Locating Sex: The Rhetorical Contours of Transgender Anti-Discrimination Law

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Dissertation submitted to the faculty of the Virginia Polytechnic Institute and State University in partial fulfillment of the requirements for the degree of

Doctor of Philosophy
In
Rhetoric & Writing

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March 21, 2017
Blacksburg, Virginia

Keywords: rhetoric, law, gender, transgender, anti-discrimination law

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ABSTRACT

Legislation and litigation aimed at ending discrimination against transgender people has been both critiqued as eliding the structural roots of discrimination and celebrated as an important visibility project that helps to highlight the struggles trans people face. Approaching law as an ongoing interaction where meaning unfolds, I investigate what is being made visible through transgender anti-discrimination law and how it might variously impact trans and gender justice movements in the future. I analyze three different articulations of transgender anti-discrimination law, attending to the rhetorical configurations of sex, identity, and discrimination that emerge in them and the political and ethical implications of those configurations. Ultimately, I argue that this rhetorical mapping complicates how we understand identity to function within anti-discrimination law and, more importantly, that it highlights the ethical possibilities that lurk beneath simple understandings of anti-discrimination law.

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GENERAL AUDIENCE ABSTRACT

Lawsuits and laws aimed at addressing discrimination against transgender people have become front-page news. As such, anti-discrimination law is a primary lens through which the American public is coming to learn about transgender people and the political advocacy being carried out on their behalf. While some advocates have championed this development, others have argued that anti-discrimination law does little to address inequality and to protect the most vulnerable. In this dissertation, I use rhetorical theory to analyze how various instances of anti-discrimination law position transgender people, their identities, and the problem of discrimination. Through this analysis, I show how anti-discrimination law can both foreclose and invite further inquiry into the roots of discrimination. Ultimately, I argue that anti-discrimination law cannot solve the problem of inequality but that it *can* draw attention to our ethical responsibilities toward each other.

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CHAPTER 1 - JUSTICE CONSIDERED: READING TRANSGENDER ANTI-DISCRIMINATION LAW RHETORICALLY

In the wake of Donald Trump's stunning presidential victory, some cursory post-mortem reports proposed that Democrats had lost because of the focus on so-called "boutique issues" like transgender bathroom access and anti-discrimination protections. One Ohio Democratic official quipped, "[P]eople in the heartland thought the Democratic Party cared more about where someone else went to the restroom than whether they had a good-paying job."[1] The inference is that in attending to transgender bathroom access, among other things, the Clinton campaign gave the impression that it did so at the expense of the majority's needs. Transgender activist and writer Jennifer Finney Boylan bristled at the suggestion: "A boutique — a place where you'd shop for, say, artisan pantyhose — is not the first place I'd associate with an individual's quest for equal protection under the law, but then what did I know? I was now one of the people from whom the country had been 'taken back.'"[2] As Boylan makes clear, this label of "boutique" renders transgender rights frivolous, trivial—a luxury that Democrats could not afford. Certainly, for the significant percentage of transgender people who struggle with unemployment, housing discrimination and homelessness, and harassment and violence, these circumstances can hardly appear trivial.[3] Yet, as the Ohio official's comments evince, there is a sense (for some) that transgender people's struggles and rights are apart from those of other Americans.

I bring this up not because I attempt to solve the problems of the Democratic Party here, but because this debate highlights tensions over recent political struggles concerning transgender

[1] James Hohmann, "The Daily 202: Rust Belt Dems Broke for Trump because they Thought Clinton Cared More about Bathrooms than Jobs," *The Washington Post*, November 22, 2016, http://www.washingtonpost.com.
[2] Jennifer Finney Boylan, "Really, You're Blaming Transgender People for Trump?," *The New York Times*, December 2, 2016, http://www.nytimes.com.
[3] For a current snapshot of some of the dire circumstances transgender Americans face, reference the 2015 U.S. Transgender Survey. Sandy E. James et al., "The Report of the 2015 U.S. Transgender Survey," (2016), http://www.transequality.org.

anti-discrimination law. There is a sense that perceived specialized political and legal attention is at the expense of the majority. I suggest that these appraisals of transgender rights and anti-discrimination law have in part to do with how discrimination, law, and sex are rhetorically constructed and understood. That is, the notion that transgender rights are a novelty rests upon certain presumptions about the origins of discrimination against transgender people and the relationship we all bear to this discrimination and to transgender people. This project examines those constructions by investigating what political and ethical relationships and knowledge are created across various articulations of transgender anti-discrimination law.

Arguably, anti-discrimination law is the most prominent and visible type of current transgender advocacy and activism. The United States government, including the Equal Employment Opportunity Commission, the Department of Justice, and the Department of Education, have issued guidelines specifying that to discriminate on the basis of gender identity or transgender status is to discriminate on the basis of sex. Municipalities and states across the country have passed gender identity and expression anti-discrimination statutes. And transgender students' and employees' discrimination lawsuits, including the issue of bathroom access, have become front-page news. Anti-discrimination law is a primary lens through which the American public is coming to learn about transgender people and the political advocacy being carried out on their behalf.

This focus on anti-discrimination law is not without critics. Legal scholar and transgender activist Dean Spade argues that anti-discrimination law operates on a symbolic rather than material level and that it "primarily conceptualizes the harm of [discrimination] through the

perpetrator/victim dyad," thus eliding the systemic roots of discrimination.[4] On the other hand, others argue that in addition to providing specific remedies, anti-discrimination law compels courts and society to contemplate "sex" in novel and productive ways.[5]

While much of the criticism and commentary on transgender anti-discrimination law understands it as a singular, easily identifiable thing, my rhetorical approach understands it as multidimensional. In the chapters that follow, I investigate different articulations of transgender anti-discrimination law to examine the diverse ways sex, identity, discrimination, and even law itself are configured and the implications of these configurations. In other words, rather than evaluating transgender anti-discrimination law as a discrete whole, I analyze it as a diverse and dispersed area of law that may function quite differently across arenas of enactment and development.

Within these articulations, I consider the political and ethical implications of the rhetorical constructions I highlight. While anti-discrimination law and its enumeration of types of discrimination (sex, age, disability, race, etc.) might be understood as an attempt to name and address widespread bias and inequity (with the end goal of eventually obviating the need for such protection), it might also be understood as a means of recognizing and upholding individual identity. In either formulation, law is understood as addressing a social problem, but in the former structurally-upheld inequity appears as the problem whereas in the latter the problem is misrecognition and the problems and inequalities that attend to it. These different understandings of anti-discrimination law, then, impact not only what we think the law does and should do, but also how we relate to the law and to each other. In this sense, legal thinking permeates our social

[4] Dean Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law*, 2nd ed. (Durham, NC: Duke University Press, 2015), 42.
[5] Taylor Flynn, ""Transforming" the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality," *Columbia Law Review* 101, no. 2 (2001): 292-420.

and political worlds but in a more open-ended way then we might intuit. That is, law doesn't just tell us what to do and how to be, we also tell law what it does and how it makes us. It is not only the laws we pass and argue for that shape our world, but also the terms of those arguments, the connections we forge, and the very conjuring and constitution of legal scenes that give law its rhetorical world-making power. In investigating transgender anti-discrimination law, I consider not only what anti-discrimination law says but how courts, legislators, litigants, and citizens are positioned with regard to the necessity of and grounds for anti-discrimination law. This study considers not only what transgender anti-discrimination law tells us about sex, identity, and discrimination but also about law, its power, and its impotence.

This project derives its approach to understanding and examining law from both rhetorical scholarship and humanist-informed legal studies. To situate this approach, I begin with a discussion of this particular theoretical framework and what it affords rhetorical scholars studying the law. I then turn to various discussions of trans politics and legal engagements, drawing attention to disagreements over specific legal reform and recognition campaigns, including anti-discrimination efforts, so as to better describe some of the issues this study takes up. Next, to provide context for my discussions of sex, identity, and justice, I provide a summary of more recent gender theory and its varied articulations of sex and gender. I then contrast some of these articulations and concerns with ongoing discussions within trans studies, highlighting both some shared investments and some sites of conflict or confusion. In the final section, I bring these insights together to situate this project and outline its design.

Law, Rhetoric, and World Making

Rebecca Dingo proposes a transnational feminist rhetorical methodology for examining public policy, arguing that such an approach better accounts for how "history, relationships,

connections, and contexts impact the persuasiveness, pervasiveness, and contradictions of certain arguments."[6] Dingo extends the network metaphor forwarded by Jenny Edbauer[7] to understand not only how rhetorics circulate and shift across time and space but, importantly for feminist rhetoricians, the power relations implicated and altered in these circulations. So, while the notion of rhetorical ecologies generally attends to the travel of rhetorics, transnational feminist rhetorical methodologies attend to how the travel of discourses and terms differentially impact women and gender relations across national borders. Dingo uses the analogy of "trafficking" to track how ideologies are imported, circulated, fused, and altered through rhetorical interactions. For Dingo, the network analogy is a particularly useful for tracking the links and disjunctures between related discourses.

Similarly, Mary Queen urges us to track the circulation of texts, arguing that focusing on texts and authors may "obscure[e] the rhetorically transformative power of the circulation of these texts."[8] Queen tracks the circulation of a letter about the Revolutionary Association of Women of Afghanistan through various digital channels, tracing how authorship was misattributed and how the meaning of the letter changed depending on its circulation and citation. Queen refers to her analysis as a "rhetorical genealogy," arguing that such an approach "works to uncover not only the meaning of meaning, but the structuring of meaning… the cultural practices and rhetorics through which particular representations and interpretations gain validity and power."[9] Though Queen focuses on digital circulation, arguing that "electronic texts… are mobile: they circulate and in the process of circulation, they encounter and are

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[6] Rebecca Dingo, *Networking Arguments: Rhetoric, Transnational Feminism, and Public Policy Writing* (Pittsburgh, PA: University of Pittsburgh Press, 2012), 25.
[7] Jenny Edbauer, "Unframing Models of Public Distribution: From Rhetorical Situation to Rhetorical Ecologies," *Rhetoric Society Quarterly* 35, no. 4 (2005): 5-24.
[8] Mary Queen, "Transnational Feminist Rhetorics in a Digital World," *College English* 70, no. 5 (2008): 485.
[9] Queen, "Transnational Feminist Rhetorics," 476.

transformed by other forces,"[10] I would argue that this notion of transformation and circulation can apply not only to electronic texts, but to all texts, as Dingo's work helps to demonstrate. Paying attention to circulation and transformation of rhetorics is critical for any rhetorical scholar hoping to speak about policy and power.

As Jenny Rice argues in *Distant Publics*, understanding and analyzing rhetorics as networked may also lead to better political deliberation because it offers a more complex and compelling picture of our interrelationships with political and public issues.[11] Rice insists that political deliberation requires a politics of inquiry, based in networking rhetorics and our relations within them, as opposed to a politics of feeling, which often generates "exceptional subjects" whose responses to political and public issues are static and uninventive. It is through networking rhetorics and rendering complexity more visible that we are able to open up political possibility. J. Blake Scott and Dingo similarly argue that "[p]art of the job of the rhetorical critic is to unravel that which appears to be common sense and, in doing so, explore *how* and *why* commonsense rhetorics are not temporal but circulate continually across time and space."[12] Rhetorical analysis helps to highlight the "rhetorical histories and intertexts" behind seemingly commonsense and cohesive discourses to explain and complicate the purportedly common sense.[13]

Some within feminist rhetorical studies have worked to better explain and complicate the ways in which human rights rhetoric is taken up with various effects globally. Their work elucidates how a networked theory of rhetoric can explain how law is variously taken up and

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[10] Queen, "Transnational Feminist Rhetorics," 475.
[11] Jenny Rice, *Distant Publics: Development Rhetoric and the Subject of Crisis* (Pittsburgh, PA: University of Pittsburgh Press, 2012).
[12] J. Blake Scott and Rebecca Dingo, "Introduction: the "Megarhetorics" of Global Development," in *The Megarhetorics of Global Development*, eds. Rebecca Dingo and J. Blake Scott (Pittsburgh, PA: University of Pittsburgh Press, 2012), 5 (emphasis original).
[13] Scott and Dingo, "Introduction," 5.

amended through rhetorical action and circulation. Rather than insisting that the emergence of the human rights paradigm is an inherent good or that human rights are always Western, totalizing, and oppressive, these scholars have sought to better understand the political and material impacts of human rights discourses.

Wendy Hesford has done some of the most insightful and interesting work in this area. Hesford argues that "[t]o approach human rights as a living practice is to view human rights as a cultural system and to envision culture as contentious, as 'unbounded, contested, and connected to relations of power.'"[14] Her *Spectacular Rhetorics* looks at how so-called victims of human rights violations are figured through rhetorical practices—both visual and verbal.[15] As Hesford frames it, her study is directed toward "viewing persuasion, or rhetoric, more broadly … as a practice of making and remaking social and political relations and incorporating subjects into discursive formations and regimes of truth."[16] Hesford examines pictures, documentaries, and artistic representations of human rights violations—particularly those directed toward Western audiences about abuses in developing countries. She investigates the ways in which these representations inscribe victimization, vulnerability, and abuse.

As Hesford points out, cultural representations of human rights violations and victims are not apart from or incidental to the law. Instead, these representations have impacts on how both the witnesses and presumed victims of human rights violations understand and apply human rights discourses. Thus, they are not merely revealing or uncovering underlying violations—they are rhetorical acts that construct the human rights "spectacle" and that have a bearing on how Western audiences understand the nature of rights violations, the victims of these violations,

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[14] Wendy S. Hesford, "Human Rights Rhetoric of Recognition," *Rhetoric Society Quarterly* 41, no. 3 (2011): 282 (citing Merry).
[15] Wendy S. Hesford, *Spectacular Rhetorics : Human Rights Visions, Recognitions, Feminisms* (Durham, NC: Duke University Press, 2011).
[16] Hesford, *Spectacular Rhetorics*, 12.

themselves as viewers, and the power structures implicated in human rights abuses. Despite this, Hesford maintains a distinction between "legal" law and "cultural" law, arguing, "Strict legal definitions of human rights are the most actionable, but cultural translations and enactments shape the perception and application of legally based human rights discourses."[17] I would go even farther to say that these cultural representations have critical impacts on how human rights violations are or are not legally cognizable and on how we, globally, understand and enact human rights laws. I believe the point is embedded, but I want to deny the divide between "legal" and "cultural" apprehensions of human rights, understanding that legal definitions are always and already intertextual. Hesford gets close to this when she says her book "is a call for ethical visions that focus on how human rights law and culture are mutually implicated in and set the parameters for social and political recognition and identification practices."[18] This refusal of a clear distinction between what law mandates and what culture says begins to suggest that rights and law may be much less stable than we intuit. Such a perspective calls us to focus less on whether rights claims are legally accurate or correct (whatever that might mean) and more on what they do. In other words, it calls us, through a rhetorical approach, to broadly consider how rights are figured and what purpose they are serving.

Arabella Lyon offers another perspective on the rhetorical nature of human rights.[19] She reads rights as relationships or "political performances,"[20] understanding them as "learned behaviors and actions that may change cultural norms and hegemonies."[21] Rights have a normalizing force but this presumed stability makes them particularly valuable tools for political

[17] Hesford, *Spectacular Rhetorics*, 14.
[18] Hesford, *Spectacular Rhetorics*, 197.
[19] Arabella Lyon, *Deliberative Acts: Democracy, Rhetoric, and Rights* (University Park, PA: Pennsylvania State University Press, 2013).
[20] Lyon, *Deliberative Acts*, 6.
[21] Lyon, *Deliberative Acts*, 6.

mobilization. Thus, the political power of rights lies in the paradox of their presumed stabilizing power and their inherent fluidity and incoherence.

For Lyon, rights claims are elements of "performative deliberation." Lyon shifts the focus of political deliberation away from "an end of unified action" toward "the moments when the many meet, recognize each other, and share their acts and agency."[22] Important to Lyon's conception of performative deliberation is Hannah Arendt's insistence that all political action bears the "burden of irreversibility and unpredictability."[23] When one acts in the political sphere, one cannot control how those actions will reverberate or circulate. Political action is oriented toward shaping the world anew, but we can never know precisely what the consequences of our actions will be. This, Lyon says, causes citizens to "fear the transfiguring power of their actions."[24]

Michael Warner's discussion of publics is helpful in expounding upon the indeterminate and ongoing nature of world-making.[25] Warner says that public discourse not only stakes a claim and stakes that this claim is a matter of importance; it also specifies a subject's relation to that claim and a relation to the world generally. Public discourse articulates how its public will engage and why. This, as Warner reminds us, is counter to how most of us understand subjectivity. We imagine that, as participants in public discourse, we "are already the persons [we] are addressed as being and … already belon[g] to the world that is condensed in [that] discourse."[26] To the contrary, what actually happens is that public subjectivities and public possibilities are conjured through discourse.

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[22] Lyon, *Deliberative Acts*, 65.
[23] Lyon, *Deliberative Acts*, 180.
[24] Lyon, *Deliberative Acts*, 181.
[25] Michael Warner, *Publics and Counterpublics* (Brooklyn, NY: Zone Books, 2002).
[26] Warner, *Publics and Counterpublics*, 114.

Read together, these texts help to demonstrate that legal speech cannot be correct or incorrect—it always has implications beyond being a question of law or fact and it is both performative and constitutive. Rhetorical and legal scholar Marianne Constable helps to better explain this.[27] Using J.L. Austin's speech act theory, Constable argues that we should understand legal speech as composed of both performative and passionate utterances.[28] (10). Significant for Constable is that all legal claims are made in the name of "our" law—a fact which binds us together and requires our constant negotiation of our law and our world. Staking a legal claim (regardless of outcome) is already a social act. It calls for the negotiation and consideration of "our" law or being together and demands recognition and responsibility.[29] Though legal claims can be rejected, legal speech cannot be undone or unsaid—it has already acted and must be reckoned with. Constable's notion of the "we" of law perhaps helps to explain why, despite strong critiques, activists are drawn to law and rights-based advocacy. As Patricia Williams says, rights are the "magic wand of visibility"[30]; they seem to confer subjectivity. As such, law is a powerful form of political contest. As both Lyon and Constable would remind us, it is significant that legal claims are public and addressed to the "we." As such, they lay claims to what this "we" is, what its law, norms, and values are, and also to the subjects' relations to these things.

As in rhetorical studies, scholars within the law and humanities have devoted attention to the rhetorical nature of law. Legal scholar James Boyd White argues that law is a process of imagination; in imagining law, justice, and legal arguments, those positing and affirming these arguments imagine (and shape) the world.[31] However, as Peter Goodrich points out, the methods

[27] Marianne Constable, *Our Word is Our Bond: How Legal Speech Acts* (Stanford, CA: Stanford Law Books, 2014).
[28] Constable, *Our Word is Our Bond*, 10.
[29] Constable, *Our Word is Our Bond*.
[30] Patricia Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Cambridge, MA: Harvard University Press, 1991), 164.
[31] James Boyd White, *The Legal Imagination: Studies in the Nature of Legal Thought and Expression* (Boston, MA: Little, Brown, 1985).

for legal imagination are not necessarily unbounded.[32] Behind legal reasoning and imagination there are "unconscious structures of institutional reason" that generally limit the scope of arguments presented within a legal framework.[33] We need only to turn to Joan Williams's suggestions for legal reform in *Unbending Gender*[34] and contemplate why they seem unlikely in order to elucidate Goodrich's point about the predispositions and assumptions at work within legal argument. Both because law is indeed a rich source for and location of rhetorical invention and because law operates with some often unremarked upon but incredibly powerful assumptions, scholars have continued to pursue rhetorical considerations of the law.

In response to what had come to be known as legal realism (a school of thought that looked to the empirical results of legal statutes and case law), legal scholars informed by poststructuralist thought posited that law is not merely instrumental—a matter of cause and effect—but that it is also constitutive. In other words, law doesn't just address behavior; it actually helps to form subjects, acts, and the state (and the relationships between them). This may seem obvious, but the implications for legal study are important. In their introduction to the edited collection *Cultural Analysis, Cultural Studies, and the Law*, Austin Sarat and Jonathan Simon argue that legal realism adopts a limited view of the subject—assuming and forwarding the rational man of law—without paying attention to how subjectivity is constituted, formed, and reformed through law.[35] Scholars interested in the law have begun to consider law not just as a rhetorical art (as White presents it) but also what we might think of as the rhetoric of law. Naomi Mezey succinctly states the goal of such work, contra legal realism: "[t]o focus on culture is to

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[32] Peter Goodrich, "Antirrhesis: Polemical Structures of Common Law Thought," in *The Rhetoric of Law*, eds. Austin Sarat and Thomas R. Kearns (Ann Arbon, MI: University of Michigan Press, 1996), 57-102.
[33] Goodrich, "Antirrhesis," 60.
[34] Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford, UK: Oxford University Press, 2000).
[35] Austin Sarat and Jonathan Simon, "Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship," in *Cultural Analysis, Cultural Studies, and the Law: Moving beyond Legal Realism*, eds. Austin Sarat and Jonathan Simon (Durham, NC: Duke University Press, 2003), 1-34.

locate the ways in which law influences who we are and who we aspire to be, and it moves us beyond the standard critique of what the law is and what we want it to be."[36]

Law is neither solely instrumental nor is it static and stable. Law itself circulates and changes. As it does so it is both altered by and alters subjectivities, knowledge, relationships, and desires. It is with this understanding that I approach transgender anti-discrimination law. To contextualize this approach and what is at stake in transgender anti-discrimination law, I turn to discussions and critiques of trans politics and its relationship to the law.

Trans Politics Considered

A number of scholars have tried to address material impacts of transitioning gender (or, in some cases, living a non-binary social gender status) by producing policy and legislative recommendations. Clark A. Pomerleau discusses policies for colleges and universities, arguing for gender neutral residential and recreational facilities and a preferred name policy that would enable students to consistently be identified by their preferred names, regardless of whether their legal documents have been changed.[37] Kyla Bender-Baird interviewed transgender people about their employment experiences, finding that those who worked for employers with non-discrimination policies or in jurisdictions with specific non-discrimination policies had more positive employment experiences than those with no such policies.[38] Accordingly, she argues for a federal statute that specifically prohibits discrimination on the basis of gender identity and gender expression.[39] Bender-Baird's informants also evinced a belief that such non-

[36] Naomi Mezey, "Law as Culture," in *Cultural Analysis, Cultural Studies, and the Law: Moving beyond Legal Realism*, eds. Austin Sarat and Jonathan Simon (Durham, NC: Duke University Press, 2003), 60.
[37] Clark A. Pomerleau, "College Transitions: Recommended Policies for Trans Students and Employees," in *Transfeminist Perspectives in and Beyond Transgender and Gender Studies*, ed. A. Finn Enke (Philadelphia, PA: Temple University Press, 2012), 81-97.
[38] Kyla Bender-Baird, *Transgender Employment Experiences: Gendered Perceptions and the Law* (Albany, NY: State University of New York Press, 2011).
[39] Bender-Baird, *Transgender Employment Experiences*, 134.

discrimination statutes increased the visibility of the transgender community and that this in itself would help to protect transgender individuals from discrimination, employment and otherwise.

