promote equality. While it is true that theoretically there is equal treatment under the law, interpreting sex as gender consistently will encourage actualization of the law of the land: All people are created equal and are entitled to be treated as such.

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[180] Id. at 981.
[181] Transgender Access supra note 123.
[182] Mustapha Chamekh et al., Differential Susceptibility to Infectious Respiratory Diseases between Males and Females Linked to Sex-Specific Innate Immune Inflammatory Response, FRONT. IMMUNOL., December 2017.
[183] Megan R. Underhill, White Parents Teach Their Children to be Colorblind. Here's Why That's Bad for Everyone., WASHINGTON POST, October 5, 2018.