Although it appears a foregone conclusion in Bender-Baird's text, within transgender scholarship and activism, the question of *whether* to stake rights claims and, if so, *in whose name* is a contested issue. Strongly questioning the utility of recognition and inclusion before the law, legal scholar Dean Spade argues that transgender activists must instead focus on demanding material (rather than merely symbolic) changes.[40] Spade argues that anti-discrimination and hate crime statutes individualize the discrimination and injustice that transgender people face, eliding and obscuring the systemic roots of this discrimination. This may protect the most privileged and "normal" of the trans population but may actually further oppress the most vulnerable and marginalized within that population who cannot or do not fit the developing "norm" for this new protected class. Spade argues that the "mainstreaming of trans politics is concerning both because of how it fails to support trans people's well-being and because of how what becomes the visible trans agenda is not based on what trans people want or need but on what is desirable and convenient to elites."[41] Spade is dubious about the ability of visibility and identity politics to alter the material circumstances of trans people's lives. He sees tolerance and inclusion as masks for systemic oppression. Feminist political theorist Wendy Brown elaborates on the pernicious nature of tolerance, arguing that that tolerance is the means by which "outsiders" become enfolded within the community as citizens, but that this enfolding is contingent upon the marking and trivialization of difference.[42] That is, difference must both be tolerated, but it must also be

[40] Spade, *Normal Life.*
[41] Spade, *Normal Life*, 143.
[42] Wendy Brown, *Regulating Aversion: Tolerance in the Age of Identity and Empire* (Princeton, NJ: Princeton University Press, 2006).

rendered apolitical. Tolerance enables and depoliticizes systemic injustice and further marginalizes those who are most oppressed because it marks individual bias (rather than deep systemic injustices) as the cause of oppression.

Related to this concept of political effect of marking difference, anthropologist David Valentine considers the political implications of the emergence of the category "transgender" in *Imagining Transgender: An Ethnography of a Category.*[43] While Valentine originally conceived of a research project in which he would investigate two "transgender communities," as he embarked upon his research, it became clear to him that he would have to "examine the idea of transgender itself" given the mixed reception and usage the term had among the members of the supposedly "transgender communities" he was studying. In a different vein, rhetorical scholar K.J. Rawson and historian Cristan Williams have charted the rhetorical landscape of the term "transgender," demonstrating that its uses definitions, adherents, and detractors have shifted over time.[44] Valentine, as an ethnographer, is more concerned with how the term circulated through and among the communities he studied. Valentine found that many of his informants didn't use the term or that they used it specifically to gain access to social services. However, Valentine also argues that the increasing circulation of the category of transgender and this notion of the strict divide between sexuality and gender compels those in search of services and support to "un-know what they know about themselves" in line with an emerging "official" transgender paradigm.[45]

[43] David Valentine, *Imagining Transgender: An Ethnography of a Catergory* (Durham, NC: Duke University Press, 2007).
[44] K.J. Rawson and Cristan Williams, "Transgender*: the Rhetorical Landscape of a Term," *Present Tense* 3, no. 2 (2014).
[45] Valentine, *Imagining Transgender*, 135.

Valentine argues that the "primary focus of contemporary transgender activism has come to be characterized by claims to recognition and 'inclusion.'"[46] The result is that the meaning of transgender becomes flattened such that those who don't fit, often along the lines of race or class, are actually excluded. Further, Valentine argues that the insistence that

> homosexuality is not inflected by gender variance is at root an attempt to argue for the validity of *male* homosexuals as *men* and to erase the stigma that attaches to femininity in male-bodied people. This, in turn, depends on a conceptualization of gender as a form of social difference rather than, from a feminist perspective, a site of social power relations, and is embedded in a structural devaluation of femininity in U.S. society.[47]

Ultimately, what Valentine seeks to demonstrate is that this insistence upon the strict divide between gender and sexuality and the stabilization of the category transgender reorders identities, political movements, and alliances. Valentine does not argue that these implications militate against advocacy and activism on behalf of transgender people; rather, he argues that effective advocacy must wrestle with this tension and engage, like effective ethnography, in "deconstructive methodologies."[48]

While Valentine is concerned with the emergence and increasing visibility of transgender as category, sociologist Viviane Namaste highlights the invisibility of transgender *people* in scholarly work, social services, health care, and media representations.[49] Like Valentine, Namaste focuses on some of the most marginalized and vulnerable transgender populations, like prostitutes and indigent persons, to demonstrate how institutions and systems render these transgender people invisible and unable to gain access to services. For example, Namaste discusses how the Canadian healthcare system will only cover gender reassignment surgery for those who meet the "real-life test," living as their chosen gender while either employed full time

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[46] Valentine, *Imagining Transgender*, 180.
[47] Valentine, *Imagining Transgender*, 236 (emphasis original).
[48] Valentine, *Imagining Transgender*, 252.
[49] Viviane Namaste, *Invisible Lives: The Erasure of Transsexual and Transgender People* (Chicago, IL: University of Chicago Press, 2000).

or enrolled in school, and how this effectively excludes both unemployed persons and those who work as prostitutes. The result is that it is only those who already have a certain degree of social capital and wealth that are able to secure government-funded reassignment surgery and, relatedly (depending on the jurisdiction and documents in question), meet the requirements for legal sex change. Ultimately, Namaste criticizes both queer and sociological considerations of transgender for failing to account for these material difficulties and, as a result, contributing to the invisibility of transgender lived experiences.

Rhetorical scholar Gayle Salamon analyzes the ways that transgender people are both compelled to disappear and appear through legal documentation.[50] Discussing New York's requirement that one must already have removed one's original genitals in order to obtain a birth certificate marked with the desired sex, Salamon argues that, in so requiring, the state compels erasure of that other sex. In the realm of legal documentation (driver's licenses, birth certificates and the Social Security Administration's no-match letters, for example), Salamon argues, gender is not an individual identity, it is state property. Salamon argues that these are cases of the transpeople's sex needing to align with their paperwork rather than the opposite, that is, transpeople seeking total alignment. In this reading, the state is the arbiter of sex—sex can be changed so long as it is changed according to the state's parameters and as long as all requisite paperwork align with the idea of stable sex identity from birth to death. An inadequate change is a "no-match," a lasting mark of transgender status while an adequate change is one that erases any trace of a former sex. There is a tension within the law between marking transgender status for perpetuity (obviating any chance of confusing a transgender person for a non-transgender person) and erasing transgender experience through the insistence on consistent sexed

[50] Gayle Salamon, *Assuming a Body: Transgender and Rhetorics of Materiality* (New York, NY: Columbia University Press, 2010).

documentation. In some sense, these documentation tangles both try to solve and insist upon the problem of transgender.

These debates about the utility of recognition and inclusion, as well as Salamon's discussion of sex as state property, evince an understanding that law is not merely a means-ends proposition. That is, law does not merely impact policy and conduct; it impacts subjectivity, identity, agency, and desire. Law is necessarily an ordering system but its ordering is more diffuse and less orderly than we might typically conceive.

At issue in the debate over whether trans politics should be rights and identity-based is essentially the question of whom and how law orders. As Spade, Valentine, and others point out, claiming rights in the name of one group of persons necessarily excludes others and, as a result, performs a normalizing function. However, as Pomerleau's and Bender-Baird's works evince, statutory and regulatory provisions can help some individuals maintain employment or pursue education, for example. Spade himself suggests engaging law and the administrative state to secure material improvements.[51] The question seems less about whether or not to pursue legal avenues of reform and more about how to engage law and, prior to that, how to understand law.

Salamon's discussion of sex as the state's legal property shows that pursuing legal reform without questioning how law functions in a given circumstance misrecognizes law and its effects. That is, focusing exclusively on what are presumed to be strictly legal effects and outcomes (e.g. making it easier to change sex designations on state documents) obscures the ways in which law is never simply its legal force and effects. The processes through which one changes one's sex for state documentation purposes and, beyond that, the fact of state documented sex have implications beyond being able to file a tax return with the I.R.S. or pass through airport security unmolested. These regulations also affect, among other things, who

[51] Spade, *Normal Life.*

appears through and before the law, how we are to understand the term transgender (and what and who properly falls into and outside of that category), and our understanding of the importance of consistently sexed and gendered selves. In short, law's effects permeate far beyond outlining permissible and impermissible behaviors. What a rhetorical approach to the law helps to critique is not necessarily law as institution but a simplistic notion of what law is and how it works. Hence, while I agree with many of Spade's critiques regarding the "mainstreaming" of trans politics, I resist his move to draw a line between so-called symbolic and material legal change. As the various feminist rhetorical approaches I've discussed above help highlight, an instrumental approach to law fails to acknowledge the powerful and diffuse effects of both legal action and speech.

Transgender anti-discrimination law, then, impacts not only material circumstances but also who and how people appear both before the law and to each other. Additionally, it helps to shape knowledge about gender, sex, discrimination, and the law's role in identifying these things. To that end, I now turn to gender theory and, then, trans studies and theory to begin to chart their various articulations of and investments in these terms. My purpose in doing so is to begin to chart how definitions and understandings of sex and gender "function variably while they [may appear to] maintain a seemingly static definition."[52]

Gender Theory: The Meanings of Sex and Gender

Gender has not always been the province of feminist theory. Bernice Hausman demonstrates how the concept originated out of treatment protocols for intersexed patients. Hausman charts how sexologist John Money developed the term "gender role" to signify that intersex patients unable to "represent a sex 'authentically' could simulate one through adequate

[52] Dingo, *Networking Arguments*, 107.

performances of gender that would fix [their] identit[ies] irrevocably in a sex category."[53] From this foundation, psychologist Robert Stoller originated the term "gender identity" in 1964 to denote the concept of *feeling* oneself to be a particular gender as distinct from gender role denoting one's *behaving* as a particular gender.[54]

Feminists later picked up on this sex/gender distinction to challenge arguments that rooted sex stereotypes and discrimination in biology. Gayle Rubin's well-known 1975 essay, "The Traffic in Women: Notes on a 'Political Economy' of Sex," is one the earliest articulations of this stance.[55] Rubin argues that "every society … has a sex/gender system—a set of arrangements by which the biological raw material of human sex and procreation is shaped by human social intervention and satisfied in a conventional manner."[56] According to Rubin, there is a "necessity" to create a "sexual world" (sex) but oppressive practices and structures (gender) need not follow from sex. In Rubin's construction, sex is inevitable and gender is the stereotypes, structures, practices, and conventions that render women oppressed but that need not necessarily follow from sex. While the sex/gender system borrows from the clinical concept of gender, the distinction between sex and gender, and the association of sex with biology and gender with the social, it moves gender out of the realm of the individual—an individually enacted gender role or possessed gender identity—into the realm of society. That is, though both clinical model and Rubin's model define gender as social, the clinical usage seems to suggest that we all have and must have gender while Rubin suggests that we can and should be without it. Gender is the artificially imposed tool of our oppression. In Rubin's sex/gender system, we see the firm

[53] Bernice L. Hausman, *Changing Sex: Transsexualism, Technology, and the Idea of Gender* (Durham, NC: Duke University Press, 1995), 107.
[54] Hausman, *Changing Sex*, 102.
[55] Gayle Rubin, "The Traffic in Women: Notes on the "Political Economy" of Sex," in *Toward an Anthropology of Women*, ed. Rayna Reiter (New York, NY: Monthly Review Press, 1975), 157-210.
[56] Rubin, "The Traffic in Women," 165.

rejection of biological essentialism and any arguments about the way men and women should be or behave without, necessarily, a rejection of men and women.

Since Rubin, other feminists have moved to focus entirely on gender, arguing that all notions of sexual difference are socially maintained and imposed. Suzanne Kessler and Wendy McKenna relied exclusively upon the term gender in their book *Gender: An Enthnomethodological Approach*.[57] They argue that "the element of social construction is primary in all aspects of being male or female"[58] and, thus, any notion of sex is already socially constructed and, therefore, more properly termed gender. Investigating the ways in which the fact of two dichotomous genders is maintained, Kessler and McKenna observe how gender is unfailingly attributed in everyday interactions. They argue that though in this culture we provide anatomy as the "rationale" for a "gender attribution," we routinely and consistently attribute gender without knowledge of genitals (they posit that attribution is maintained on other grounds in other cultures). That is, aside from an initial gender assignment at birth (typically based on anatomy), gender is attributed in everyday interactions based on culturally specific cues. From this gender attribution follows genital attribution. That is, to believe that somebody is a man is to believe that he has a penis. What is important is not the one *actually* have a penis to be a man but that one be regarded as having a penis and, therefore, necessarily a man. Importantly, though the attribution of genitalia is how we attribute gender, genitals are not actually the criteria we use for attributing gender, except in infancy. It is for this reason, Kessler and McKenna argue, that transsexuals can "pass" without having had sex reassignment surgery.

Endeavoring to explain the origins of this seemingly intractable gender binary, Judith Butler famously argues in *Gender Trouble* that individual gendered identities are not the result of

[57] Suzanne J. Kessler and Wendy McKenna, *Gender: An Ethnomethodological Approach* (Chicago, IL: University of Chicago Press, 1978).
[58] Kessler and McKenna, *Gender*, 7.

biological sex but of powerful discursive constructions.[59] For Butler, gender is a repetition without an original; it is through our continual performances of gender that the categories of woman and man are achieved. There is "no preexisting identity" that produces gender and, thus, "the very notions of an essential sex and a true or abiding masculinity or femininity" are also constructions that work to uphold the necessity and naturalness of gender and gendered practices.[60] Like Rubin's "Traffic in Women," Butler's text evinces the desire to deconstruct any notion of biologically-mandated gender-based oppression. For Butler, however, the very notion of sexual difference is already oppressive and constricting. Accordingly, she encourages us to understand all notions of biological difference as discursively constructed.

Like Butler, Monique Wittig sees sex distinctions and gender subordination as a discursive phenomenon.[61] For Wittig, "oppression … creates sex."[62] Any notion of natural or biological difference suggests the contrary—that sex creates oppression. Accordingly, Wittig claims that the goal of feminism should be to abolish sex altogether because the category is inherently political and oppressive. Wittig claims that the category of women cannot be conceived outside of sex—"*they* are sex, *the* sex, and sex they have been made in their minds, bodies, acts, gestures."[63] Given that women *are* sex, Wittig adopts the radical position that lesbians are not women because "woman" exists only within heterosexual systems of thought and economics. Thus, the political power of lesbian identity is in claiming and demonstrating that it is not merely another form of heterosexuality and of woman and that possibilities exist outside of "woman."

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[59] Judith Butler, *Gender Trouble: Tenth Anniversary Edition* (New York, NY: Routledge, 1999).
[60] Butler, *Gender Trouble*, 180.
[61] Monique Wittig, *The Straight Mind: And Other Essays* (Boston, MA: Beacon Press, 1992).
[62] Wittig, *The Straight Mind*, 2.
[63] Wittig, *The Straight Mind*, 8.

Near the same time that Butler was dispelling the notion of an inherently gendered self, Joan Scott presented "gender" as a useful term for historical analysis.[64] For Scott, gender is the means to interrogate what has been known as sex and what impact sex has had on social structures and relationships. Gender appears as a historically specific structure that orders bodies and societies. Scott's approach maintains Rubin's focus of gender as social phenomenon, but abandons any consideration of sex or "natural" difference because, for Scott, the point is that gender (or sex) isn't something we have, it is a historically specific structure that then creates "gendered identities."

Scott's analysis of the famous *Sears* case in which the EEOC sued Sears for sex discrimination based on its pattern of preferring to hire men for full-time commission sales jobs helps to explain her approach. Scott argues that, in part, the EEOC failed in proving sex discrimination because it accepted the false dichotomy between equality and difference; Sears won because it showed the discrepancy in hiring numbers was based on women's (as a category) lack of enthusiasm for aggressive sales jobs—naturalizing difference. The EEOC, Scott argues, needed to reject this equality/difference dichotomy and, instead, expose the "operations of categorical difference," not to argue sameness but to argue for "equality that rests on differences" by exposing the differences in and among these supposedly stable categories and, thus, "render[ing] ambiguous the meaning of any fixed binary opposition."[65] Thus for Scott, gender does not help us to understand what a woman is, but, rather gives us complicated and conflicting accounts of how women have been thought of and what they have been, both collectively and individually.

Legal scholar Joan Williams's *Unbending Gender* is an example of using gender as both

[64] Joan Wallach Scott, *Gender and the Politics of History* (New York, NY: Columbia University Press, 1988).
[65] Scott, *Gender and the Politics of History*, 176-77.

an analytic category and a lens for critique.[66] Williams provides specific prescriptions for altering family and employment law so as to "undo" gender—that is, to help address some of the deep structural and legal norms and rules that help to compel gender subordination. By pointing out the ways in which "neutral" laws are indeed not neutral at all and are rather based on ensuring that men suffer limited financial and personal hardship as a result of childrearing and divorce (in addition to other things), Williams shows how notions of gender operate and are reified within family and employment law. Though Williams acknowledges that individual circumstances vary, her point is to show how legal structures themselves help to foster gender subordination. As such, Williams uses gender as Scott suggests, as a means for interrogating the impacts of gender as social structure on people so gendered.

As Toril Moi points out in her 1999 book, *What is a Woman?*, Scott's use of the term gender is not critical to her project.[67] Moi argues that "Scott's concern is to analyze the historical and social effects of sexual difference" but that she uses "gender" to avoid the taint of biological essentialism now associated with "sex."[68] Moi posits that Scott might just as easily have used "sex" or "sexual difference" to interrogate how and with what effects the categorical difference between men and women is created.

In keeping with this notion, Moi proposes that we abandon gender as the primary term for analysis. Drawing from Simone de Beauvoir's *The Second Sex*, Moi suggests we employ the notion of "body as situation" to better understand individual lived experiences. Such an approach, Moi argues, has the virtues of avoiding biological essentialism while accounting for individual bodies in their specific historical circumstances:

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[66] Williams, *Unbending Gender*.
[67] Toril Moi, *What is a Woman? and Other Essays* (Oxford, UK: Oxford University Press, 1999).
[68] Moi, *What is a Woman?*, 31.

> To say that my subjectivity stands in a contingent relationship to my body is to acknowledge that my body will significantly influence both what society—others—make of me, and the kind of choices I will make in response to the Other's image of me, but it is also to acknowledge that no specific form of subjectivity is ever a necessary consequence of having a particular body.[69]

In other words, the body one is born with is significant but it is not determinant. It is not by mere chance or, in the alternative, mere will that we are organized as men and women. Our bodies, always situated in their specific contexts, impact how others see and understand us and, accordingly, they influence what we will do with our bodies. To say this is not to suggest that biology is destiny or even that there is a fixed meaning for the body; it is only to highlight, as Linda Nicholson would put it, that the body is a "historically specific variable"[70] that is of consequence for how people experience the world but that does not carry, regardless of perceived marker or difference, predetermined, generalizable consequences.

Iris Marion Young would agree with Moi that "lived body experience" is a more useful term for describing and understanding subjectivity, arguing that "problems with a concept of gender have surfaced at least partly because gender aims to be a general category, but subjectivity is always particular."[71] However, Young asserts that gender still serves as a useful category for analysis of social structures. "An important conceptual shift occurs," she argues, "when we understand the concept of gender as a tool for theorizing structures more than subjects. We no longer need to ascribe a single or shared gender identity to men and women."[72] Young is concerned with accounting for both specific individual experiences and also naming the norms that help to structure, though not entirely determine, those experiences. Young argues, in some

[69] Moi, *What is a Woman?*, 114.
[70] Linda Nicholson, "Interpreting Gender," *Signs* 20, no. 1 (1994): 79-105.
[71] Iris Marion Young, *On Female Body Experience : "Throwing Like a Girl" and Other Essays* (New York, NY: Oxford University Press, 2005), 19.
[72] Young, *On Female Body Experience*, 22.

ways echoing both Scott and Butler, that "each person experiences aspects of gender structures as facticity, as sociohistorical givens with which she or he must deal."[73]

In fact, it seems that Moi provides for this understanding of gender in her own account. In discussing how "heterosexism and homophobia are the effects of social norms for sexuality and sexual practices," she argues that it "makes a great deal of sense to consider such questions under the rubric of 'gender'" where gender means " 'social norms,' 'ideology,' 'power,' or 'regulatory discourses.'"[74] The critical point for Moi is that "an account of such norms and regulations will not in itself explain that person's lived experience."[75] I don't think Moi would disagree with Young that it is helpful and necessary to consider the social norms that govern one's lived bodily experience, but I do think she would be careful to avoid universalizing or generalizing the impacts of these norms.

In her 2004 book, *Undoing Gender*, Butler too attempts to better account for bodies in their specificity, paying particular attention to transgender, transsexual, and intersex movements and experiences, which she terms the "new gender politics."[76] As distinct from *Gender Trouble*, *Undoing Gender* is anchored in the concern that everybody be granted the ability to live a "livable life." Butler maintains her understanding of gender as performative and constructed, arguing that it is "an improvisational possibility within a field of constraints."[77] However, she stresses throughout the book that "we must be undone in order to do ourselves"[78]—constraints both enable and suppress our desires and our efforts to render a comprehensible and livable "I." Thus, though Butler continues to reject the notion of essential gender identity, she does argue

[73] Young, *On Female Body Experience*, 25.
[74] Moi, *What is a Woman?*, 117.
[75] Moi, *What is a Woman?*, 117.
[76] Judith Butler, *Undoing Gender* (New York, NY: Routledge, 2004).
[77] Butler, *Undoing Gender*, 115.
[78] Butler, *Undoing Gender*, 110.

that, at least in our context, becoming a gender is essential to "one's very sense of personhood" and that it is upon these grounds that we must work to change economic and legal institutions such that transsexual persons have access to technologies that might render their lives livable. At the same time, she argues, we must work, incrementally, to alter the social conditions that give rise to the possibilities for subjectivity. In other words, Butler assumes that the ways one becomes gendered or what it means to be gendered will not and should not remain constant.

Raewyn Connell evinces a similar concern with livability amidst constraints in her 2012 essay "Transsexual Women and Feminist Thought: Toward New Understanding and New Politics."[79] Distinct from some of the theorists referenced earlier, Connell refers to gender as both a social structure and an identity. She argues that both are intransigent (not in an eternal sense but in an experienced sense) and that it is this reality that creates the "central contradiction" of transsexuality—that is the social intransigence of gender structures comes in conflict with a sense of the personal intransigence of one's felt gender as an identity. She posits that "[a]rguably there is no cause, in the mechanical sense" for feeling oneself in the wrong body and that it is "more helpful to think of the powerful process of social embodiment as constantly engaging bodies and bodily agency, as well as social practices and cultural meanings, in a complex 'co-construction.'"[80] We can see how this description, as distinct from an insistence on immutable "gender identity," seems to align with Moi's and Beauvoir's concept of "body as situation." Connell stresses that, generally, both feminist and queer considerations of transsexuality often center on questions of identity. The unfortunate consequence, she argues, it that "major issues in transsexual women's lives, especially social ones, are not well represented

[79] Raewyn Connell, "Transsexual Women and Feminist Thought: Toward New Understanding and New Politics," *Signs* 37, no. 4 (2012): 857-81.
[80] Connell, "Transsexual Women and Feminist Thought," 867.

by identity discourses of any kind."[81] She refers to gender reassignment as something along the line of "emergency medicine: dealing with a critical situation well enough to allow life, including social life, to continue."[82] The surgery itself is only one among many difficult and painful components of changing "locations in the gender order."[83] Maintaining employment and managing workplace relationships, as Connell notes, are others. Though Connell refers to the "gender order" as intransigent, I believe she means this in the same sense that, for example, Scott or Young do—gender, or the "gender order," is a structure that shapes our perceptions and existence—but it is not necessarily unchanging or unyielding; it only appears so. Significantly for Connell, transsexual women's experiences are made more difficult by discourses that celebrate identity without paying attention to the material circumstances and difficulties of their lives. She argues that a greater focus on the gender order—structural circumstances—as opposed to a focus on gender as an identity will better address these concerns. Of course, identity is critical to Connell's analysis—the transsexual woman does not come into being without the sense that she really is a woman. However, Connell seems to be arguing, much like Butler, that this becoming a gender is essential for personhood without being essential in an immutable sense. At the same time, these theories do insist that gender is a social structure that dictates how we experience our bodies and what we can do with them.

Feminist Theory Encounters Trans Studies: The Importance of Being Gendered

Where these later gender theories depart most significantly from the earlier cited theory seems to be in their embrace of gendered and sexed identities. That is, the significance of gender identity to the transgender person seems to shift focus away from abolishing sex altogether (a la

[81] Connell, "Transsexual Women and Feminist Thought," 864.
[82] Connell, "Transsexual Women and Feminist Thought," 870.
[83] Connell, "Transsexual Women and Feminist Thought," 857.

Wittig) to loosening the hold of the gendered social order. What these latter theories also evince is that the relationship between feminist theory and transgender studies and theory is ambivalent—while the fields of study share a concern about gender, their investments in and orientations toward gender as object of study can conflict. As David Valentine argues, "[t]ransgender studies … is an emergent field of knowledge that, while impacted by feminism… is being institutionalized through an understanding of "gender" that … flows more from the history of sex research, gay/lesbian scholarship and activism, and the concerns of MTF people than from feminism and the concerns of FTMs."[84] That is, while gender is the object of analysis and concern for both fields, the understanding of gender and the investment in it as an object of study can vary between the fields, though sometimes it does align. In the introduction to his edited collection *Transfeminist Perspectives*, A. Finn Enke argues that "feminist studies and transgender studies are intimately connected to one another in their endeavor to analyze epistemologies and practices that produce gender"[85] but that "[their] interests, vocabularies, and epistemological foundations can seem—and at times are—opposed."[86]

Julia Serrano's contribution to Enke's collection is illustrative of this tension. Serrano argues that what she calls trans-misogyny is fueled by a distrust and hatred of femininity. Serrano calls for a "reclaiming" of femininity and contends that

> [o]nce we accept that femininity exists and needs no explanation, then we can focus on debunking countless double standards… Once we get beyond having to account for *why* we are feminine, then we can finally make the case that all the dismissive connotations and meanings that people associate with feminine expression are merely misogynistic assumptions on their parts.[87]

[84] Valentine, *Imagining Transgender*, 171.
[85] A. Finn Enke, "Introduction," in *Transfeminist Perspectives in and beyond Transgender and Gender Studies*, ed. A. Finn Enke (Philadelphia, PA: Temple University Press, 2012), 1-15.
[86] Enke, "Introduction," 2.
[87] Julia Serrano, "Reclaiming Femininity," in *Transfeminist Perspectives in and Beyond Transgender and Gender Studies*, ed. A. Finn Enke (Philadelphia, PA: Temple University Press, 2012), 182.

While much feminist theory would hold that "femininity" is unstable, constantly changing, and part of the structure that oppresses and subjugates women, Serrano insists that it exists naturally. Contra theorists like Young and Scott, it isn't important for Serrano to understand why or how femininity (however understood and however complicated and unstable) comes to be. Rather, it is important to celebrate the devalued aspects of femininity, which appears for Serrano as a stable, knowable thing. While challenging dominant value systems doesn't necessarily seem at odds with the feminist project, embracing femininity as something that exists (naturally, innately) does. Rubin's sex/gender distinction, Scott's understanding of gender as an analytic category, and Butler's notion of gender citationality (to name just a few) all conflict with this notion of a stable and knowable femininity. As Wittig argues, the problem with "woman" isn't that it is devalued, it is that woman and femininity are a "myth"—"woman" is the "political and ideological formation which negates 'women.'"[88] Rather than troubling the distinction between woman and man, femininity and masculinity, Serrano seems to be attempting to clearly delineate these boundaries—an endeavor which seems at odds with much of feminist theory from the 1990s on.

Enke's own contribution to the collection addresses another troubled site of boundary-marking. He describes how the term "cisgender," created by trans activists to mark the privilege of being nontransgender, now serves to solidify each as a knowable and stable identity category—with all attendant implications about normalcy and difference. Enke cites the increasing prevalence of the term within classrooms and worries that the term actually defeats the some of the goals and insights of both feminist and queer theory: "As cis circulates, it renders 'woman' and 'man' more stable, normative, and ubiquitous than they ever were. In the very

[88] Wittig, *The Straight Mind*, 15-16.

same gesture, the cis ally reduces 'trans' to the most oppressed and institutionally defined object fighting for recognition within a framework of identity politics and additive 'rights.'"[89]

Part of what Enke identifies in both his introduction and his discussion of *cis* is the tension between gender (trans or otherwise) as identity and gender (trans or otherwise) as social structure and lived experience. That is, Enke seems to suggest that a focus on immutable identity (trans or cis, woman or man, feminine or masculine) elides important political questions about the impacts of living a life as one, the other, or neither. Political questions like these are at the heart of a feminist approach that recognizes the label "woman" as a source of oppression, not an essential identity. Such an understanding can be at odds with transgender studies approaches that are premised on the necessity and, perhaps, the joy of being gendered.

While these need not necessarily be incompatible notions—as I think Enke demonstrates in his discussion of the problems with *cis*—the tendency for some within trans studies to ardently embrace and essentialize gendered identities (see Serrano's discussion of reclaiming femininity) is at odds with a feminist tradition that holds that gender (and, for some, sex) is not a readily apparent, stable phenomenon but a historically contingent albeit omnipresent system of ordering within an overall discriminatory social order. As Butler's later work and Connell's essay demonstrate, it is possible to continue to analyze and attack gender as social structure and order without rejecting the notion of gendered selves. However, as Serrano's defense of femininity illustrates, it is sometimes not so easy to see or practice that distinction. Attacking gender as structure may look like attacking individual enactments of gender or purportedly gendered behavior. Moi's and Young's work is helpful in elucidating that the implications of gender as structure and of having a sexed/gendered body vary across individual experiences. An individual

[89] A. Finn Enke, "The Education of Little Cis: Cisgender and the Discipline of Opposing Bodies," in *Transfeminist Perspectives in and Beyond Transgender and Gender Studies*, ed. A. Finn Enke (Philadelphia, PA: Temple University Press, 2012), 76.

cannot entirely control how her body will be read or what the implications of having such a given body will be, but what she can do with that body is not scripted either. Gender identity, therefore, *can* be something one feels deeply but it is neither entirely self-constructed nor innate—it is the result of a multitude of forces and phenomena. This, too, can be a site of tension between feminist and trans studies in that discussions of how people come to be gendered can be read as assaults on the authenticity of one's gendered practices and identity.

These tensions are part of what surfaces in transgender anti-discrimination law and the various ways in which it locates discrimination and identity. Part of my goal in investigating what surfaces in transgender anti-discrimination law is to trouble the neat distinction between symbolic and material change that Spade draws.

Letting Go of Law's Agents, Charting Law's Attachments

In some ways, rhetorical scholar Isaac West works to upset the neat dichotomy of symbolic versus material change in *Transforming Citizenships: Transgender Articulations of Law.*[90] Focusing not on official legal results or enactments, but on transgender activists' uses and interactions with the law, West helps to show how transgender activists do things with the law, paying particular attention to what he sees as individual agential actions through and against the law.

West argues that "legal agency … is not necessarily synonymous with legal recognition."[91] Each chapter of his book presents a reading of a different transgender advocacy event in which his primary focus is on the ways transgender activists craft new identities and arguments in opposition to what is seen as the norm or law's desire. West uses Butler to talk

[90] Isaac West, *Transforming Citizenships: Transgender Articulations of the Law* (New York, NY: New York University Press, 2014).
[91] West, *Transforming Citizenships*, 24.

about the "performativity of identity" but fails to account for the ways in which identity is constrained from without and not self-manufactured. While I appreciate West's rhetorical approach to law and his understanding that law exists outside of legal opinions and statute books, he tends to focus on how transgender activists' encounters with the law impact their own feelings of subjectivity and fails to account for the ways that subjectivity circulates through law, power, politics, and individuals. For example, West celebrates transsexual Debbie Mayne's successful efforts in 1955 at being arrested for using the women's bathroom. Though Mayne was acquitted, West claims this is inconsequential. What is consequential is that Mayne "developed a legal consciousness against the law's aims and hence created agential pathways for herself."[92] Though West does discuss the relationship between these small agential acts and larger political movements, arguing for an "impure" and mixed politics, it is ultimately the valorization of these small identity acts he is after: "agency is not found in heroic actions within or outside cultural formations but rather in performative repertoires, or the everyday contestations of identity informed by one's experiences."[93] Ultimately, politics seems to be about experiencing agency against "law's aims." The result is that West fails to acknowledge that law, in a sense, rests on the myth of autonomy—both law's and the individual's. In other words, West spends little time considering what autonomy means or how the very notion of autonomy might actually impede our ability to address systemic injustices.

Part of what rhetoric of law and rhetoric and culture scholars have helped to demonstrate is that this notion of the autonomous individual subject is one that is paradoxically upheld and undermined consistently in both law and culture. That is, part of the project of this work has been to demonstrate that law's "reasonable man" (read: rational, autonomous individual) does not

[92] West, *Transforming Citizenships*, 46.
[93] West, *Transforming Citizenships*, 179.

exist but that he is propped up at every turn. However, West seems concerned with recovering or calling for the individual autonomous subject rather than working to trouble this notion. This is perhaps because he turns his attention to identity, taking the subject and subjectivity for granted.

Though subjectivity and feelings of individual agency may be some of the effects of legal speech or action, they are not the only effects and must be understood in the constellation of everything else that is happening. As Warner demonstrates, subjects are always in the process of becoming and there is no outside or pure position.[94] Similarly, when Lyon talks about the unpredictability and irreversibility of public action, we understand that agency is always shared as are the effects of political action.[95] Political acts cannot and should not be judged for how transgressive and non-normative they are. Though law props up the individual reasonable man, it is, as Constable demonstrates, always the "we" which legal speech considers. In short, when we turn to legal speech and action looking for "agential pathways" or individual triumph, we misunderstand how political and/or legal action works while simultaneously promoting the myth, so embedded in much of legal reasoning, that individuals initiate and own action.

Rosi Braidotti's *The Posthuman* endeavors to move away from notions of identity and agency while specifically considering subjectivity in what she terms our posthuman existence.[96] As Braidotti explains, the human has always been a problem for her as a feminist because women "historically speaking, never quite made it into full humanity, [our] allegiance to that category is at best negotiable and never to be taken for granted."[97] Braidotti proposes a posthumanist view of the subject that acknowledges "radical relationality,"[98] which holds that "one is the effect of irrepressible flows of encounters, interactions, affectivity and desire, which

[94] Warner, *Publics and Counterpublics*.
[95] Lyon, *Deliberative Acts*.
[96] Rosi Braidotti, *The Posthuman* (Malden, MA: Polity Press, 2013).
[97] Braidotti, *The Posthuman*, 81.
[98] Braidotti, *The Posthuman*, 102.

one is not in charge of."[99] Like Jane Bennett,[100] Karen Barad,[101] Elizabeth Wilson,[102] and other feminist theorists pursuing new materialist or vital materialist lines of inquiry, Braidotti (who calls this the matter-realist trend) considers the assemblage—consisting of "human and non-human, planetary and cosmic, given and manufactured"—the primary unit of analysis for posthuman studies. The upshot of this is a rejection of a nature/culture divide or a subject/object agential cut (to borrow from Barad). Accordingly, action is executed jointly; part of the project is to show that there are no individually acting agents, but there is action and there is change.

Though I do not adopt an expressly posthumanist or materialist approach in this study, I do proceed from the notion of radical relationality. I am less interested in expressions of or gestures toward agency and autonomy than I am with understanding transgender anti-discrimination law as a set of interacting relationships. Political activism and legal speech are not only about altering material conditions. For example, in trans activism, gender neutral bathrooms are referred to both as a solution and an unacceptable compromise. What this controversy indicates is that it is not only the material conditions of peoples' lives that are negotiated in these political struggles. Also at stake are questions of who people are—in relation to each other, to the state, to the law (perhaps but not necessarily the same thing as the state), and perhaps also in perpetuity. As Constable points out, legal speech cannot be unsaid—it becomes part of "our" law and how it becomes part of our law is not totally in the control of the speaker. The memorialized, recorded, and precedential nature of legal speech makes it both powerful and dangerous (in the

[99] Braidotti, *The Posthuman*, 100.
[100] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Durham, NC: Duke University Press, 2010).
[101] Karen Barad, "Scientific Literacy to Agential Literacy = (Learning + Doing) Science Responsibly," in *Feminist Science Studies: A New Generation*, eds. Maralee Mayberry, Banu Subramanium, and Lisa H. Weasel (New York, NY: Routledge, 2001): 226-46.
[102] Elizabeth Wilson, "Organic Empathy: Feminism, Psychopharmaceuticals and the Embodiment of Depression," in *Material Feminisms*, eds. Stacy Alaimo and Susan Hekman (Bloomington, IN: Indiana University Press, 2008):373-99.

unpredictable, irreversible sense that Lyon talks about) with regard to both its social and personal impacts. This perhaps begins to explain some of its allure.

Legal speech has impacts not only on our world and our law, as Constable and Warner note, but also on how legal subjects and relationships are rendered and remembered. This is perhaps part of what West is trying to get at in his investigation of "impure" trans politics. Though he attends to activists' efforts to control representations of themselves and transgender people, more generally, the necessity and utility of doing so appear as foregone conclusions rather than open questions. This, I think, is because West focuses on visibility and agency at the expense of considering *what* and *who* is made visible. Though West cites Valentine in his work, he begins with the assumption that transgender people have always existed. The category is static—the political action is the variable. As Dingo makes clear, rhetorical analyses that focus agency of marginalized groups or persons without understanding and interrogating power, relationships, and representations of both those persons and the terms of their political engagement ultimately fail to provide insight into the nature and maintenance of current political and social conditions. Therefore, part of my purpose is to investigate what knowledge, relationships, and subjectivities are produced and contested through transgender anti-discrimination law.

If law is part of how we create "our" world, then this is an arena where litigants, courts, legislatures, and activists are negotiating what sex is, why it's important, and how it functions. Litigating a sex discrimination claim and claiming rights on the basis of gender identity, trans status, or any other gendered marker are all acts presumably designed to secure certain legal protections and outcomes but they are also acts that reconfigure our law, our world, and how subjects are ordered and oriented within it. As such, articulations of transgender anti-

discrimination law are not merely legal contests, they are ongoing interactions which political and ethical relationships are formed and negotiated.

In the chapters that follow, I investigate three different articulations of transgender anti-discrimination law, attending to the rhetorical configurations of sex, identity, and discrimination that emerge in them and the political and ethical implications of those configurations. As I've explained, my approach to analyzing these legal articulations is rooted in a rhetorical approach to the law that understands law as ongoing participant in world-making. Drawing on Hesford's and Lyon's rhetorical approach to human rights, which shows how human rights are constantly navigated, contested, and recreated and how these developments impact power, relationships, and subjectivities, my rhetorical approach to law attends to the ways that it is entangled and responsive, always in development. Thus, I study how the law—both in terms of court cases and legislative activity—provides an interrelated, ongoing interaction where meaning unfolds.

Such an approach counters traditional legal analysis's tendency to orbit around and shore up law. That is, because law relies on consistency, legal analysis has a tendency to focus on what the law *is* or should be (as stable thing). Further, because the common law system relies on precedent (that is, earlier court rulings are supposed to determine and dictate future rulings), legal analysis is also often linear, looking to explain developments in an ordered, sequential fashion that upholds law's consistency. Rhetorical analysis, on the other hand, is particularly attuned to detecting change in broad context. My rhetorical analysis of law attends not only to legal outcomes but to broader implications. Further, its goal is not necessarily to solidify the law—shoring up its consistency and determinacy—but to examine what law, in all its manifestations and circulations, is doing. Looking at it another way, while legal analysis seeks to

preserve law's consistency and predictability, rhetorical analysis works to show how those values are both leveraged and frustrated in law's enactments.

In application, this approach entails rhetorically attuned reading. In analyzing the archive I collected for each articulation of transgender anti-discrimination activity, I read first to get a sense of the rhetorical landscape—how the arguments and interlocutors were positioned, what themes were reoccurring, where change happened. From this initial close reading, I looked for rhetorical mechanisms at work. Understanding rhetorical theories and mechanisms as a "toolbox" of sorts, I examined the initial rhetorical landscape of the articulation and determined what mechanism might best explain the archive I am examining. In other words, I asked: what best explains the contestations, arguments, and decisions at stake in this particular archive of transgender anti-discrimination activity? Importantly, this rhetorically attuned reading enables me to attend to rhetorical configurations, interactions, and developments articulated within the archive before interpreting them through the lens of legal precedent or visibility politics, for example. The difference may seem subtle, but, in part, my analysis in the chapters that follow will illuminate what this rhetorically attuned approach to law is and does.

As I've already indicated, this approach relies upon reading across different kinds of transgender anti-discrimination legal activity to understand how meaning is articulated within these kinds of legal activity and to then read again for tensions and convergences and attendant insights. This approach understands the diverse legal contexts I've selected as discrete ongoing modes of interaction concerning transgender anti-discrimination law. In other words, what happens within Title VII sex discrimination jurisprudence is distinct from (albeit tangentially related to) what happens in California anti-discrimination legislation and law is not permanently "settled" within either. Title VII case law continues to evolve as does California legislation and

statutory interpretation. The purpose, then, is not to present a historical account of developments in transgender anti-discrimination law but to read within and across dispersed kinds of legal activity to understand the diverse rhetorical constructions of sex, identity, and discrimination that develop through them.

Though there are certainly far more kinds of transgender anti-discrimination legal activity than what I turn to now, the three I've picked represent the diversity of recent developments in transgender anti-discrimination law. There are two main legal areas of development: 1) interpreting existing sex discrimination law to prohibit discrimination against transgender people and 2) creating new statutes that more explicitly address discrimination against transgender people. To examine developments in existing law, in the second chapter, I analyze federal Title VII sex discrimination case law. And to investigate statutory developments, in the third chapter, I look to the legislative histories of California's new anti-discrimination laws and, in the fourth chapter, to the legislative debates over North Carolina's "Public Facilities Privacy and Security Act" (also popularly known as "the bathroom bill"). I've selected these latter two examples to represent legislative efforts to both extend anti-discrimination law protections to transgender people and to explicitly deny them those protections. These three chapters, then, focus on a cross-section of recent developments in transgender anti-discrimination law and provide insight into its various manifestations and implications. Again, it's important to note that these three kinds of legal activity coexist and continue to develop—Title VII case law and the EEOC's interpretation of it evolve alongside state legislative efforts to pass and enforce anti-discrimination protections. Therefore, the chapters should not be read as a historic progression of developments in transgender anti-discrimination law but as three distinct, though interrelated, kinds of legal development. In is through this understanding that, in the final chapter, I call on

recent work within both rhetorical studies and political theory to position my analyses in relation to questions about anti-discrimination law, politics, and justice. I argue that a rhetorical understanding of the law demonstrates that anti-discrimination law can and does do far more than grant recognition to the discriminated; it can draw attention to our ethical responsibilities and connections to each other.

CHAPTER 2 - "BECAUSE OF SEX:" SHIFTING THE STASIS OF SEX IN TITLE VII SEX DISCRIMINATION

A version of this chapter was originally published as: Collins, Laura J., "Sex Before the Law: Transgender Arguments under Title VII and Shifting Stases of Sex," *Law, Culture, and the Humanities*. DOI: 10.1177/1743872116679391, first published November 21, 2016.

In 2008, Diane Schroer won a Title VII sex discrimination suit against the Library of Congress based on the Library's having rescinded its offer of employment to Schroer once it found out that she would be transitioning from male to female.[103] At the time, transsexual[104] plaintiffs had experienced some limited success with Title VII suits, but the most promising strategy relied upon asserting that the plaintiff had been discriminated against based upon the sex assigned at birth (in Schroer's case, male). Schroer's attorney, Sharon McGowan, recounts how Schroer told her, "I haven't gone through all this only to have the court vindicate my rights as a gender non-conforming man."[105] In reflecting on her litigation strategy, McGowan explains that winning the case under the theory that Schroer was a man would, for her client, actually be a loss. Accordingly, the litigation team presented evidence to demonstrate that "one's gender is part of one's sex" even if it is not conclusively part of one's "biological sex."[106] Ultimately, and

[103] *Schroer v. Billington*, 577 F. Supp. 2d. 293 (2008).
[104] I use the term transsexual rather than transgender to refer to these plaintiffs for two reasons: 1) this is the term the courts employ and, therefore, more accurately reflects the rhetorical construction of the courts' arguments and 2) because transsexual refers specifically to one who, in Raewyn Connell's words, has "been through a process of transition between locations in the gender order." Connell, "Transsexual Women and Feminist Thought," 857. Each of the plaintiffs in the cases discussed here has undergone such a transition. The terms trans or transgender, while more popular, lack this specificity as they can refer to anybody who envisions themselves outside the bounds of binary gender. Indeed, one of the questions with regard to Title VII jurisdiction is whether recent opinions offer relief only to transsexual plaintiffs (those who locate themselves firmly in either side of the gender order) or, more broadly, to anybody who appears or claims to fall outside the bounds of binary gender.
[105] Sharon M. McGowan, "Working with Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on *Schroer v. Billington*," *Harvard Civil Rights-Civil Liberties Law Review* 45, no. 1 (2010): 205.
[106] McGowan, "Working with Clients," 237.

remarkably, the court found sex discrimination against Diane Schroer without making a determination about her "actual" sex.

However, in much of the commentary about this case, scholars mistake the *Schroer* opinion and evolving Title VII jurisprudence to be about expanding the notion of what constitutes one's sexed identity. This mistake may be attributable to reading these newer decisions as addressing the same issue about sex as older ones (that is, how to understand and assign sex as identity). While earlier opinions did hinge on the courts' understanding of sex as an immutable identity marker discerned at birth, contrary to what others have argued, the *Schroer* opinion does not revise this formula for assigning individual sex. Rather, the opinion shifts our focus away from how to determine individual sexed identities to how sex as classification system causes sex discrimination. As I will demonstrate, doing so enables the court reframe the "plain meaning" of sex before the law and to shift responsibility for the imposition of sexed identities and expectations onto society and away from the law. In what follows, I highlight the significance of *Schroer* in relation to earlier cases by using stasis theory to help pinpoint the rhetorical constructions of *sex* upon which these Title VII cases hinge. Briefly (and as I will explain in greater detail below) stasis theory is a method of identifying the precise point of contention upon which any given case centers. Using stasis theory, then, helps to identify what exactly is being disputed and decided.

Many others, particularly legal scholars, have traced the developments in Title VII jurisdiction for transgender plaintiffs.[107] Jillian Weiss has done so with the express purpose of

[107] Mary Anne Case, "Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA," *Stanford Law Review* 66, no. 6 (2014): 1333-80; L. Camille Hébert, "Transforming Transsexual and Transgender Rights," *William and Mary Journal of Women and the Law* 15(2008): 535-90; Anna Kirkland, "What's at Stake in Transgender Discrimination as Sex Discrimination?," *Signs* 32, no. 1 (2006): 83-111; Sue Landsittel, "Strange Bedfellows? Sex, Religion, and Transgender Identity under Title VII," *Northwestern University Law Review* 104, no. 3 (2010): 1147-78; Jennifer L. Levi, "Misapplying Equality Theories: Dress Codes at Work," *Yale Journal of Law and Feminism* 19(2008): 353-90.

tracing the understandings of *sex* that authorize these decisions.[108] As she explains, the question in these cases is not whether there was discriminatory behavior (typically it is clear that there is). Rather, the question is whether this is sex discrimination under Title VII. That is, the viability of the case depends on the court's understanding of sex. However, she and others who have studied the evolution of this case law read the stasis, or the question upon which the cases hinge, as fixed throughout, understanding each of the cases to depend upon the way the court understands and assigns sex as a personal identity marker. For example, Weiss argues that the *Schroer* court "ruled that sex includes gender identity"[109] when, in fact, the court refused to rule upon the "proper scientific definition of sex," stating that to do so was both outside the court's "competence" and "unnecessary."[110]

It's not surprising that some commentators see *Schroer* as expanding the notion of what constitutes one's sexed identity as, in many cases, these arguments frame explanations of transgender identities and calls for rights. Several years before *Schroer* was decided, legal scholar Taylor Flynn argued that:

> [t]ransgender rights cases… challenge the sex system by presenting the court with people for whom gender and anatomical birth sex in some way diverge. The typical conceptualization of sex, a doctor's peek at a newborn's genitals, is simply a form of shorthand that adequately describes sex in most cases. It is, though, an oversimplification that fails to capture the multitude of factors that constitute sex. Most crucially, this shorthand overlooks a person's gender identification, one's internal sense of being male or female. [111]

Flynn argues for an expanded notion of sex as identity that understands it not as something assigned at birth but an identity born of a "multitude of factors." Her inference is that

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[108] Jillian Todd Weiss, "Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?," *Temple Political and Civil Rights Law Review* 18, no. 2 (2009): 573-649.
[109] Weiss, "Transgender Identity, Textualism, and the Supreme Court," 633.
[110] *Schroer*, 306.
[111] Flynn, ""Transforming" the Debate," 394.

"transgender rights cases" necessarily compel courts to contemplate and complicate the "shorthand" (i.e., sex assigned at birth) notion of sex. This is, indeed, the understanding that shapes much of the commentary on the evolution of Title VII jurisprudence with respect to transgender plaintiffs. Sex as identity is understood as *the* issue for transgender plaintiffs (as Diane Schroer's concerns over the litigation strategy evince) but, at least in *Schroer* and the later EEOC opinion in *Macy v. Holder*, [112] it does not end up being the issue for the adjudicating bodies.

I agree with Flynn that transgender rights cases do cause courts and others to contemplate the meaning of sex in ways that other cases might not. However, as I will demonstrate through tracking the stasis points in these cases, this contemplation does not necessarily lead to an expanded, definitive notion of what comprises one's sex but, rather, an acknowledgment that, at least for the purposes of sex discrimination law, that is beside the point. Such a conclusion may seem in opposition to a transgender rights movement that appears, at least in large part, to be rooted in an identity politics campaign of increasing visibility of and knowledge about trans identities. Diane Schroer's comments evince a desire not only to be free from discrimination but also to have the court proclaim and firmly uphold her female identity. The court does not reject the importance of sexed identities or dispute Schroer's identity. However, by shifting the stasis over the meaning of sex it shows how it is the sex classification system, the practice of marking sexed identity (and not Schroer's identity or being), that gives rise to sex discrimination. Thus, the *Schroer* court reorients the issue of sex before the law, suggesting that the "plain meaning" of

[112] *Macy v. Holder*, 2012 WL 1435995 (2012). In *Mac*y, the EEOC extended the logic of *Schroer* to find discrimination against Mia Macy, a transwoman whose offer of employment had been rescinded when her employer found out that she was in the process of transitioning. Following this administrative decision, the EEOC also released guidelines specifying that, as a whole, it would interpret Title VII sex discrimination as applying to transsexual people, representing a significant policy shift and enabling more transsexual plaintiffs to seek legal protections under Title VII.

sex has never been so plain and that, perhaps, the law's role should be to loosen its hold on that meaning. Fascinatingly, then, the opinion locates sex as a rhetorical construction and individual sexed identities as rhetorical achievements.

While these shifts in stasis and the rhetorical constructions of *sex* within Title VII case law may seem like trivial points to those interested in securing successful legal outcomes for transgender plaintiffs, I argue that paying careful attention to and tracking these rhetorical constructions of *sex* can help us to both better understand the extant state of gender justice movements and to think creatively about coalitional paths forward, especially with feminism. As Elizabeth Schewe[113] and A. Finn Enke,[114] among others, have noted, this (perhaps not yet existent) coalition is fraught but potentially fruitful for both fields. That is, thinking "feminist-transgender coalition" (as Schewe terms it), rather than how either field might be enriched by selected insights from the other, may help us to together refine and sharpen our commitments to gender justice for all. Raewyn Connell points out that the issue of identity has dominated both feminist and transgender writing about transsexual people and that this focus elides the major issues and difficulties in transsexual women's lives.[115] Connell argues that a focus on gender as order and structure helps to elucidate these difficulties. As I will show in what follows, the *Schroer* opinion helps to draw attention to these difficulties and to center Title VII jurisdiction around them in ways that impact the EEOC's current policies and practices. It also suggests a slightly different orientation and location of sex as stasis within trans anti-discrimination politics and within gender justice politics more broadly.

[113] Elizabeth Schewe, "Highway and Home: Mapping Feminist-Transgender Coalition in Boys Don't Cry," *Feminist Studies* 40, no. 1 (2014): 39-64.
[114] Enke, "Introduction."
[115] Connell, "Transsexual Women and Feminist Thought."

In what follows, I will first offer a brief explanation of stasis theory and its utility in describing and analyzing judgment. I will then track stasis points in Title VII sex discrimination jurisprudence as it relates to transsexual plaintiffs. I will then conclude by considering these shifting stasis points in relation to larger questions about sex, identity, and discrimination. Ultimately I argue that by shifting the stasis over sex from identity to classification system, the opinion repositions sex before law, calling attention to how sex as system gives rise to discrimination. Thus, the confusion over sex in this case is not attributable to law's limited frame or its inability as written and conceived to account for transsexuality. Rather, the problem is with how sex is socially structured. However, in reorienting the stasis over sex this way the *Schroer* court ultimately rests the resolution of this issue not with the law but with society.

Stasis Theory and the Rhetorical Act of Judgment

Michael Carter describes stasis as "the method by which rhetors in the classical tradition identified the area of disagreement, the point that was to be argued, the issue on which a case hinged."[116] Though Carter argues that stasis is a process of inquiry which seeks, first, to determine the "true point of contention,"[117] others have challenged this notion. Zemlicka and Matheson argue that stasis is not a point of contention discovered in the clash between two sides but, rather, is created through the rhetorical act of judging:

> Stasis is not given in advance of the debate, but rather is a contested terrain in which opposing stakeholders struggle to create strategic points of clash throughout the course of the arguments. The act of judgment then chooses the most persuasive location of stasis and retroactively affixes it to the entire argument field. We say retroactively because the adjudicating body presents his or her decision as if the stasis point had always existed as characterized by the winning side.[118]

[116] Michael Carter, "Stasis and Kairos: Principles of Social Construction in Classical Rhetoric," *Rhetoric Review* 7, no. 1 (1988): 98.
[117] Carter, "Stasis and Kairos," 100.
[118] Kurt Zemlicka and Calum Matheson, "To Make a Desert and Call It Peace: Stasis and Judgment in the MX Missile Debate," *Argumentation and Advocacy* 51, no. 1 (2014): 38.

For Zemlicka and Matheson, stasis remains the "point of contention" on which judgment rests. However, that point of contention does not precede judgment. Rather, it is through the act of judgment that the adjudicating body settles the stasis point and "affixes it to the entire argument field." In other words, the act of judgment and the fixing of the stasis point reconfigure the terrain of the argument. In this way, judgment not only determines the outcome of the case or argument, it also reconfigures both past and future argument terrain. As Zemlicka and Matheson point out, "That means not only that stasis is not the precondition for the debate, but also that the debate is rendered sensible starting not from the beginning of the arguments, but by its endpoint—its judgment which then looks back from the start of the debate and organizes it retroactively."[119]

Zemlicka and Matheson's work on the establishment of the MX "Peacekeeper" Missile program during the Reagan presidency helps to demonstrate how those adjudicating a debate (in their case, members of the Reagan administration) can refix the point of contention through their decision by synthesizing and reorienting the competing key terms (or topoi). Zemlicka and Matheson argue that by rearticulating the notion of "national security" through drawing on the conceptions forwarded by both those opposed to and in favor of the missile program, the Reagan administration was able to reorient the nature of the debate from one over what "national security" meant to one over how the MX missile could be used to support national security. In so doing, the administration was able to argue for the necessity of the MX missile program on terms that appeared to appeal to and transcend sides.

Amy Koerber's work on immunology and breast milk is another excellent example of how stasis theory can be used to analyze how debates are framed over time and what impact this

[119] Zemlicka and Matheson, "To Make a Desert and Call It Peace," 38.

framing has not only on future arguments but on future action.[120] Koerber discusses how a single scientific review article initially established the stasis point in research over breast milk's role in infant immune protection such that, in order to unsettle the proposition that breast milk had no immunity-promoting properties, researchers had to reframe the question and their orientation toward it. This occurred by working through new metaphors about immunity and framing the question as one of immunology rather than of pediatrics. In other words, once an initial stasis point had been established, it was only in changing the question itself that the debate about human milk's immune properties could be reopened or reworked.

Koerber's and Zemlicka and Matheson's work helps to demonstrate the utility of stasis theory in understanding how the act of judging itself helps to frame and establish arguments and, accordingly, the terms for future engagement. Employing stasis theory in analysis of a debate or legal case helps to highlight the rhetorical nature and impact of judgment, shedding light on both what contributed to that judgment and also what that judgment enables and forecloses with regard to future engagements. That is, if judgment "settles" into stasis, as it were, it is important to understand where exactly that settlement lies and how the location of that settlement impacts the terrain of that given issue moving forward. As Graham and Herndl argue, "stasis allows us to understand some of the concrete and messy rhetorical work… involved in attempting to change a discursive formation."[121] Stasis theory, then, shows how the rhetorical act of judging can reorient the argument field, changing not only the point of resolution but the very issues to be disputed and resolved.

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[120] Amy Koerber, *Breast or Bottle?: Contemporary Controversies in Infant Feeding Policy and Practice* (Columbia, SC: University of South Carolina Press, 2013).
[121] S. Scott Graham and Carl G. Herndl, "Talking Off-Label: the Role of Stasis in Transforming the Discursive Formation of Pain Science," *Rhetoric Society Quarterly* 41, no. 2 (2011): 164.

Stasis theory is particularly appropriate to analyzing legal acts of judging because judges must deal with precedent. In a common law system, like the United States', decisions in individual cases set law for future cases. Judges in the same jurisdiction are bound to follow the precedent set by earlier cases. Judges in other jurisdictions are to view the decisions from outside jurisdictions as persuasive but not binding. This means that a case can be incredibly important and influential on future cases despite being decided in a different jurisdiction. The system is designed to promote consistency and predictability in the law. Because of the precedential nature of case law, when a court desires to make a decision that appears contrary to previous case law, it must distinguish the instant case from those that have preceded it, often even cases from other jurisdictions.

Particularly in cases in which there seems to be a new development in law, stasis theory helps to draw attention to question the court seems to be answering, which may, in fact, be an entirely different question than that answered in previous cases. In so doing, stasis theory can help to better explain how courts are dealing with and navigating precedent and opinions from outside its jurisdiction.

In the case of establishing Title VII sex discrimination jurisdiction for transsexual plaintiffs, stasis theory helps us to track the rhetorical constructions and framing of the argument upon which jurisdiction relies. As others have argued, these cases do indeed hinge on the question of *sex*. However, as this chapter will demonstrate, *Schroer* represents a radical shift not only in how that question is answered (as many have noted) but, more importantly, in how that question is asked. It is not so much *Schroer*'s answer to the question of sex that is interesting and thought provoking with regard to gender justice but its location of the question—its "retroactive" fixing of the stasis point—that merits further consideration. Stasis theory also helps to explain

why, despite what *Schroer* actually says, scholars continue to read the opinion within the frame of identity. In what follows, I will chart the stasis points in important Title VII cases brought by transsexual plaintiffs. I have selected these cases because they are widely known and cited and because they represent particular trends in this jurisprudence that help to elucidate the shifting stases over *sex*.

Displacing Sexed Confusion: Early Title VII Cases

Because the first state to ban employment discrimination against transgender people was Minnesota in 1993 and because there continues to be no federal law explicitly banning employment discrimination against transgender people, historically transsexual plaintiffs have tried to use a number of different federal statues and constitutional provisions to bring employment discrimination claims. Among these is Title VII's prohibition against discrimination "because of … sex." It is only within the past several decades that Title VII has become a viable avenue for pursuing these claims, as courts originally read the statute very narrowly, interpreting it to apply only to situations in which there was direct evidence that an employer treated female employees differently than male employees.

Early decisions regarding whether transsexual plaintiffs could bring Title VII discrimination suits hinge on the definition of sex. In these early cases, the definitional question is framed as being twofold: 1) the meaning of sex under Title VII and 2) the sex of the plaintiff for Title VII purposes. The courts spend a good deal of time discussing the first question, each insisting that this meaning is "plain" and well established. Despite this "plain" meaning, these courts have difficulty sexing the transsexual plaintiffs before them. To resolve this, the opinions each displace the confusion over sex onto the transsexual plaintiff, suggesting that it is for the plaintiff and not the law to resolve this dispute over sexed identity.

In one of the earliest court of appeals cases, *Holloway v. Arthur Andersen & Co.*[122], the court appeared to address the definitional question (the meaning of sex), but the case ultimately rested on the confusion over Holloway's sex. In the case, Ramona Holloway was fired from the accounting firm at which she worked after initiating hormone treatment, preparing for sex reassignment surgery, and having her company file changed to reflect her new classification as a woman.

The stasis point, as the court framed it, was definitional: whether sex within Title VII should be read as "[synonymous] with 'gender' [where] gender would encompass transsexuals"[123] or whether "sex" should be "given the traditional definition based on anatomical characteristics."[124] The court noted that "there is no generally accepted definition of the term "transsexual" but, regardless, seemed to accept that Holloway was indeed a transsexual. The issue, as the court saw it, was whether Title VII's prohibition against discrimination "because of…sex" covered transsexuals. The court argued that if sex is given its "traditional definition based on anatomical characteristics," one can only assert a Title VII claim on the basis of purported anatomical sex. Alternatively, the court argued that if we take "sex" to really mean "gender," such a reading would provide coverage for transsexuals. Though the court does not spend any time parsing this distinction, the implication seems to be that gender begins where certainty over sex (which the court sees as anatomical and self-evident) ends. In this construction of sex and gender, transsexuality can only be a form of gender, not a form of sex. Thus, whether Holloway, who presented herself to the court as a transsexual—a type of gender—could be afforded Title VII coverage hinged on whether Congress intended *sex* within Title VII to refer only to sex or, more expansively, to gender.

[122] *Holloway v. Arthur Andersen and Co.*, 566 F.2d 659 (1977).
[123] *Holloway*, 662.
[124] *Holloway*, 662.

Ultimately, the court concluded that "[g]iving the statute its plain meaning, … Congress had only the traditional notions of 'sex' in mind."[125] Accordingly, it found that Ramona Holloway could not bring a Title VII sex discrimination suit on the grounds that she was fired "for initiating the process of sex transformation."[126] The court explained that transsexuals are not excluded from Title VII protection:

> Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII. Holloway has not claimed to have [sic] treated discriminatorily because she is male or female, but rather because she is a transsexual who chose to change her sex.[127]

In describing how Title VII remedies are "equally available" to all, but not to somebody who has "chos[en] to change her sex," the court actually demonstrated how Title VII sex discrimination claims are specifically *un*available to those who "change … sex." Despite proclaiming that "sex" should be given its "traditional definition based on anatomical characteristics,"[128] the court never decided, for the purposes of Holloway's case, whether her sex was male or female. Her transsexual "gender" superseded any sex classification and it was this "choice" that was fatal to her Title VII claim. It is precisely because the court could not and would not establish Holloway's sex, because she was a transsexual, that there could be no sex discrimination. Thus, the instability and inscrutability of Holloway's sexed identity made her Title VII claim inscrutable as well. The resolution was to pin this confusion on her "choice" and to insist that the law's definition of sex was transparent, stable, and clear. Sex before the law, then, retained its untroubled "plain meaning" by displacing the trouble onto Holloway's choice.

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[125] *Holloway*, 662.
[126] *Holloway*, 661.
[127] *Holloway*, 664.
[128] *Holloway*, 662.

The Eighth Circuit Court of Appeals had similar difficulties in establishing the plaintiff's Title VII sex in the 1982 case *Sommers v. Budget Marketing Inc.*[129] The court begins the opinion by noting that the plaintiff, Audra Sommers, is "also known as Timothy Cornish"[130] (748) and offering a disclaimer that "Sommers claims to be a 'female with the anatomical body of a male.' Inasmuch as Sommers refers to herself in the feminine gender, this court will likewise do so."[131] This statement immediately signals that, for the court, Sommers's "gender" is an unsettled matter and clarifies that it refers to Sommers as a woman not because it definitively believes her to be so, but because that is how she refers to herself. From the outset, in other words, the court was troubled by how to classify Sommers for the purposes of Title VII sex.

Given this, it is perhaps not surprising that the court ultimately found that "Title VII coverage [does] not extend to those discriminated against because of their transsexuality."[132] Interestingly, while the *Holloway* court focused on Holloway's "choice" and asserted that one could not claim sex discrimination on the basis of "initiating the process of sex transformation,"[133] the *Sommers* court focused on Sommers's condition of "transsexuality." The *Holloway* court seemed to insist that Holloway did have a cognizable sex under Title VII (though it isn't quite clear what they would take that to be), but the *Sommers* court was honestly troubled as to how to classify her. She was, as far as the court was concerned, and, more importantly, as far as Title VII was concerned, ambiguously sexed. Validating its failure to establish Sommers's sex, the court reasoned that "even medical experts disagree as to whether Sommers is properly classified as male or female."[134] So while the opinion purported to rely upon the "plain meaning"

[129] *Sommers v. Budget Marketing Inc.*, 667 F.2d 748 (1982).
[130] *Sommers*, 748.
[131] *Sommers*, 748.
[132] *Sommers*, 749.
[133] *Holloway*, 661.
[134] *Sommers*, 749.

of sex and to resolve the case on these grounds, ultimately, it was the inability to sex Sommers upon which the decision hinged. The stasis point is indeed the definition of sex, but with regard to the specific plaintiff (how to "sex" her) and not to the "plain meaning" of sex itself. Of course, in some ways, this opinion shows how the "plain meaning" of sex is not so plain. If sex is an identity marker that is plainly discerned and upheld by the law, the inability to sex Sommers suggests that the meaning of sex is less transparent and easily applicable than the court insists it is.

Perhaps the case that most clearly demonstrates this trend of preserving the law's "plain meaning" of sex by displacing confusion onto the transsexual plaintiff is the Seventh Circuit Court of Appeals 1984 decision in *Ulane v. Eastern Airlines, Inc*.[135] Unlike in *Holloway* and *Sommers*, in *Ulane* the lower court had actually granted relief to the plaintiff, Karen Ulane, under Title VII. Thus, rather than affirming the lower court's determination that Title VII could not offer relief to transsexual plaintiffs, the *Ulane* court had to overrule the lower court and its foundation for permitting Title VII jurisdiction. In the district court opinion, Judge Grady found that "'sex' as used in any scientific sense and as used in [Title VII] can and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."[136] Judge Grady held that Title VII granted relief to transsexuals and that Ulane was a transsexual for the purposes of Title VII or that, in the alternative, Ulane was a woman discriminated against because she was a woman. The Seventh Circuit, then, had to confront both the purported and actual stasis points upon which earlier decisions had relied: 1) the definition of sex under Title VII, and 2) the sex of the transsexual plaintiff before it.

[135] *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (1984).
[136] *Ulane v. Eastern Airlines, Inc.*, 581 F. Supp 821, 825 (1983).

Addressing the claim that "sex" for the purposes of Title VII includes transsexuals, the Seventh Circuit argued that the "plain meaning" of Title VII precludes coverage for people sexed "transsexual." The court found that Title VII "implies that it is unlawful to discriminate against women because they are women and against men because they are men"[137] and that it does not outlaw discrimination against "a person born with a male body who *believe*s himself to be female, or a person born with a female body who *believes* herself to be male.[138] This rationale suggests that, for the court, *sex* means the sex assigned at birth and the only valid sex discrimination claim is one that relies upon that initially assigned sex. Those who believe themselves to be a sex other than that assigned at birth have upended the "plain meaning" of their own sex. The problem, again, is of their own creation and not the law's. Though the court spent a good deal of time discussing the meaning of the word "transsexual," this seems to be a designation outside the law's province. The "plain meaning" of sex is as consistent identity marker—male or female.

Addressing the second theory, that Ulane was entitled to relief as a woman, the court was careful to establish that even if it were to regard Ulane as female, she would still have no Title VII sex discrimination claim. The court stated that "Ulane [was] entitled to any personal belief about her sexual identity she desires" and that *if* Eastern Airlines had considered her to be a woman and discriminated against her on the basis of her being a woman, she would have a viable sex discrimination claim.[139] The problem, the court found, was that Eastern Airlines did not discriminate against Ulane because she was a woman. In fact, Eastern Airlines' unwillingness to accept Ulane as a woman and insistence on seeing her as a transsexual was precisely *why* the court found there was no viable Title VII suit. Eastern Airlines discriminated against Ulane

[137] *Ulane* (1984), 1085.
[138] *Ulane* (1984), 1085.
[139] *Ulane* (1984), 1087.

because she was 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."[140] Therefore, in the view of the court, because *sex* under Title VII did not extend to transsexuals, Ulane could not state a viable Title VII claim.

Remarkably, then, Ulane could only have a viable sex discrimination claim as a woman if all parties (the court, her employer, and Ulane) were unanimous in their conviction that she was a woman. Of course, if everyone agreed, the underlying basis for discrimination would likely be resolved.

Paradoxically, in these cases we are left with a situation where transsexual plaintiffs must convincingly establish a stable sex, universally agreed upon by the court, their employers, and themselves, to state a sex discrimination claim. Relying on the "plain meaning" of sex, these opinions suggest that it is the job of the transsexual plaintiff to uphold that plain meaning by aligning perceptions of their individual sex before they are able to state a claim. Stable, uncontested sex, then, must precede Title VII sex discrimination claims. Under this construction of sex, if there is disagreement between the parties as to how to sex the plaintiff (which is essentially always the case in sex discrimination cases brought by transsexual plaintiffs), a sex discrimination suit cannot proceed. The "plain meaning" of sex before the law is upheld by displacing any confusion over sex onto the transsexual plaintiff. Thus, sex remains stable, constant, and accounted for within the law.

The stasis point, then, is the incongruity between the plaintiffs' and the courts'/employers' understanding of the plaintiff's individual sex. This stasis suggests that only through resolving and settling the transsexual plaintiff's sex would the court be able to find Title VII jurisdiction.

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[140] *Ulane* (1984), 1087.

Shifting Sex: *Price Waterhouse* and Gendered Expectations

The Supreme Court's ruling in *Price Waterhouse v. Hopkins*, a case brought by a non-trans woman, provided the foundation for shifting the stasis point away from sex as identity toward sex as gendered expectations.[141]

In *Price Waterhouse,* decided in 1989, the Court held that Title VII's prohibition against sex discrimination did not refer only to simple cases of disparate treatment between female and male employees (that is, cases where an employer chose a male candidate over a female one), but that it also applied to cases where employers used sex stereotypes to discriminate against their employees. Whereas the inability to establish Ulane's sex proved the stasis point in that decision, in *Price Waterhouse*, the question is not one of how to understand the plaintiff's sex relative to Title VII but one of how to understand the term *sex* in relation to Title VII. The answer begins to take us out of the realm of identity and in to the realm of sex as gendered evaluations and expectations—that is, toward an understanding of gender as structure.

In *Price Waterhouse*, the plaintiff, Ann Hopkins, was denied a partnership position at the accounting firm at which she worked despite her stellar performance, because, among other things, she was perceived as "macho," "overcompensat[ing] for being a woman," and in need of a "course at charm school."[142] Though the trial and appellate courts had found that Hopkins had experienced sex discrimination, other federal courts held conflicting views about whether Title VII really protected against sex stereotyping and had restricted findings of sex discrimination to cases where, in their view, employers explicitly discriminated based on sex (that is, preferring a male candidate over a female one). Affirming the lower court's finding of discrimination in *Price Waterhouse*, the Supreme Court held that Title VII's prohibition of discrimination against

[141] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
[142] *Price Waterhouse,* 235.

an employee "because of such individual's … sex" meant that "gender must be irrelevant to employment decisions"[143] (240) and that

> [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, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.[144]

Thus, the Court held that Title VII applied not only in cases where, say, an employee was not promoted expressly because she was a woman (as opposed to a man) but also to cases in which an employee was not promoted because she was a woman who seemed, in the estimation of her employer, not to act as a woman should.

Relatedly, the Court held that it was the sexed nature of the evaluations and not their *truth* that rendered this employment discrimination:

> It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.[145]

At issue, then, was not *what* Hopkins was (i.e., a "nice" woman versus an aggressive one) but how sex stereotypes animated her employers' reactions to her. Importantly, the Court found that it did not have to decide what Hopkins was *really* like; it only had to be able to discern from her employers' reactions to her that these reactions were based on sex. "Interpersonal problems" alleviated by lipstick are "problems" originating from notions about how gender is properly performed and made manifest. In some sense, then, the issue rests less on Hopkins' particular enactment of her female sex and more on her employer's perceptions of and beliefs about gender and her performance of it. Sex discrimination inheres less in the employee herself, though her

[143] *Price Waterhouse,* 240.
[144] *Price Waterhouse,* 251.
[145] *Price Waterhouse,* 258.

sex forms the basis for the suit, and more in the sex-based expectations and presumptions of her employer.

Though some have argued that *Price Waterhouse* essentially forbids gender discrimination, understanding gender as an individual identity or performance,[146] if we take the Court's statement that its "perception of Hopkins's character is irrelevant" seriously, we can understand the opinion as being less about Hopkins's individual enactment of her gender and more about her employer's gender-based evaluations of her. That is, the discrimination does not necessarily stem from Hopkins's behavior but from her employers' beliefs about gender. As the Court makes clear, at issue is not what Hopkins is really like (that is, whether she is an aggressive woman whose aggressiveness merits Title VII protection); rather, the issue is whether Title VII prohibits discrimination based on employers' sex-based expectations and evaluations. The stasis point is not Ann Hopkins's sexed identity (whether Ann Hopkins's behavior and dress are atypically or imperfectly feminine); it is her employer's notions of sex. To be clear, Hopkins's sex is indeed critical to the decision—the court found that she was discriminated against because her superiors reacted negatively to her because of both her sex (female) and their sex-based evaluations of her—but it is never at issue. The case does not hinge on whether Hopkins was a woman or how she was a woman (as the Court says, that is irrelevant). As such, how to understand Hopkins's sexed identity (either in terms of sex assigned at birth or what Hébert calls "genderlinked characteristics"[147]) is decidedly not the stasis in the *Price Waterhouse* decision. The question of *sex* here becomes about Hopkins's employer's sexed expectations and evaluations. The finding of sex discrimination rests upon a determination that Price

[146] Hébert, "Transforming Transsexual and Transgender Rights," 579; Landsittel, "Strange Bedfellows?," 1159.
[147] Hébert, "Transforming Transsexual and Transgender Rights," 579.

Waterhouse's evaluations of Ann Hopkins were based on sex stereotypes or gendered expectations.

It was some years after *Price Waterhouse* that a transsexual plaintiff successfully argued Title VII sex discrimination. In part this was because federal courts still insisted that because protecting transsexual plaintiffs was not within the original Congressional intent of Title VII, the statutory protections could not apply to them. Addressing the stasis of legislative intent, the Supreme Court's 1998 ruling in *Oncale v. Sundowner Offshores Services, Inc.*, held that in prohibiting discrimination "because of … sex," Title VII means what it says and, thus, Title VII prohibits discrimination on the basis of sex regardless of the sex of the perpetrator or the victim.[148] Thus, in *Oncale*, a male employee could allege sex discrimination against his male coworkers. Invalidating earlier lower court opinions that had barred such suits the Court held that "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[149]

Aligning Sex: *Smith v. Salem*

The *Oncale* Court's acknowledgement that Title VII means what it says coupled with the *Price Waterhouse* holding that "gender must be irrelevant to employment decisions" (240) invalidated some of the earlier arguments upon which decisions barring Title VII jurisdiction for transsexual employees were based. The first Court of Appeals decision parsing these impacts was the Sixth Circuit's 2004 decision in *Smith v. City of Salem.*[150]

In *Smith*, armed with the decisions in *Price Waterhouse* and *Oncale*, the plaintiff's lawyers used the stasis point settled in earlier case law to establish jurisdiction for their

[148] *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).
[149] *Oncale,* 79.
[150] *Smith v. City of Salem*, 378 F.3d 566 (2004).

transsexual client. By presenting herself as Jimmie Smith, her name prior to transition, the plaintiff solidified her sex as male for the purposes of Title VII. Doing so enabled Smith to argue that he[151] was discriminated against because his employer, the City of Salem, perceived him as a man who, in presenting himself as a woman, failed to adhere to the stereotypes about how a man should behave. It also foreclosed the court's ability to argue that Smith had no sex because he presented his sex as stable, constant, and without question. Smith, the court, and the City of Salem were presented as being unanimous in their appraisal of Smith as a man. The decision, then, could not hinge on whether Smith had a cognizable sex under Title VII but had to hinge on whether Jimmie Smith had experienced sex discrimination.

Though the Supreme Court had used the terms sex and gender interchangeably in *Price Waterhouse*, in *Smith* the Sixth Circuit Court of Appeals used the sex/gender distinction as well as the *Price Waterhouse* articulation of sex stereotyping as unlawful sex discrimination to uphold Smith's sex discrimination suit.

The Sixth Circuit noted that just as Price Waterhouse had discriminated against Ann Hopkins "because she failed to *act* like a woman,"[152] the City of Salem had discriminated against Smith because of "his failure to conform to sex stereotypes concerning how a man should look and behave"[153]—in other words, his failure to act like a man.

The court reasoned that earlier cases like *Holloway* and *Ulane* relied on a distinction between sex discrimination and gender discrimination where those decisions found that Title VII protected against sex but not gender discrimination. Defining gender as "socially-constructed norms associated with a person's sex" and sex as "an individual's anatomical and biological

[151] In discussing these cases, I reference the plaintiffs using the names and pronouns they have used to bring suit because, particularly in this case, these decisions are material to how the case is understood and judged.
[152] *Smith*, 571-72 (emphasis original).
[153] *Smith*, 572.

characteristics,"[154] the *Smith* court read *Price Waterhouse* to enfold gender discrimination under Title VII's prohibition against sex discrimination. In support of this position, the *Smith* court cited the Supreme Court's declaration in *Price Waterhouse* that "in the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[155] Though the *Price Waterhouse* decision did not at any point articulate any definitional distinction between gender and sex, the *Smith* court took this statement and the Supreme Court's general acceptance of a sex stereotyping theory of discrimination under Title VII as evidence of the Court's reading Title VII as prohibiting discrimination based on both one's biological sex and on gender. It found that while the first term refers to an individual's sex identity marker (assumed here to inhere in biology), the second refers to "socially-constructed norms." That is, for the court, sex discrimination hinges on biological classification as male or female, and gender discrimination hinges on an *employer's* perceptions of how one should be, pursuant to "socially-constructed norms" associated with one's sex.

As Kirkland observes, the *Smith* ruling "focuses explicitly on the judicial understanding of gender, the socially mandated behavior and appearance for men and women, respectively, as opposed to sex, the anatomical division of our species into male and female."[156] Thus, for the *Smith* court, a finding of "gender discrimination" is contingent upon first establishing the underlying sex of the plaintiff and then determining what stereotypes the employer associated with that sex. In this way, sex discrimination inheres in the plaintiff's "anatomical and biological characteristics"—presumably stable and easily identifiable traits—while gender discrimination inheres in an employer's perceptions and prejudices about the "norms" associated with sex—

[154] *Smith*, 572.
[155] *Smith*, 572 (citing *Price Waterhouse*, 250).
[156] Kirkland, "What's at Stake," 94.

identified through the employer's actions and statements. Therefore, in either case, the employee's sex is critical to a finding of discrimination, but only in the second case is the employer's understanding and imposition of purported social norms relevant to the discrimination claim. The *Smith* court argued that transsexual people had historically been denied Title VII protection "because they were considered victims of 'gender' rather than 'sex' discrimination:"[157]

> After Price Waterhouse, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[158]

Unlike the earlier cases brought by transsexual plaintiffs, the "true" sex of the plaintiff was not at all contested in this case. Smith was, for the purposes of the litigation, indisputably biologically male. And it was this indisputable male sex that enabled the court to find, without having to delve into expert testimony about the nature and etiology of transsexualism or Smith's particular instantiation of it, that Smith had been discriminated against because he is a man acting like a woman. This is presented, as in *Price Waterhouse*, as a simple case of sex stereotyping where an unambiguously sexed plaintiff (where sex is construed as the patently evident anatomically and biologically determined male or female classification of a person) experiences discrimination because his employer perceives him as failing to adhere to sex stereotypes.

The *Smith* court recuperated transsexual plaintiffs' Title VII claims by insisting that, contrary to the holdings if not the dicta of earlier opinions, "a label such as 'transsexual' is not fatal to a sex discrimination claim."[159] By establishing the *sex* of a transsexual plaintiff as the one

[157] *Smith*, 573.
[158] *Smith*, 574.
[159] *Smith*, 575.

assigned at birth, the *Smith* court provided transsexual plaintiffs with a cognizable sexed identity before the law and repositioned the employer's perception of an employee as transsexual not as determining the employee's sex (or lack thereof) for the purposes of Title VII, but as determining "gender" (understood here as "socially constructed norms") for the purposes of Title VII.

The outcome, then, rested on the premises that: 1) Smith was really a man (as acknowledged and uncontested by all parties), and 2) he was being penalized by his employers because they thought that men should not act like women. Relying upon the untroubled stasis of sex as identity and the *Price Waterhouse* articulation of gender as social norms, the court found Title VII jurisdiction for Smith. Thus, the "plain meaning" of sex before the law was upheld by Smith's willingness to submit that his true sex was male.

Sex Discrimination without Sexed Plaintiffs: *Schroer v. Billington*

In the 2008 case *Schroer v. Billington*, the District Court for the District of Columbia dispensed with the need to stabilize the sexed identity of the transsexual plaintiff (either in terms of transsexual sex or sex assigned at birth) for the purposes of establishing a viable Title VII claim. In that case, the plaintiff, Diane Schroer, had applied for and been offered a position at the Library of Congress as David Schroer. After Schroer met with Charlotte Preece, the Library employee ultimately responsible for the hiring decision, to relate that she would be transitioning from male to female and would be starting work as Diane, the offer of employment was rescinded. At that meeting with Preece, Schroer showed Preece pictures of herself in "typically feminine professional attire."[160] The court concluded that either under a Price Waterhouse "sex stereotype" theory or a plain reading of the statutory language, the Library's actions towards Schroer constituted unlawful sex discrimination under Title VII.

As I mentioned earlier, Diane Schroer found the *Smith* litigation strategy repugnant and understood it as relying upon a denial of her identity because it depended upon filing and pursuing the suit under her previous name and, as she saw it, inaccurate sex. Accordingly, Schroer's attorneys filed the case under her new name and presented evidence at trial that gender identity is part of one's sex. While at least one scholar has argued that the Schroer court "ruled that sex includes gender identity,"[161] in fact, the court took great pains *not* to rule on the constitution of sex as identity. Rather, it adopted and expanded the stasis point of *Price Waterhouse* by considering how the Library's notions of sex as classification system and set of expectations resulted in discrimination against Schroer.

[160] *Schroer*, 297.
[161] Weiss, "Transgender Identity, Textualism, and the Supreme Court," 633.

Rather than looking to first establish the sexed identity of the plaintiff and then to determine if there was discrimination based on that identity, the court looked to the specific statements and actions of the defendant to conclude that its "hiring decision was infected by sex stereotypes."[162] In reading the actions of the Library through this lens, the court looked for references to sex and gendered expectations, but did not seek to tie these to Schroer's definitive sex. For example, the court relates:

> [Preece] admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing … Preece testified that her difficulty in comprehending Schroer's decision to undergo a gender transition was heightened because she viewed David Schroer not just as a man, but, in light of her Special Forces background, as a particularly masculine kind of man.[163]

In discussing the above cited evidence that the Library's decision was "infected by sex stereotypes," Judge Robertson concluded, "I do not think that it matters for the purposes of Title VII whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."[164] He argued that "one or more of Preece's comments could be parsed in each of these three ways,"[165] but he also argued that it did not matter which way the statements were parsed. In other words, a finding of sex discrimination is not contingent upon a definitive finding of the plaintiff's sex (either in the eyes of the employer or the plaintiff); it is only contingent upon a finding that the employer discriminated against the plaintiff because it found her to fall outside gendered expectations.

For example, Preece's admission that she "saw a man in women's clothing" when Schroer presented her with the photos of herself in "traditionally feminine attire" could be read

[162] *Schroer*, 305.
[163] *Schroer*, 305.
[164] *Schroer*, 305.
[165] *Schroer*, 305.

as Preece thinking that Schroer's femininity looked masculine or Preece thinking that Schroer was "actually" a man in women's clothing and, therefore, an "insufficiently masculine man." As the court points out, determining which of these perceptions Preece held is immaterial. What is clear from the statement is that Preece's evaluation of the photos was "infected with sex stereotypes" about what men and women ought to look like. Whether Preece took Schroer to be one, the other, or neither of these things does not matter. What does matter is that Preece was evaluating Schroer relative to Preece's ideas about what sex is and how it should be enacted.

In addressing the plain reading of Title VII theory of sex discrimination, the court's opinion hinged on Schroer's having changed sex. Though the opinion provides a rather lengthy discussion of the expert medical testimony offered both in support of and against the proposition that gender identity is a component of one's sex (and, therefore, would dictate one's underlying sex for the purposes of Title VII litigation) and opined that the "testimony of both experts … was impressive,"[166] it ultimately decided that such testimony was immaterial to the outcome in the case.[167] The court concluded that pursuant to the plain language of Title VII, Diane Schroer was discriminated against "because of … sex."[168] While transsexuality or the "change in sex" was precisely the problem for the *Sommers, Holloway,* and *Ulane* courts (because "changing sex" attempts to confuse sex's plain meaning), according to Judge Robertson, change in sex was precisely *why* the plain language of Title VII provided relief for Diane Schroer. He reasoned: "the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become,

[166] *Schroer*, 306.
[167] "Resolving the dispute between Dr. Schmidt and Dr. Bockting as to proper scientific definition of sex, however, is not within this Court's competence. More importantly (because courts render opinions about scientific controversies with some regularity), deciding whether Dr. Bokting [sic] or Dr. Schmidt is right turns out to be unnecessary." *Schroer*, 306.
[168] *Schroer*, 306.

legally, culturally, and physically, a woman named Diane. This was discrimination 'because of … sex.'"[169]

Expounding upon this point, the court analogized change of sex to a change of religion, arguing that if an employer claimed "no bias toward either Christians of Jews but only 'converts,'" that would nonetheless be a "clear case of discrimination."[170] The *Schroer* court concluded that in the same way, discriminating against somebody expressly because she has changed sex is, on its face, discrimination "because of … sex"[171] because, in discriminating against a "convert," the employer has taken sex into account in making decisions.

In an important way, the *Price Waterhouse* decision changed the articulation of sex and, particularly, sex discrimination such that the *Schroer* court was able to find sex discrimination without ruling on Schroer's sexed identity. Just as the Supreme Court did not need to determine in *Price Waterhouse* whether "the negative reactions to Hopkins were based on reality"[172] to find sex discrimination, the *Schroer* court did not need to determine what sex Schroer really was to find sex discrimination in her case. It only needed to find either that the Library's perceptions and evaluations of Schroer were "infected" with sex stereotypes or that the Library discriminated against her because she had changed sex. In both cases, sex discrimination does not rest on the plaintiff's sex as identity but on how the defendant's application of sex stereotypes or sex classifications resulted in discrimination against the plaintiff. The focus, then, is not on the plaintiff's behavior or identity, but in how the defendant applied his or her own ideas about sex to sanction the plaintiff for acting outside of his or her particular sex classification system.

[169] *Schroer*, 306.
[170] *Schroer*, 306.
[171] *Schroer*, 306-07.
[172] *Price Waterhouse*, 258.

In another way, however, the *Schroer* decision makes a critical departure from the *Price Waterhouse* decision. While the *Price Waterhouse* court stressed that Title VII prohibits discrimination "because of such individual's … sex" and held that the negative reactions to Hopkins were "because she [was] a woman,"[173] the *Schroer* decision resisted assigning a sex to Schroer for the purposes of litigation. Though the court consistently referred to Schroer as a woman and seemed to regard her as such, its determination of discrimination in no way rested on Schroer's sex as a stable thing. Instead, the court read "sex" within the statutory language of Title VII to refer to the sex classification system and an employer's apprehension and application of "sex" with regard to an employee. The *Schroer* opinion extended the *Price Waterhouse* declaration that "gender must be irrelevant to employment decisions"[174] by making Schroer's gender (or sex) as a knowable thing irrelevant to the judicial decision. In so doing, the court was able to avoid wading through the expert medical testimony to determine the plaintiff's real sex and, further, was able to avoid determining, as a factual matter, what sex the *defendant* took the plaintiff to be. In fact, as McGowan explains, basing the ruling on a medical understanding of sex that incorporated gender identity would have made the ruling more easily challenged and appealed.[175] It is specifically *because* earlier cases had established the stasis of sex as identity that the *Schroer* court needed to reject the question of sex as identity altogether. In other words, to unsettle the sex as identity stasis, the court had to do better than select the more convincing expert testimony; it had to reorient the argument.

It did this by using the *Price Waterhouse* notion of gendered evaluations. Arguing that it was employing the "plain meaning" of sex, which had always referred to gendered expectations or sex classification system, the *Schroer* court located the confusion over Schroer's sex (and the

[173] *Price Waterhouse*, 258.
[174] *Price Waterhouse*, 240.
[175] McGowan, "Working with Clients."

resulting discrimination) not within Schroer's identity but in the Library's own evaluations and assessments. In so doing, the court actually demonstrated that the "plain meaning" of sex (both as identity and classification system) is, and always has been, an unsettled matter.

Relocating *Sex* in the Argument Field and Responding to the Law

Significantly, the *Schroer* opinion repositions law's relationship to sex and, thus, law's and our responsibility with regard to sex. It isn't that the law previously improperly assigned sex (or, in many cases, failed to do so). Rather, by locating sex as classification system, the court shows that this socially-maintained system has always been the problem and law, as written, has always been able to account for that. In this construction, the problem with sex is not a legal one but a social one. As Sarah Burgess explains, claims for recognition, like those brought by the transsexual plaintiffs in these cases, call law's consistency and constancy into question by asking law to reconfigure the terms of recognition.[176] The trick for law is to displace that reconfiguration, thus preserving the notion that law has always contained the scene of recognition and that it has not been altered by this encounter. In other words, to maintain its consistency and constancy, law must displace confusion outside itself. Doing so preserves the impression that law has always accounted for this encounter and has always had the frames and terms necessary to deal with it. In this line of cases, transsexual plaintiffs' demands for recognition of the discrimination they face threaten to upset sex before the law as it has been known.

To preserve the constancy of sex before the law in the early cases, the courts relied on the "plain meaning" of sex and displaced the conflict over sex onto the plaintiffs' personal choices or beliefs about their owned sexed identities that had (in this construction, mistakenly) confused

[176] Sarah K. Burgess, "Exposing the Ruins of Law: The Rhetorical Contours of Recognition's Demand," *Philosophy & Rhetoric* 48, no. 4 (2015): 516-35.

that meaning. In *Smith*, the problem of recognition was again displaced onto the plaintiff who, by presenting himself as the man Jimmie Smith, worked to preserve the constancy of sex before the law by aligning his, his employer's, and the court's perceptions of his sex. The *Schroer* court, faced with the prospect of redefining what constitutes individual sex, an act which would betray law's previous inability to account for or understand sex, instead shifted our focus to sex as classification system. Doing so enabled the court to argue that it was giving sex its "plain meaning." In this construction, confusion over sex is not attributable to law's limited frame or its inability, as originally conceived, to account for transsexuality. Rather, the problem is with how sex is socially structured. Lack of consensus over the plaintiff's sex is not the result of the plaintiff's faulty understanding of her own sex nor is this the result of a defect in the law. It is the result of the inherently unstable social category of sex. The court's trick, then, is to displace law's interest and role in structuring and maintaining that classification system.

Reconfiguring the location of sex before the law, the *Schroer* opinion suggests that law's "plain meaning" of sex had never been about assigning it as identity marker but, instead, had always indicated the *social practice* of assigning sexed identities. Thus, sex is located as a rhetorical construction and law is positioned not as a mechanism by which the fixity of sex is maintained but, rather, a lens through which to examine the effects of this construction.

In some ways, the shift in stasis in this line of cases mirrors a similar shift in feminist theory. While ending discrimination and gender subordination have always been goals of feminist work, feminist theories from the 1980s and 1990s often focused on unsettling the determinacy of sex as identity. In some ways, trans activists' and theorists' insistence on the importance of sexed identity compelled feminists to grapple with the place of identity within feminist theory and activism. The evolution of Judith Butler's work is one example. Whereas

subversion may have been the clarion call of *Gender Trouble,*[177] fostering conditions for livability is the overarching theme of Butler's later *Undoing Gender.*[178] Butler acknowledges the importance of gendered identities and of facilitating the ability of people to live them but assumes that the ways one becomes gendered or what it means to be gendered will not and should not remain constant. One of the outstanding questions regarding sex discrimination law, with regard to all plaintiffs, is what role the law plays in prescribing and proscribing what it means to be gendered. Raewyn Connell's emphasis on the difficulty of changing "locations in the gender order" is another example of incorporating trans identities and struggles into the insights of feminist theory.[179]

In both Butler's *Undoing Gender* and Connell's essay, gender begins to appear more as an ongoing experience than either a preordained identity or a socially mandated trajectory. In each, there is a concern for the lived body experience of individuals and a suggestion that grand theories might discount or overwrite these experiences. There is also a tacit recognition that these bodies were sexed based on physical characteristics and that, at least for some people, altering those bodies is critical to sustaining life. In a sense, this is a recognition that bodies matter without an insistence that the physical body *is* sex. At the same time, these theories do insist that gender is a social structure that dictates how we experience our bodies and what we can do with them. This point is significant legally because, though Title VII courts originally located the question of sex as one of identity, the *Schroer* opinion abandons this stasis, looking at sex as ordering system instead. In other words, the focus moves from *sex* or *gender* as individual identity to the ways individuals experience gender as structure.

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[177] Butler, *Gender Trouble*.
[178] Butler, *Undoing Gender*.
[179] Connell, "Transsexual Women and Feminist Thought," 857.

To be clear, I am not arguing that by shifting the stasis thusly the *Schroer* court aims to destroy the category of sex altogether or that it sets out to articulate a social constructionist view of sex. Rather, I am arguing that the court reveals the rhetorical construction of sex on the way to reaching a stable judgment. In Marianne Constable's words, "[l]aw's unfamiliar ways of doing things … interrupt and challenge habitual or routine ways of hearing and judging."[180] Confronted with the particulars of Schroer's case and her decision not to adopt a *Smith*-like litigation strategy, the court was called to rhetorical invention, called to rethink the plain meaning of sex in the name of law and justice. That is, while many advocates for trans rights rest those arguments on the authenticity of trans peoples' sexed identities, this (as of late) habitual way of understanding the issue would have been a difficult position for the court to adopt. Specifically, if the court had made a definitive ruling as to what constituted individual sex such a ruling would have been highly appealable as there would be conflicting evidence, accounts, and prior rulings on this issue. But beyond that, this might not have addressed the confusion over sex (and law's understanding of it) that these types of cases had presented for years. That is, a ruling that established the bases for considering Diane Schroer a woman would have continued to suggest that these cases hinge on the need for unanimous agreement on as to individual sex where the court is the arbiter of and a party to that agreement. As the opinion makes clear, the problem here is precisely that there is *not* agreement as to Schroer's sex. Rather than trying to fix the truth of sexed identity, as earlier decisions had claimed but failed to do, the *Schroer* court considers the fragility of sexed identities.

In this ways, the opinion doesn't rest on Schroer's success in changing sex but, actually, on her failure, at least relative to her employer. To show discrimination, the opinion establishes that the Library discriminated against Schroer either because it did not find her change in sex to

[180] Constable, *Our Word is Our Bond*, 135.

be successful (the theory that the employer's actions were "infected with stereotypes" regardless of assumed underlying sex) or because it did not believe such change possible (the discrimination against "converts" theory). The finding of discrimination, then, underscores the *Library's* belief that Schroer's attempts to change sex were either impossible or unsuccessful.

Interestingly, through the legal act of finding sex discrimination, the court rejects the Library's belief, implying that changing sex *is* possible and *can be* successful. Rather than faulting Schroer for failing to convince all parties of the stability of her sex, the court suggests that it is sex discrimination, by definition, not to treat her sex as stable, as she would want it. In tacitly supporting and upholding Schroer's ability to transition, the court betrays that while sex must be "irrelevant" to employment decisions, sex is deeply relevant to individuals. For its part, the court seems to want to aid in this transition, though it does not seem to consider itself capable of fully guaranteeing the transition's success. If sex is a classification system, a set of expectations, the court does not and cannot dismantle the systems and structures that make sex a problem to begin with; it can only gesture towards that problem and recruit employers (and others) in helping ease transition for those who seek it.

By highlighting the cooperative nature of transition, the *Schroer* court's refixing of the stasis point may help us to understand anti-discrimination law and its relationship to combatting systemic sex discrimination a bit differently. Anti-discrimination law is often seen as primarily protecting identities rather than combatting systemic prejudices and biases. For example, Erin Buzuvis writes that *Macy* (following the reasoning of *Schroer*) prohibits "discrimination on the basis of gender identity and gender status" and argues that "such discrimination is directed at the gender that individual performs relative to that "individual's "biological," or assigned, "sex.""[181]

[181] Erin Buzuvis, ""On the Basis of Sex": Using Title IX to Protect Transgender Students from Discrimination in Education," *Wisconsin Journal of Law, Gender & Society* 28(2013): 233.

In Buzuvis's construction, discrimination is *directed* at an *individual's* gender rather than being born of larger notions and prejudices about gender (or sex) and how it operates. Similarly, Anna Kirkland writes, "We ought to always focus our anti-discrimination laws on the hatred and bigotry of the people who would discriminate if the law did not force them to refrain. If the real trouble is trans hatred, this new jurisprudence may fail to recognize that."[182] Though Kirkland is clear that "hatred and bigotry" originate in those who would discriminate (rather than stemming inherently from the identities of certain classes), she asserts that anti-discrimination law needs to name and categorize the people against whom discrimination is directed. It is not surprising that she takes transgender discrimination and sex discrimination to be discrete types of discrimination, wondering what "transgender discrimination as sex discrimination may do to transform both transgender legal identities and sex discrimination doctrine."[183] The inference is that these types of discrimination are melded or thrown together through creative litigation strategies but that they are, in fact, separate and distinct things. Of course, such a move disarticulates discrimination against transgender people from discrimination on the basis of sex otherwise. As Katherine Franke argues, it suggests that discrimination inheres in individual traits rather than structural forces and inequities.[184]

In some sense, the desire to distinguish types of discrimination stems from a belief in the power of visibility. Both Buzuvis's and Kirkland's comments evince a desire to name both transgender identities and transgender discrimination as distinct, knowable things. Critiquing identity-based trans politics, Dean Spade argues "against a focus on what the law says about trans people and for a focus on intervening in the law and policy venues that most directly

[182] Kirkland, "What's at Stake," 108.
[183] Kirkland, "What's at Stake," 87.
[184] Katherine Franke. Comments presented in "Gender Theory and Lesbian, Gay, Bisexual and Transgender Empowerment." In "Symposium: Queer Law 1999: Current Issues in Lesbian, Gay, Bisexual and Transgendered Law." *Fordham Urban Law Journal* 27.2 (1999): 377-81.

impact the survival of trans people as part of a larger politics whose demands are not limited to formal legal equality."[185] Citing critical race theorists, Spade argues that anti-discrimination law "primarily conceptualizes the harm … through the perpetrator/victim dyad"[186] which elides structural and systemic issues.[187] The shifted stasis in the *Schroer* opinion suggests that anti-discrimination law might not always rely on this perpetrator/victim dyad and, in refusing to locate the discrimination in individual identities, draw our attention towards easing the impact of larger social forces perpetuating discrimination.

Considered in this light, the *Schroer* opinion demonstrates how concerns about whether stressing the importance of sexed identities impedes efforts to destroy sex as structure draw lines too starkly. In other words, the tension between trans activist and feminist definitions and diagnoses of sex might be less fraught than some intuit. The shifted stasis in *Schroer* shows us how we can honor the importance of sexed identities by, perhaps paradoxically, defending and defining their authenticity less. In other words, by demonstrating the rhetorical construction of sex and refusing to rule on what constitutes individual sex, the *Schroer* opinion highlights how sexed identities are complicated and irreducible to a legal test. At the same time, the opinion upholds and honors Schroer's right and ability (with help) to live a stably sexed identity. In a sense, we might read the opinion as standing for the proposition that discrimination occurs not because of whom one is but in spite of whom one is. Locating difficulties in "changing sex" (or even more broadly in living sex) not as individual problems but ones that are wrought by the entire sex classification system, the *Schroer* opinion suggests that the resolution to these problems is not a purely legal one.

[185] Spade, *Normal Life*, 12.
[186] Spade, *Normal Life*, 42.
[187] Spade, *Normal Life*, 44.

Stasis theory, then, shows how law is able to maintain its claims to universality and constancy through shifting the argument field and displacing what might appear to be "new" developments or reconfigurations of law's terms or frames to locations outside of law (here, the social system of sex). This is convenient for law, of course, for it can locate the problem of sex in the social sphere rather than within law and, in this sense, abdicate responsibility for maintaining sex. I'll now turn to consider what happens when law is called to adjudicate gender identity through new anti-discrimination legislation.

CHAPTER 3 - AUTHENTICATING IDENTITY: TRACKING *TOPOI* IN CALIFORNIA ANTI-DISCRIMINATION LAW

As I've discussed, historically, transgender people have had limited success in pursuing anti-discrimination claims. While lawyers, courts, and administrative agencies have had some success in arguing that anti-sex discrimination laws already cover discrimination against transgender people, some states and municipalities have seen fit to pass laws specifically aimed at outlawing discrimination against transgender people. These laws generally rely on the language of "gender identity" and "gender expression." Many are also incorporated into preexisting anti-discrimination statutes. California is one such state. Regarded as the fourth state to have outlawed discrimination against transgender people, California first amended its anti-discrimination laws in 2003 and then again in 2011 in an effort to offer better protection to transgender people.

This chapter attends to the legislative debates over these amendments using the rhetorical concept of *topoi* to understand how the arguments in support of and opposed to this legislation are positioned with regard to anti-sex discrimination law.

In the last chapter, I explained how stasis theory is particularly appropriate for analyzing the (inherently rhetorical) act of legal judging because it helps draw attention to how courts frame the questions they are answering. Given that courts must distinguish the instant case from those that have preceded it, the framing of the question is often very important. By carefully positioning the issue the case is answering, courts can offer new developments while honoring the common law system and notions of the constancy and universality of law.

Legislating, on the other hand, does not rely on precedent. Legislators are dealing with a more open field where they are vying for attention. When proposing legislation, they have to

make a case for why this, among the legislature's many concerns, is worthy of attention and time and, more broadly, how it serves the public interest. While the rhetorical act of judging is presumably constrained by precedent and the values of consistency and predictability, the rhetorical act of legislating is presumably constrained by the state's limited resources and the mission to promote the public good. That is, regardless of whether a piece of legislation will really serve the general public good, legislators are bound by the need to present it as doing so.

For this reason, the rhetorical theory of *topoi* is particularly helpful in analyzing the act of legislating. As I will explain below, topoi, or "common places," are sites of common interest and knowledge. As such, tracking the topoi recruited in any given legislative debate is useful in understanding how legislators seek to build their arguments on common knowledge or concerns and, in so doing, work to reshape that common ground.

After analyzing the topoi that ground the legislative debates, I demonstrate the effects of this grounding by analyzing the first case brought by a transgender plaintiff (Nick Lozano) under California's amended statutes. Ultimately, I claim that by arguing that the amendments were a necessary clarification of sex discrimination law, fusing the topoi of expansion and clarification, supporters created a landscape where sex discrimination law became more about establishing the identity of the discriminated, or the authenticity paradigm, than about understanding and ending discrimination in employment and housing decisions. The result is that courts and juries become the arbiters of sexed identities, affirming the adjudication of identity as valuable social and legal practice and risking that some identities would be found wanting.

Generating New Connections (Intended and Otherwise) through *Topoi*

Topoi are generally understood as "commonplaces" to which a rhetor may turn to invent argument. Drawing upon the notion of place, Carolyn Miller conceives of topoi as a "conceptual

space without fully specified or specifiable contents."[188] They are sites of grounding and discovery. The utility of topoi, then, lies in their ability to help frame ideas and shape connections differently than either are constituted in the present. It is, in a sense, the space—the limited constriction—that makes topoi useful. They function as "an aid to pattern recognition, specifically as a region that permits or invites the connection between the abstract and the concrete."[189] As such, topoi are "intellectual tools that yield new viewpoints"[190] while simultaneously serving as a "means of decorum" in that they reify these spaces and patterns. Other recent scholarship on topoi suggests that they are a way of culling social energy and creating social linkages by calling on and building upon the familiar.[191] Again, we can see the emphasis on creating new connections by highlighting and buttressing (albeit inevitably altering) the familiar.

Michael Leff suggests that topoi can be used clumsily, inartfully. "Rhetorical invention demands painstaking attention to the particular case and the unique circumstances associated with it," he argues.[192] As such, topoi are only useful insofar as they help "develop a capacity for arguing in precisely those situations where theory offers the least guidance."[193] Quoting Quintilian, he argues that without attention to the particular, those who rely upon topoi will "be the possessors of what I can only call a dumb science."[194] What I want to highlight from Leff's discussion is the notion that reliance upon topoi (whether conceived of as a formal set of

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[188] Carolyn Miller, "The Aristotelean *Topos*: Hunting for Novelty," in *Rereading Aristotle's Rhetoric*, ed. Alan G. Gross and Arthur E. Walzer(Carbondale, IL: Southern Illinois University Press, 2000), 141.
[189] Miller, "The Aristotelean *Topos*," 142.
[190] Miller, "The Aristotelean *Topos*," 142.
[191] Ralph Cintron, "Democracy and Its Limitations," in *The Public Work of Rhetoric: Citizen-Scholar and Civic Engagement*, eds. John M. Ackerman Ackerman and David J. Coogan (Columbia, SC: University of South Carolina Press, 2010), 98-116. Christa J. Olson, "Performing Embodiable Topoi: Strategic Indigeneity and the Incorporation of Ecuadorian National Identity," *Quarterly Journal of Speech* 96, no. 3 (2010): 300-23.
[192] Michael Leff, "Up from Theory: Or I Fought the Topoi and the Topoi Won," *Rhetoric Society Quarterly* 36, no. 2 (2006): 207.
[193] Leff, "Up from Theory," 208.
[194] Leff, "Up from Theory," 208.

commonplaces or even as a more broad notion of social commonplaces or "storehouses of energy"[195]) without careful consideration of the rhetorical ecology one confronts can lead to arguments which are limited in their effectiveness. Reading these commentaries on topoi together, I submit that arguing from topoi or commonplaces does indeed forge new connections; however, in relying on commonplaces without carefully considering how they are already implicated and embedded in existing rhetorical constructions, we can forge connections that are unintended and that have implications far beyond the contemplated argument field. In other words, because commonplaces are so common, arguments that are attached to and born of them can have effects far beyond the instant case or argument. Certainly, this warning applies to any rhetorical act (that is, connections drawn have reverberating and unforeseen consequences), but perhaps more so to arguments firmly rooted in topoi because they are so common or easily found and circulated. In the case of legislating, recruitment of topics must be considered not only with regard to what arguments might win the day but also how topics recruited will alter the common ground and that impact of that legislation moving forward.

I will now turn to consider the topoi that circulate within the California's efforts to amend its anti-discrimination statutes. I begin by discussing a related bill to amend the California penal code to better protect transgender people and then move on discuss the legislative history of the amendments to anti-discrimination law. I analyze the California legislation for several reasons. First, the California law was one of the first designed specifically to address discrimination against transgender people. As such, it is an example of how state legislatures used rhetorical constructions of sex and discrimination to frame the issue. Second, California, unlike some other early adopters, maintains relatively robust legislative histories, providing an ample archive from which to analyze these laws. Third, the law (eventually passed in 2003) took three legislative

[195] Cintron, "Democracy and Its Limitations," 101.

sessions to pass. Thus, this history provides us an ability to track the legislature's arguments over time and to chart their evolution.

Clarification or Expansion? A Legislative History

In 1998, California Governor Pete Wilson signed into law a bill that amended the California penal code to consistently include gender as a protected category in hate crime statutes. Most relevant to this discussion, the bill added this definition of gender: "'gender' means the victim's actual sex or the defendant's perception of the victim's sex, and includes the defendant's perception of the victim's identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with the victim's sex at birth."[196]

Prior to AB 1999's passage, California law had already specified that hate crime penalties applied to defendants who acted "because of" the victim's sex (or other specified characteristic) or "because the defendant perceived that that victim" was a particular sex (or other specified characteristic). In this sense, hate crime statutes already understood the crime to inhere in the perpetrator's perceptions of the victim's characteristics and not only or exclusively in the victim's actual characteristics or traits. That is, according to the statutes, a finding of a hate crime is not contingent upon establishing the facticity of the victim's having actually exhibited a particular characteristic or actually belonging to a particular identity category. Rather, it is contingent upon establishing that the perpetrator perceived the victim as exhibiting that characteristic and acted based upon this perception. With regard to sex, then, prosecutors would need only to have established what sex the *defendant* took the victim to be and not whether that perception was indeed accurate.

[196] AB 1999, 1997-1998 Legislative Session (Cal. 1999).

Prior to the passage of AB 1999, some prosecutors had been using preexisting hate crime statutes to prosecute violence against transgender people. Assembly Member Sheila Kuehl, the author of AB 1999, argued that "[w]hile hate crimes based upon actual or perceived gender and actual or perceived sexual orientation are included in California's hate crime statutes, and hate crimes against transgendered persons can legally be prosecuted under those statutes, only a few District Attorney's offices, such as those in Los Angeles and San Francisco, are actually pursuing those charges."[197] Accordingly, Kuehl presented AB 1999 as offering "further clarification" for prosecutors.[198]

The essential argument was that hate crime statutes already covered crimes against transgender people; the bill was needed to help prosecutors understand this and act accordingly. Adding credence to the argument that the bill was a necessary clarification was that some, but not the majority, of prosecutors were successfully and legally using preexisting hate crime statutes to prosecute hate crimes against transgender people. This provided the support for understanding the bill as a clarification (it was being done) and also the warrant for the need for clarification (it wasn't being done enough).

The two organizations registered in opposition of the bill argued that it wasn't merely a clarification but a vast expansion, albeit with different notions about the direction of that expansion. While the Committee on Moral Concerns argued that the bill expanded and confused the definition of gender, defining it "in a way that is inconsistent with logic, science, or the English language,"[199] the California Attorneys for Criminal Justice argued that adding gender to all hate crime statutes ran the risk of enfolding all domestic violence and sexual assault cases under the umbrella of hate crimes, adding harsher sentences to already (arguably) enhanced

[197] Assembly Committee on Public Safety on Assembly Bill 1999 (1997-1998 Regular Session) April 14, 1998, 3.
[198] Assembly Committee on Public Safety, 3.
[199] Assembly Committee on Public Safety, 5.

sentence crimes.[200] Despite this opposition, the bill eventually passed the Assembly 52-15 and the Senate 28-5.

Amending the Fair Employment and Housing Act's definition of sex and gender to parallel the one newly articulated in the penal code was not quite as easy. The bill died in both the 1999-2000 and 2000-2001 legislative sessions before being passed as AB 196 in 2003. In what follows, I trace the arguments in support of and opposition to the bill through these three legislative sessions. Particularly, I track how the topoi of clarification and expansion are taken up and how arguments about sex stereotyping and transgender discrimination are variously featured, fused, and separated.

The California Fair Employment and Housing Act (FEHA) makes it illegal to discriminate on the basis of a number of specified characteristics, including sex, in employment practices and housing accommodations. Prior to the successful passage of AB 196 in 2003, "sex" under the FEHA had been defined as "include[ing], but not limited to, pregnancy, childbirth, or medical conditions, related to pregnancy or childbirth."[201] AB 196 added that "'Sex' also includes, but is not limited to, a person's gender, as defined in [the penal code as amended through AB 1999]."[202] In other words, AB 196 used a cross reference to the penal code's new definition of gender to enfold that definition into FEHA.

The bill was first proposed by Assembly Member Fred Keeley in 2000 as AB 2142. In this first go-round, he[203] argued that the bill "clarifie[d] that gender stereotyping is a prohibited form of sex discrimination" and that "[n]o one should be subjected to discriminatory treatment

[200] Assembly Committee on Public Safety, 5.
[201] Cal. Gov't Code § 12926(p) (2000).
[202] AB 196, 2003-2004 Legislative Session (Cal. 2003).
[203] Though bills must be sponsored by a legislator to be introduced, invested organizations often either completely or mostly author the legislation. Given this, it should not necessarily be surprising that the text of the legislation remains essentially unchanged in each of the three legislative sessions in which it was proposed, despite being sponsored by a different assembly member each time.

because of gender-related characteristics that have no relevance to his or her qualifications as an employee or tenant."[204] Relying primarily on the topos of gender stereotyping and the notion that gender should be irrelevant to employment or housing decisions, Keeley advanced an argument similar to the Supreme Court's reasoning in *Price Waterhouse.*

Following this lead, those in support of AB 2142 relied upon the topos of clarification and the notion that the proposed amendments were merely codifying existing practice. Supporters argued that as courts had begun to address the harms contemplated by AB 2142 "on a case-by-case basis in the past ten years, legislators [had] an equal responsibility to keep pace with changing social realities and to ensure that [California's] statutes provide[d] a sufficiently clear and adequate prohibition against gender-based discrimination."[205] Essentially, they argued that California law already prohibited discrimination based on gender stereotypes; these amendments would merely clarify that.

Because these arguments, unlike those in support of the amendments to the penal code, did not reference the need to protect transgender people, the clarification argument was a weak one. Supporters' primary argument was that "[n]o one should be subjected to discriminatory treatment because of gender-related characteristics that have no relevance to his or her qualifications as an employee or tenant."[206] Keeley defined "gender-based discrimination" as "rooted in discomfort or disapproval of the way another person does or does not exhibit the traits stereotypically associated with his or her sex."[207] To illustrate, he offered, "the bill would protect a female employee who is told that she must dress in a more 'feminine' manner or a man who is

[204] Assembly Committee on Labor and Employment on AB 2142 (1999-2000 Regular Legislative Session) April 12, 2000, 2.
[205] Assembly Committee on Labor and Employment (April 12, 2000), 2.
[206] Assembly Committee on Labor and Employment (April 12, 2000), 2.
[207] Assembly Committee on Labor and Employment (April 12, 2000), 2.

subjected to gender-based harassment on the job because he has a soft voice or a slight build."[208] While later arguments would use the language of "sex at birth," in this early proposal of the legislation, supporters relied on the familiar notion of sex stereotyping, providing familiar examples of men and women who deviate from purported gender stereotypes:

> Sadly, in fact, almost every family includes some family members who have been hurt or suffered discrimination because of gender stereotypes—whether it is a brother or son who has been ridiculed as a "sissy," a sister or mother who has been discouraged or perhaps even prevented from pursuing a traditionally "masculine" career, or a daughter or granddaughter who has been denied housing or harassed on the job because of stereotypical beliefs about women.[209]

These primary arguments never directly or indirectly referenced transgender people and, instead, presented cases that would fall under the then current FEHA and federal Title VII precedent (following *Price Waterhouse* and *Oncale*). The bill was presented not as adding a new class of protected persons (transgender people) but as defining sex in a way that was consistent with developing case law. Relying on the notion of sex stereotyping as discrimination, supporters presented familiar cases and arguments, arguing that the bill would clarify that sex stereotyping or gender-based discrimination was prohibited under California law.

In some ways, by failing to mention the ways in which the new definition would protect transgender people, supporters provided those in opposition to the bill with an argument based in the bill's *lack* of clarity. That is, by refusing to acknowledge that the bill would offer better protection to a particular class of persons (transgender people), supporters enabled the opposition to name and describe who else (besides "sissies"[210] and women pursing "masculine" careers[211]) the bill might benefit.

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[208] Assembly Committee on Labor and Employment (April 12, 2000), 2-3.
[209] Senate Judiciary Committee on AB 2142 (1999-2000 Regular Legislative Session) June 20, 2000, 3.
[210] Senate Judiciary Committee (June 20, 2000), 3.
[211] Senate Judiciary Committee (June 20, 2000), 3.

For example, the Committee on Moral Concerns rejected the characterization of the bill as clarifying the prohibition against illegal sex stereotyping. Rather, they argued, the bill "would give cross-dressers, transsexuals, opposite sex impersonators, and comedians special protection."[212] The Committee raised concerns about how this clarification would actually protect a much larger group of individuals than current law. Grouping "transsexuals" with "cross-dressers," "impersonators," and "comedians," it also suggested that each of these classes of persons were fakes, pursuing undeserved "special protections" (presumably the "special" privilege referenced here is maintaining a job or house free from discrimination regardless of gendered presentation).

Supporters addressed the fear of fakery and inconsistency by arguing that "employees may still be required to wear appropriate attire" but that "this bill [would] protect persons who are in the process of changing their sexual identity, a.k.a. gender, along with men and women facing traditional sex discrimination and sexual harassment."[213] By separating those "in the process of changing their sexual identity" from those "facing traditional sex discrimination," the supporters betrayed their belief that the legislation did indeed cover a new class of people (transgender people) and that discrimination against transgender people may be related to but is not synonymous with "traditional" sex discrimination. They also suggested that despite the declaration that gender-related characteristics were "irrelevant" to employment or housing, gender inconsistency or inscrutability was indeed relevant and was *not* condoned by the legislation. That is, the bill was not understood to provide protection for gender confusion or trickery, only for those who could be consistently gendered. Accepting the argument that "special protections" should not be extended to cross-dressers and impersonators, supporters

[212] Senate Judiciary Committee (June 20, 2000), 6.
[213] Senate Judiciary Committee (June 20, 2000), 7.

argued that the bill only contemplated those who were authentically and completely changing "sexual identity." Of course, there was no specific language within the bill that required such a limitation. That is, the plain language of the bill did nothing to limit its protections to "authentic" transgender people only.

Ultimately, though the bill was approved by the Assembly, it failed to pass the Senate Judiciary Committee.[214] The next legislative session, Assembly Member Jackie Goldberg proposed the legislation as AB 1649. It again passed the Assembly but ultimately died in the Senate inactive file. Though the language of the bill was identical to AB 2142, the arguments in support of it shifted the focus to discrimination against transgender people and relied upon the topos of expansion rather than clarification.

Eschewing arguments about clarification, Goldberg and supporters argued for the bill as a necessary expansion, offering that the bill would "extend the coverage of existing anti-discrimination" laws. They forwarded the rationale that "transgender and transsexual individuals" are "some of the most frequent victims" of "gender stereotype" discrimination and that the bill would offer them much needed protection.[215] In shifting the focus to the discrimination experienced by transgender people, supporters demonstrated the necessity for the legislation. However, this reliance on the topos of expansion also provided fodder for opponents' arguments.

Those in opposition accepted that the bill was an expansion of existing law and an unwieldy one at that. "The California Employment Law Council called the bill's language 'unintelligible' and wrote that 'No employer in the State will have the foggiest idea what conduct

[214] California maintains a bicameral legislature. Bills must pass both the assembly and the Senate before being sent to the governor to sign. The governor's veto may be overridden by a two-thirds vote of the assembly and the Senate.
[215] Senate Floor Analysis on AB 1649 (2001-2002 Regular Legislative Session) July 11, 2001, 3.

is being prohibited by this addition.'"[216] Shifting the harm from employer's frustrated expectations to employees' unfettered liberties, others "argue[d] that the bill's scope [was] so large that it would give employees unrestricted freedom to dress as they please."[217] The Traditional Values Coalition argued that gender as defined within the bill was an "open-ended and undefined term [that] opens the floodgates for individuals to dress as they please or as they perceive their gender to be."[218] The arguments for the bill as necessary expansion thus enabled those in opposition to raise concerns over how expansive that expansion might be. These arguments framed the harm not only as a gender free-for-all but also as removing employers' abilities to uphold professionalism and propriety in the workplace.

To counter these arguments about over-expansiveness, supporters relied upon the authenticity and stability of the transgender person. The Senate Judiciary report recounted supporters' arguments this way: "Supporters argue that individuals who claim a different gender from day-to-day, or who do so simply in jest or to be disruptive, do not meet the criteria for transsexuality… It would be left to the trier of fact[219] to determine if an individual meets this standard or other standard that is consistent with the author's intent."[220] In other words, though nothing in the language of the bill suggested that it was designed only to protect transgender people, there was an assumption that only authentic transgender people would be covered. The argument implied that those who consistently dress in a purportedly gender nonconforming fashion for the purpose of disruption would not be protected. In other words, protection for

[216] Senate Judiciary Committee on AB 1649(2001-2002 Regular Legislative Session) July 3, 2001, 3-4.
[217] Senate Judiciary Committee (July 3, 2001), 3.
[218] Senate Judiciary Committee (July 3, 2001), 4.
[219] In legal terms, "the trier of fact" refers to the party responsible for determining issues of fact (in this case, whether a plaintiff meets the definition of transgender would be the issue of fact). In addition to the trier of fact, there is the "trier of law" who is responsible for determining issues of law (for example, whether FEHA requires that transgender employees be permitted to use restrooms in accordance with their gender identities would be an issue of law). In jury trials, the jury is the trier of fact while the judge is the trier of law. In bench trials (those with no jury), the judge is both the trier of fact and the trier of law.
[220] Senate Judiciary Committee (July 3, 2001), 4.

gender expression seems to be premised upon motive as well as constancy. Further evincing this notion was supporters' argument that "nothing in the bill prohibits reasonable dress codes that permit an individual to dress consistent with his or her gender"[221] and the existence of the dress code provision itself. In this argument, the bill is understood to expand sex discrimination protection to those who express their gender in consistent (albeit purportedly nontraditional) ways. Fakes, comics, rabble-rousers, and undecideds are outside the scope. Interestingly, because the bill cross-referenced the language from the penal code, it actually only referenced the "*employer's* perception of the employee's identity, appearance, or behavior," which suggests that even an employer's perception that an employee's gender identity or appearance was inconsistent, unintelligible, or confused would be contemplated and covered under the plain language of the bill.

In some ways, the opposition's arguments about over-expansiveness set the argument field for the supporters' defense. Stemming the anarchy of a gender free-for-all, the supporters hung their hats on the stability and verifiability of transgender identities and individual gender presentation. Attempting to convince the opposition that the legislation would neither destroy gender nor the propriety of workplaces, supporters adopted the position that the legislation would only protect "authentic" gender presentation, as determined by the trier of fact.[222] In lay language, this means that the jury (or the judge in a bench trial) would be responsible for determining whether a plaintiff met the standard of being transgender. Thus, the authenticity of the transgender individual was posited as a stop-gap against over-expansiveness.

This strategy carried over into the next and last time the legislation was proposed. As AB 196 in 2003, the bill passed and was signed into law by Governor Gray Davis on August 2, 2003.

[221] Senate Judiciary Committee (July 3, 2001), 4.
[222] See *supra* note 30 for a discussion of this legal term.

This time around supporters were divided in their approaches. While some based their arguments in the need to stem discrimination against transgender people, often invoking the language of gender identity, others rooted their arguments in the stereotypical gender-based discrimination language that had appeared in the earlier debates. Relatedly, supporters fused earlier reliance on the topoi of both clarification and expansion.

Bill sponsor Assembly Member Mark Leno referred to the problem the bill sought to ameliorate as "gender discrimination" and alleged that "[g]ender discrimination is a well-documented problem in California."[223] He argued that "courts have already prosecuted gender discrimination as sex discrimination."[224] The proposed law, then, was both a clarification and an expansion. California had anti-sex discrimination law, now it would have clear gender discrimination law as well. From the language of Leno's letter, it is unclear how gender discrimination is distinct from sex discrimination. For some supporters, the proposed law was specifically designed to protect transgender people; for others, it was a clarification of sex discrimination law, particularly with regard to sex stereotyping.

To exemplify how supporters variously relied on the topoi of transgender discrimination and sex stereotyping, I'll turn to letters from supporters urging Governor Gray Davis to sign the bill into law after it had passed both the Assembly and the Senate.[225] These letters fall into three categories: those based in the topoi of transgender discrimination and expansion, those based in the topoi of sex stereotyping and clarification, and those (the minority) which fused these two strands together. I argue that, because of concerns about over-expansiveness, it was this fusion

[223] Mark Leno, Assembly Member, California State Assembly to Gov. Gray Davis, July 30, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[224] Leno to Gov. Gray Davis, July 30, 2003,
[225] These letters can all be referenced in the Governor's Bill File, AB 196 196 (2003-2004 Legislative Session), available through the California State Archives

that ultimately provided the basis for passing the legislation and that set the stage for later litigation.

Seven letters expressly characterized the bill as designed to stem discrimination against transgender people. These letters focused on the need to expand protection, calling "gender-based discrimination … a serious and well-documented problem,"[226] arguing that "transgendered people need more than protections in death, we need legislation to help us survive,"[227] citing the number of gender-identity-based complaints received,[228] submitting that the bill would "wide[n] the circle of those who are treated with respect,"[229] and characterizing the bill as making "progress toward ending discrimination … for transgender people."[230] These letters mostly called upon the topos of expansion by demonstrating the clear need for a law that better addressed discrimination against transgender people and adopting a position similar to that advanced in the 2001 proposal of the legislation (as AB 1649).

Nine of the letters relied on gender stereotype language, avoiding any direct reference to transgender people. Many of those letters drew upon the topos of clarification, arguing that AB 196 would codify existing legal precedent. As detailed in bill reports, that precedent was not only sex stereotyping case law but also the practices of the California Department of Fair Employment and Housing, who had already been accepting complaints "alleging discrimination

[226] Roxy Carmichael-Hart, President, TransGender San Francisco to Gov. Gray Davis, August 1, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[227] Gwendolyn Ann Smith, Director, Gender.org to Gov. Gray Davis, July 28, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[228] Virginia M. Harmon, Executive Director, Human Rights Commission, City and County of San Francisco to Gov. Gray Davis, July 31, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[229] Rev. Kathryn Schreiber, United Church of Hayward to Gov. Gray Davis, August 8, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[230] Gloria L. Young, Clerk, City and County of San Francisco Board of Supervisors to Gov. Gray Davis, August 4, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.

based on gender nonconformity and/or gender-identity or expression."[231] By using the language of gender stereotyping and referencing precedent and the need to codify existing practice, these letters seemed to minimize any distinction between discrimination against transgender people and sex discrimination otherwise understood. Rather than relying upon the need for expansion so as to protect vulnerable people, they relied upon the need for clarification so as to protect law's consistency and predictability. Their argument was similar to that advanced in the 2000 proposal of the legislation (as AB 2142). However, this time, precedent for protecting transgender people under FEHA was arguably much stronger, which might have further undermined the clarification argument.

It was precisely the existence of legal and administrative precedent upon which Assembly Republican Leader Dave Cox pinned his opposition:

> Labor attorneys who have reviewed this bill have concluded that the only issue that would be covered by this new definition that is not covered by the current prohibition against sex discrimination is transvestitism. Every situation that is cited by supporters as justifying this law is already covered by the existing statutory prohibition against discrimination based on "sex."[232]

Presumably, Cox was arguing that (then) current law did protect both victims of sex stereotyping and transgender people (both in DFEH's practices and courts' rulings). Therefore, a clarification was unnecessary and would actually result in expansion that protected transvestites. Similarly, the California Employment Law Letter, a periodical for employment law lawyers, speculated:

> The problem with this new law isn't just that it expands the basis for litigation but also that it stands to create confusion. The law doesn't simply say "you may not discriminate against transsexuals or transgendered individuals." Rather, it bars treating someone in a different fashion because he or she looks or acts differently from what an employee considers to be "traditionally associated with the employee's sex at birth." That stands to

[231] Department of Fair Employment and Housing, Enrolled Bill Report on AB 196, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives, 2.
[232] Dave Cox, Assembly Republican Leader, California State Assembly to Gov. Gray Davis, July 30, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.

> allow a wide range of claims that may not have been originally envisioned when the statute was drafted.[233]

Like earlier critics, the California Employment Law Letter worried about over-expansiveness. Though it didn't specifically name transvestites, comedians, and other gender benders, the inference was that by not specifically outlawing discrimination against transgender people, this law would protect "fakes" as well as real transgender people. The letter suggests that it would have been preferable for the legislature to explicitly outlaw discrimination against transgender people rather than expanding the sex discrimination statute in this way. Again, this suggests that courts and employers have the ability to distinguish real transgender people from fakes.

The minority of the letters rebutted this argument by fusing their clarification and expansion arguments together, demonstrating that current law did not protect transgender people well enough (though it should) and refusing a sharp distinction between transgender discrimination and other forms of sex discrimination. These letters positioned the legislation (and all related arguments in support of it) firmly between the topoi of expansion and clarification, arguing that the bill was a necessary and limited expansion of existing anti-discrimination law. In so doing, they also helped to more firmly establish the connection between sex stereotyping and transgender discrimination.

The letters that most clearly demonstrate this tactic are those from the California National Organization of Women (NOW) and Equality California. NOW cited the rates of transgender unemployment and homelessness and argued that AB 196 "further delineate[d] what constitutes illegal discrimination" by making it "explicit that FEHA prohibits discrimination based on

[233] "Transsexuals Join the Ranks of the Protected in California," 13 No 12 Cal. Employment Law Letter 1, August 18, 2003.

gender stereotyping."[234] In NOW's construction, discrimination against transgender persons was properly considered gender stereotyping and AB 196 clearly outlined that. To explicitly prohibit discrimination against transgender people would have separated and distinguished these as two different types of discrimination.

Equality California, a sponsor of the legislation since its initial introduction in 1999, similarly demonstrated the connection between the two strands of argument, highlighting in particular that the law stood for the proposition that sex and gender should be irrelevant to employment and housing practices:

> Discrimination is wrong and hurts all Californians, especially when it is based on characteristics like gender identity or expression that have nothing to do with one's qualifications as an employee or tenant. Recent polling shows that 61% of Americans believe that laws are needed to protect transgender people from discrimination. This bill will provide protection to those who are [discriminated against] because they exhibit traits not stereotypically associated with their sex at birth. This will protect men who are seen as "too feminine" and women perceived as "too masculine." Gender-based discrimination is already prohibited in California under our hate crime and education non-discrimination statutes. AB 196 will send a clear message to the courts, employers, landlords, and the public that discrimination on the basis of gender stereotypes is prohibited in California.[235]

By highlighting Americans' perception that transgender people required legal protection while also referencing "masculine" women and "feminine" men, the letter linked these types of discrimination by suggesting that, in both cases, people were being discriminated against because of expectations stemming from "sex at birth." At the same time, it suggested that discrimination against transgender people, because of prevalence, was the primary evil the legislation was designed to address.

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[234] Inna Parizher, Legislative Assistant, California National Organization of Women to Gov. Gray Davis, July 29, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.
[235] Ilona M. Turner, Legislative Advocate, Equality California to Gov. Gray Davis, July 25, 2003, Governor's Bill File, AB 196 (2003-2004 Legislative Session), California State Archives.

Uniting these two strands of argument helped to bolster the characterization of the bill as a both a clarification and a necessary expansion. By arguing that the bill would help to clarify that gender stereotyping (like that described in *Price Waterhouse*) is prohibited under the FEHA, supporters demonstrated that the legislation was merely a continuation of current practice and values. However, by specifically highlighting the discrimination experienced by transgender persons, supporters demonstrated that current law was inadequate in forwarding those values (just as supporters had done earlier with the hate-crime revision). In a way, to advance this necessary clarification argument, the bill had to be characterized as neither exclusively about protecting transgender people (which would suggest a new and distinct class of protected persons rather than an already contemplated one) nor entirely about *Price Waterhouse*-type sex stereotyping (which would appear as already contemplated and covered by the law). That is, discrimination against transgender people had to be presented as a pressing problem that was either of the same kind or at least related to other gender-based discrimination. This characterization provided the rationale for understanding the law as both a clarification and a limited expansion. What resulted was a characterization of the legislation as protecting all Californians against gender-based discrimination and, importantly, specifying that discrimination against transgender people fell into this category.

In 2011, the California legislature once again amended this portion of FEHA (in addition to a number of other anti-discrimination statutes), this time by removing the cross reference to the penal code and, instead, providing the operative definition of gender within the body of FEHA itself. That definition reads: "'Gender' means sex, and includes a person's gender identity

and gender expression. 'Gender expression' means a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."[236]

As they had successfully done in 2003, supporters argued that the bill was a necessary clarification (fusing the topoi of expansion and clarification), and the bill was signed into law on October 9, 2011. Supporters characterized the necessary clarification as moving the definition of gender directly into the statute so as to better inform citizens of the law's protections: "While … anti-discrimination statutes protect non-enumerated classifications such as transgendered Californians, this fact is not always known by those the law was intended to protect, or by employers, housing authorities, and others vested with the responsibility of ensuring that current anti-discrimination laws are enforced."[237] Interestingly, transgendered Californians continue to be non-enumerated with the statute. Gender identity and gender expression are assumed to be clear referents to this class of persons and are also understood to limit protection to "authentic" transgendered persons, not the fakes or comics that continue to concern opponents.

By relying on the topos of necessary clarification (or a fusion of clarification and expansion), supporters of both sets of FEHA amendments responded to the opposition's concerns about over-expansiveness. Rather than rejecting the premises that a) over-expansiveness was a problem and b) that the statute *could* be over-expansive, supporters relied upon the ability to identify and authenticate transgender people as an argument against over-expansiveness. Thus, by the 2011 amendments, "gender identity" and "gender expression" had come to be understood as personal attributes and clear indexes for transgender status. Though the vestiges of the argument that transgender discrimination and sex stereotyping were the same thing remained, this fusion resulted in a conception of anti-sex discrimination law as being about

[236] AB 887, 2011-2012 Legislative Session (Cal. 2011).
[237] Assembly Committee on Appropriations on AB 887 (2011-2012 Legislative Session) May 3, 2011, 3.

who and what you are rather than being about the irrelevance of such characteristics to housing or employment decisions. While legislators claimed that the act would "make clear that discrimination based on failure to conform to narrow gender stereotypes is against the law"[238] and would "ensure that transgender and other gender non-conforming individuals are free from discrimination,"[239] the focus shifted away from the discriminatory impact of those stereotypes to the identities of the discriminated. That is, by straddling the topoi of clarification and expansion to answer concerns about over-expansiveness, supporters had, perhaps unwittingly, shifted the focus of anti-discrimination law away from how sex operates as discriminatory system and toward how sex is enacted as individual identity.

I'll now turn to the Lozano case, the first case brought by a transgender plaintiff under the new FEHA, to consider how the parties to the case understood sex discrimination and sexed identities with regard to the statute. Particularly, I will focus on both sides' arguments and several amicus briefs filed on behalf of the plaintiff to show how both sides identify identity as the issue to be litigated. I argue that, in part, this focus on identity is an outgrowth of the legislature's reliance on the topoi of necessary clarification and its reliance on the authenticity of transgender identities as a stop-gap against over-expansiveness. In other words, the topoi recruited in the legislative sessions frame the strategies pursued in litigation and how we understand anti-discrimination law generally.

Identifying Discrimination: the Lozano Case

Nick Lozano's employment discrimination case essentially hinged on the issue of transition and bathroom use. Lozano applied for and was offered a job as Operations Technician at American Pacific Corporation (AMPAC) in September 2011. After being offered the job and

[238] Assembly Committee on Appropriations (May 3, 2011), 3.
[239] Senate Judiciary Committee on AB 887 (2011-2012 Legislative Session) June 13, 2011, 6.

while providing requested background information, Lozano disclosed that he was a transgender man and planned to undergo sex reassignment surgery. AMPAC informed Lozano that he would have to use the women's locker room and restrooms until the sex reassignment surgery was complete. Lozano then declined the job offer and filed a complaint with the Department of Fair Employment and Housing (DFEH) (the state agency responsible for enforcing FEHA), which eventually filed suit against AMPAC on Lozano's behalf. AMPAC filed a demurrer, or a motion to dismiss the lawsuit, under the theory that "FEHA does not prohibit employee restroom and locker room use based on biological gender."[240] In other words, AMPAC asked the court to dismiss the case before it went to trial because, it argued, what it had done did not fall under FEHA's prohibition against sex discrimination. Effectively, AMPAC was asking the court to make a determination as to whether FEHA requires that employees be permitted to use restrooms that comport with their gender identities. This is significant because no California court had ruled on this issue before (this is what is also known as a case of first impression).

In March 2014, the superior court rejected AMPAC's argument and overruled the demurrer, allowing the suit to proceed. AMPAC eventually offered a settlement to Lozano. Partly as a result of the case, DFEH then issued specific guidance that "employers must allow transgender employees access to restroom, shower, locker room and other such facilities that correspond with their gender identity,"[241] clarifying what had been until then an ambiguity within the new FEHA.

In what follows, I look to the arguments of the DFEH attorneys, AMPAC, and the organizations who submitted supporting amicus briefs on behalf on DFEH. My purpose in so

[240] Defendant AMPAC's Memorandum of Points and Authorities in Support of Demurrer to Complaint, Superior Court of California, County of Sacramento, #34-2013-00151153 (December 2, 2013), 8.
[241] Department of Fair Employment & Housing, "News Release: DFEH Issues Guidance for California Employers on Transgender Employees," February 17, 2016.

doing is to demonstrate how the arguments used to rebut fears of over-expansiveness during the process of amending FEHA resurfaced in this case. I begin by considering how AMPAC and DFEH similarly framed the issue as being about when to consider Lozano a man, arguing that such a framing is related to the legislative arguments about over-expansiveness. I end by using the Legal Aid Society's amicus brief to discuss alternatives to this framing and to what I call the authenticity paradigm.

In supporting its demurrer, AMPAC based its argument on the incompleteness of Lozano's transition. It argued that Lozano "intend[ed] to become a man in two years"[242] and that he was in the "multi-year process of transitioning to a male."[243] As presented in AMPAC's memo, the issue was when to consider Lozano's transition complete, when to consider him fully male. Apparently for AMPAC that point would be the completion of sex reassignment surgery: "Lozano is biologically a female and will not be fully transitioned to a male for two years."[244] AMPAC later suggested its logic for this conclusion when it mused, "A male employee need only claim a female gender-identity and the employer must permit him to disrobe, shower, and/or perform bodily functions with his female co-workers. Employers will have to comply even if it is obvious the employee is untruthful because otherwise the employee's subjective belief about his gender-identity will be litigated."[245] As AMPAC constructed it, the issue in these cases is the authenticity of the gender identity, and the only way to authenticate a gender identity is to "fully transition."

DFEH contested this argument by using some of the same arguments supporters of the FEHA amendments did to assuage concerns about over-expansiveness. Distinguishing between

[242] AMPAC, 1.
[243] AMPAC, 1.
[244] AMPAC, 3.
[245] AMPAC, 7.

transgender individuals and those who inconsistently present a gender (or no gender), DFEH argued, "Individuals who claim a different gender from day to day, or who do so simply in jest or to be disruptive, do not meet the definition of transgender. The FEHA protects persons such as … Lozano, who consistently identify with the opposite sex, sometimes so strongly as to undergo surgery and hormone injections to effect a physical change of sex."[246] Substituting the constancy for one's gender identity for "complete" sex reassignment surgery, DFEH accepted AMPAC's argument that FEHA is limited to protecting verifiable and consistent gender expression. We can see how this reading of FEHA forwards both the amendments supporters' arguments against over-expansiveness and AMPAC's notion that this case is about properly identifying and assigning identity.

The Transgender Law Center (TLC), which submitted an amicus brief on DFEH's behalf, adopted a similar position, albeit more forcefully. Rather than focusing on the legislative commentary about gender being "irrelevant" to employment and housing decisions, it alleged that "[t]he legislative history of California's … laws … manifest a deep-seated commitment to protecting transgender Californians from any kind of discrimination that treats them differently from others of the same gender identity."[247] Reading the legislative history of the amendments as being about properly classifying and protecting transgender people, TLC suggested that authenticating identity is critical to a FEHA claim. Basing its argument on Lozano's complete, authentic, and indisputable maleness, TLC argued:

> Defendant's attempt to prohibit Mr. Lozano from using the men's locker room is clearly contrary to the Legislature's efforts to prohibit discrimination based upon gender identity

[246] Memorandum of Points and Authorities in Opposition to Defendant's Demurrer to Plaintiff's Complaint, Department of Fair Employment and Housing v. American Pacific Corporation, California Superior Court, County of Sacramento, #34-2013-00151153 (February 24, 2014), 14.
[247] Brief Amici Curiae of Transgender Law Center et al. in Support of Plaintiff's Opposition to Demurrer, Department of Fair Employment and Housing v. American Pacific Corporation, California Superior Court, County of Sacramento, #34-2013-00151153 (March 11, 2014), 3.

> and sex stereotyping. Mr. Lozano is a transgender man. His body may be different than that of a non-transgender man is some ways, but this fact does not erase his maleness or his rights under California Law.[248]

Like DFEH, TLC accepted that the case rested upon the authenticity of Lozano's maleness. For TLC that maleness was clear and inerasable. And that clarity derived from a strong definition of gender identity: "Gender identity is a person's deeply rooted understanding of his or herself as male or female. A person's gender identity cannot be changed temporarily or at will for the purpose of sexual harassment."[249] In a sense, gender identity serves as the crutch upon which this theory of discrimination rests, and, therefore, TLC (and DFEH) had to make strong assertions about its "deeply felt" nature, its constancy. In other words, TLC's argument depended upon shoring up gender identity as a thing upon which the court could rely in the same way it might formerly have relied upon sex as something constant, knowable, and immutable. Just as the legislature had to assure critics and the governor that the amended FEHA would only protect transgender people and not transvestites, cross-dressers, or comedians, so too did the TLC and DFEH arguments rely upon a notion of constancy and legitimacy in gender identity and presentation. Thus, the legislature's careful navigation of the topoi of expansion and clarification set the stage for DFEH and TLC understanding FEHA as requiring identity authentication.

This anxiety over separating the authentic from the fake is exactly what Ellen Samuels writes about in *Fantasies of Identification*. She argues that these "fantasies jarringly combine a certain wistful desire to know and understand certain identities with a persistent and often violent imposition of identity upon people whose subjectivity is overruled by a homogenizing, bureaucratic imperative."[250] Sorting out the real from the fake serves not only to identify but also

[248] Transgender Law Center, 6.
[249] Transgender Law Center, 7.
[250] Ellen Samuels, *Fantasies of Identification: Disability, Gender, Race* (New York, NY: New York University Press, 2014), 3.

to shore up minority identity categories and stereotypes (in turn, stabilizing dominant identity categories). Thus, concerns about the over-expansiveness of sex discrimination protections are related to a desire to limit and circumscribe both transgender people and gender as category. In other words, if we are to expand sex discrimination protections, we had still better be able to figure out who is a man, who is a woman, and who is "truly" transgender and, relatedly, what to expect from those thusly identified. As a result, anti-sex discrimination law comes to be understood as being about who the plaintiff *is*. That is, there can be no case unless we (the jury, the law) can properly classify and identify the plaintiff. TLC's arguments (and the California's legislature's before it) evince a conviction that it is easy to distinguish "real" transgender people from fakes and that courts, juries, and employers should indeed be involved in this practice of identification. While the legislature seemed to present this argument as a stop-gap against over-expansiveness, TLC's argument seems to accept and stand for the notion that anti-discrimination law is indeed about protecting and recognizing the identities of the discriminated, perpetuating fantasies of identification.

The Legal Aid Society Employment Law Center's amicus brief suggests another alternative to understanding the statute and its applicability to Lozano's situation. Rather than resting its argument upon the stability and constancy of gender identity, Legal Aid simply proposed that the court accept self-asserted gender identity while understanding transition as an ongoing process. In so doing, it suggested that issues of completeness or legitimacy are irrelevant or at least not for the court or employers to decide.

Rather than accepting AMPAC's premise that Lozano should be offered use of the men's locker room only when he was truly and completely a man (a premise that TLC seemed to accept, though for it completion occurred at the moment of proclaiming an authentic gender

identity), Legal Aid argued that "[t]he only prerequisite for recognizing an applicant or employee's gender identity is their own assertion that they have and live this identity."[251] This may sound similar to TLC's argument but, importantly, Legal Aid's argument was not that gender identity is the determining factor of one's maleness or femaleness. Rather, the argument was that once one asserts that gender identity, he or she should be permitted to act accordingly. In so doing, Legal Aid based its argument not on the inevitably of gender identity but on the simple notion that people should be allowed to behave according to their asserted gender identities, regardless of whether others accept and believe in the authenticity of those identities.

Legal Aid also drew attention to the ongoing process of transition. It noted that "for many transgender individuals, the transition process extends for a significant period of time, and there is no particular moment when the process is deemed 'complete.'"[252] While AMPAC and TLC both centered their arguments on *when* Lozano was properly considered a man (for AMPAC, after "complete" transition, for TLC, when he asserted an authentic gender identity), Legal Aid insisted that this was beside the point. Transition is an ongoing process; employers are to facilitate that process by honoring the self-asserted gender identity of their employees. Legal Aid made clear the danger of staking protections on the completeness of transition when it argued, "Under [AMPAC's] reasoning, a transgender man such as Mr. Lozano would never be entitled to the FEHA's protection, as the asserted prerequisite—and effective and beneficial medico-surgical intervention that converts 'female anatomy' into 'male anatomy'—does not exist."[253] Rather than establishing an alternative metric for completeness, Legal Aid suggested that we simply base protections on "the individual's self-identification and full-time life and work in his

[251] Brief Amicus Curiae of Legal Aid Society – Employment Law Center in Support of Plaintiff's Opposition to Demurrer, Department of Fair Employment and Housing v. American Pacific Corporation, California Superior Court, County of Sacramento, #34-2013-00151153 (March 11, 2014), 7.
[252] Legal Aid Society, 6.
[253] Legal Aid Society, 7.

or her gender identity."[254] The question was not whether Lozano was properly a man; rather, it was whether he claimed to be one.

Legal Aid's formation, unlike TLC's, did not require that the court determine that Lozano was a man like any other in order to grant him legal protection. It only required that the court determine that Lozano had asserted a male gender identity. As such, it absolved the court (or the jury) of the responsibility of determining whether Lozano's gender was "true or false."[255] In this sense, it rejected the authenticity paradigm. The court (and AMPAC) did not have to determine whether it believed Lozano with respect to his gender identity; it only had to act as though it did.

Topoi and the Authenticity Paradigm Considered

Judith Butler illustrates the problems with the authenticity paradigm in an essay on what has come to be known as the Joan/John case. In that now infamous case, David Reimer's penis was damaged in an early childhood operation. His parents decided to raise him as Brenda, under the supervision of Dr. John Money. However, at the age of fourteen, medical professionals and psychiatrists determined that the reassignment was a mistake. Accordingly, under the direction of physician Milton Diamond, Brenda resumed living as David. Much has been written about the case and about which was Reimer's true gender or the proper medical treatment. For her part, Butler rejects the need to judge or to determine "whether the gender here is true or false."[256] Referencing David's statement that—"If that's all they think of me, that they justify my worth by what I have between my legs, then I gotta be a complete loser"[257]—she argues that David is indicating and understands that "something about him is intelligible outside the framework of

[254] Legal Aid Society, 12.
[255] Butler, *Undoing Gender*, 70.
[256] Butler, *Undoing Gender*, 70.
[257] Butler, *Undoing Gender*, 71.

accepted intelligibility."[258] In other words, when we insist upon answering the question of whether the gender is true or false, we foreclose David's humanity by circumscribing his worth to a question of gender. Framed another way, answering the question of David's true gender will not adequately answer the question of who he is or what he is about. Butler reminds us that in verifying gender and identity, something is always lacking, regardless of sex at birth, identities asserted and denied. It can never tell the whole story of who one is. By insisting on the need to judge, we reduce the question of who one is to that singular question: *is the gender here true or false?* The wrong answer can be disastrous.

Thus, the problem with TLC's argument being based in authenticity and verifiability is that it insists upon law's role and interest in adjudicating and upholding gendered identities. When the law, a jury, or one's employer is made to stand in judgment of the authenticity of one's gender, there is a risk that gender identity can be ruled inauthentic or wanting. Such a ruling doesn't just impact legal standing (that is, whether one can bring the lawsuit); it cuts at the core of who one is and what one is worth.

It should not be surprising, however, that TLC, DFEH, and AMPAC (each in a different way) relied upon authenticity arguments with regard to FEHA. As the legislative debates demonstrate, the authenticity arguments are, because of the topoi recruited, built into the statute. The legislative history of the FEHA amendments suggest that altering the statutory language to better protect transgender Californians is a necessary clarification of preexisting sex discrimination law. Having staked out this position relative to the topoi of expansion and clarification, supporters were vulnerable to charges of over-expansiveness. They responded by relying on the authenticity and verifiability of transgender identities and, as a result, began to color all anti-sex discrimination law as being about identifying the discriminated. In an attempt

[258] Butler, *Undoing Gender*, 73.

to guard against over-expansiveness, time and again supporters of the legislation staked their arguments on the authenticity and constancy of transgender identities. Is so doing, they helped to mark authenticity as an issue for litigation.

Legal scholar Jennifer Levi has argued that making authenticity a litigation issue might serve all sex discrimination plaintiffs well. She proposes that non-transgender litigants might be able to challenge sex-specific dress codes (like that upheld in *Jespersen v. Harrah's*[259]) by basing their arguments in individual gender identity, as some transgender plaintiffs have done. Levi discusses how in these cases, the plaintiffs' arguments depend upon the "centrality of gender expression and its inelasticity."[260] She discusses how the courts seem moved by the plaintiffs' "genuine reasons" for defying dress codes as opposed to a desire for "causing disruption."[261] Ultimately, she proposes that non-transgender plaintiffs, like Jespersen, might be able to challenge sex-specific dress codes by relying on the stability of their individual (and, therefore, always idiosyncratic) gender identities.

What's interesting about this proposal is that it accepts the notion that gendered expression need be "genuine" rather than "disruptive." In this construction, gender discrimination is a problem because certain gendered identities are less accepted than others. People don't fit, and the system needs to adapt to better accommodate them. But to do this, the system must first accurately understand and catalog these classes of people. In Nick Lozano's case, such a construction implies that he experiences discrimination because of who he is, eliding the systemic roots of this discrimination and displacing the problem onto his being. As Dean

[259] *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (9th Cir. 2006) (en banc).
[260] Jennifer L. Levi, "Clothes Don't Make the Man (or Woman), But Gender Identity Might," *Columbia Journal of Gender and the Law* 15, no. 1 (2006): 101.
[261] Levi, "Clothes Don't Make the Man," 103.

Spade[262] and Wendy Brown[263] argue, this elision depoliticizes the injustice and discrimination by making them about who one is rather than about the structures that compel and underwrite discrimination. This is vastly different than a notion of sex discrimination that is premised upon the irrelevance of sex to employment decisions where the problem is not lack of acceptance of individual identities but that *too much* attention is paid those identities and differences. That is, in the "irrelevance" notion of sex discrimination, it is precisely the need to classify, interpret, and impose gender that is understood as the problem because to do so is to imply that classification precedes value or suitability (as an employee, tenant, and person).

We might think that both dress code and bathroom cases necessitate arguments based in the authenticity of identity, but, again, the Legal Aid brief suggests another option. Rather than premising legal protection upon the establishment of an identity, we could merely accept the identity and the practice. In other words, Lozano doesn't get to use the men's bathroom just because the court has determined that he's properly a man and I don't get to exclusively wear pantsuits (rather than skirtsuits) just because the court has determined that such a manner of dress best expresses my individual gender identity. Instead, the court accepts Lozano's self-asserted and lived gender identity and it accepts my style of dress based not on its determination of their authenticity but because it takes seriously the notion that gender is to be irrelevant to employment decisions. In my view, we surrender far too much to the law when we allow it to determine whether our clothing or the bathroom door we walk though authentically expresses our identities. This is not to say that identities are not important, even critical. It is to say that they are too important and too critical to permit the law to have the final say on them.

[262] Spade, *Normal Life: Administrative Violence, Critical Trans Politics, & the Limits of Law*.
[263] Brown, *Regulating Aversion*.

We can see, however, how the legislature's navigation of the topoi of expansion and clarification premise FEHA's limited expansion on law's ability to sort the real from the fake. Though neither the 2003 or 2011 law reference the law's role in adjudicating identity, the legislative histories present this as precisely the law's province and lead to arguments like those in the Lozano case (Legal Aid's argument excepted).

With regard to topoi, it should be no surprise the topoi recruited to support a legislative argument constrain that legislation and future interpretations of it. In other words, it is not just passing the legislation but how legislators argue for its necessity, to what *topoi* they've attached it that matter. As Miller and Cintron remind us, topoi build new connections from common places. These new constructions remain linked to and alter those old constructions. With regard to this specific case, FEHA, sex discrimination law, and transgender discrimination are altered by these new connections. And these new articulations of the law, so to speak, have far reaching consequences. When our law (understood in Marianne Constable's sense of law being our collective and public creation[264]) proclaims an interest in authenticating transgender identity, that is an expression of what we as a people value and require. When our law suggests that discrimination occurs because of who or what one is, that is a declaration about the origin of oppression and subjugation. And these effects don't only impact potential plaintiffs; they impact the entire terrain of hoped-for gender justice.

[264] Constable, *Our Word is Our Bond*.

CHAPTER 4 - INFECTED ECOLOGIES: POSITIONING THE POLITICS OF TRANSGENDER BATHROOM ACCESS

There are likely very few people in this country who haven't heard, at least in passing, about North Carolina's "bathroom bill." The North Carolina General Assembly passed the so-called bathroom bill, or House Bill Two: the Public Facilities Privacy & Security Act (hereinafter "HB 2"), on March 23, 2016 to invalidate a Charlotte ordinance that expanded anti-discrimination protections to, among other things, require that businesses and government entities permit people to use public bathrooms that comport with their gender identities. Both within and outside of North Carolina, there has been significant backlash to the passage of HB 2. The NBA pulled its All-Star game from Charlotte, the United States Department of Justice filed a suit against the state of North Carolina for violations of various provisions of the Civil Rights Act, and business like PayPal and Deutsche Bank cancelled plans to expand into and bring jobs to North Carolina.[265] HB 2 thrust the politics of transgender bathroom access into national view.

As transgender bathroom access is articulated as a political issue of public concern, it's important to understand how that concern is situated so that when we consider this as a political issue we consider not only what should be done or what is just but, also, the terrain we are entering. In this chapter, I use the notion of rhetorical ecologies to analyze the North Carolina House and Senate floor debates over HB 2 and investigate how they position both the bill and transgender bathroom access as political issues and how this positioning impacts the way both the issue and transgender rights, more broadly, are understood and pursued. My aim in mapping the rhetorical ecology of this debate, particularly through the lens of "infected" ecologies, is to consider this issue in ways that don't rely on abstract, affect-charged arguments about

[265] Corinne Jurney, "North Carolina's Bathroom Bill Flushes Away $630 Million in Lost Business," *Forbes.com*, November 3, 2016, http://www.forbes.com.

discrimination and inclusivity. In what follows, I offer a brief background of the Charlotte ordinance and HB 2 before situating and turning to my rhetorical ecological analysis.

On February 22, 2016 the Charlotte City Council passed Ordinance Number 7056 to amend various parts of the city code to add non-discrimination protections of the basis of "marital status, familial status, sexual orientation, gender identity, [and] gender expression." Prior to the amendments, Charlotte City Code had already prohibited discrimination on the basis of "race, gender, religion, national origin, ethnicity, age, or disability." The ordinance amended three portions of the Charlotte City Code with respect to these new classifications to: 1) mandate that all businesses with which the city entered into contracts would be prohibited from discriminating on the basis of these new classifications; 2) direct the community relations committee to add these classifications to those considered in its regular reports on how to eliminate or reduce discrimination in Charlotte; and 3) prohibit discrimination on the basis of these classifications in public accommodations, including removing provisions that excepted "restrooms, shower rooms, bathhouses and similar facilities which are in their nature distinctly private" and "YMCA, YWCA and similar types of dormitory lodging facilities." Though media coverage has focused most intently on the bathroom access provisions, it is important to note that the ordinance added a number of other protected characteristics to Charlotte's anti-discrimination codes including sexual orientation—a characteristic which is not protected under federal anti-discrimination law.

The North Carolina Legislature had been aware that Charlotte might pass such an ordinance for some time. Charlotte mayor, Jennifer Roberts, had run her election campaign in part on promises to pass this ordinance, which had failed to pass the city council when it was

first proposed in March 2015. After the ordinance passed, Republican members of the North Carolina legislature (which was no longer in regular session) scrambled to call the legislature into a special session in which they would work to invalidate the ordinance. Pursuant to North Carolina law, the legislature may be called into "special session" (a session outside the normal legislative calendar) if either the Governor or three fifths of the legislature requests such a session. In this case, Governor Pat McCrory declined to call a special session but three fifths of the legislature—all but two Republican House members and all but three Republican senators—called for the session. While Special sessions initiated by the governor are far more common, these legislature-initiated sessions are a rarity. Prior to this session, the last time legislators had initiated a special session was in 1981.[266] The special session was held on March 23, 2016, a bit more than a month before the legislature was set to resume regular session (April 25th) and only a week before the Charlotte ordinance was set to go into effect (April 1st). The legislators who called the session argued that this extraordinary move was necessary to avoid the Charlotte ordinance ever being implemented.

HB 2, the bill proposed and passed during the special session, had three parts, the first of which concerned bathroom use in government facilities. The other two parts addressed localities' abilities to pass wage, labor, and anti-discrimination ordinances. While the first part has received the most media attention, the second two parts are significant to understanding the legislative debates and how supporters and opponents of HB 2 positioned their arguments. With that in mind, and to contextualize the discussion that follows, here are brief descriptions of what each section of HB 2 does:

> Part I: Specifies that local boards of education and public agencies "shall require every multiple occupancy bathroom or changing facility to be designated for and only used by

[266] Colin Campbell and Mark Price, "NC GOP expands special session beyond restroom policies to wages, workplace rights," *Charlotte Observer*, March 23, 2016, http://www.charlotteobserver.com.

> persons based on their biological sex." "Biological sex" is defined as "the physical condition of being male or female, which is stated on a person's birth certificate."
>
> Part II: Amended the statute that specified that localities (cities and counties) could not pass their own wage and labor laws (such as setting a city-specific minimum wage or paid sick leave ordinance) or impose wage or labor restrictions on contractors. Localities are now forbidden from passing ordinances that required contractors to abide by "regulations or controls of the contractor's employment practices."
>
> Part III: Added that the legislative public policy declaration against employment discrimination on the basis of "race, religion, color, national origin, age, biological sex or handicap" was properly "an issue of general statewide concern" and, therefore, superseded and preempted any local level ordinance and created a parallel public policy expression concerning public accommodations. Further, the section specified that neither of these public policy expressions created a "right of action" and, therefore, nobody would be permitted to bring a lawsuit based on the public policy statement against discrimination, though persons could bring complaints to the Human Relations Commission.

In essence, then, the bill mandated 1) that schools and public agencies would have to designate multiple-occupancy bathroom and locker room use by birth-certificate sex, 2) that localities could not require contractors to comport with local ordinances (such as Charlotte's non-discrimination ordinance) and could not otherwise regulate wage and labor practices, and 3) that localities could not pass their own non-discrimination ordinances and that there was no statutory or common law anti-discrimination cause of action under North Carolina law.

It's important to remember that HB 2 both specifies that counties are not free to pass their own anti-discrimination ordinances—which invalidated the Charlotte ordinance and all other local ordinances—and declares that all bathrooms in government facilities must be designated for use on the basis of "biological sex," defined as that specified on one's birth certificate. This means that while both individuals and government entities may have determined their own bathroom use or the use of citizens on an ad hoc basis before the Charlotte ordinance and HB 2, HB 2 makes it the business of all North Carolina government entities to determine and presumably enforce government facility bathroom use by birth-certificate sex. At the same time,

private businesses are free to designate bathroom use as they see fit. In a sense, beginning with the passage of the Charlotte ordinance and now with the implementation of HB 2, there is a community-wide, legally-backed focus on transgender bathroom usage in North Carolina that didn't use to exist. That is, while transgender people, activists, and individual school administrators and employers might have been called to consider this important issue, others may have thought very little or not at all about bathroom access for transgender and gender nonconforming North Carolinians. In a sense, the Charlotte ordinance and HB 2 compelled legislators and citizens to consider transgender bathroom access as a political issue, drawing attention to something transgender and gender nonconforming individuals had personally struggled to navigate for some time before it became dinner table conversation. Thus, while the Charlotte ordinance may have provided relief to some, it may also have drawn attention to the years- or decades-long bathroom usage practices of people whose birth certificates might not necessarily have determined which bathroom door they routinely (and without incident) walked through. Likely, because of HB 2, there are people in North Carolina who must now determine whether they should use the public bathroom that comports with their birth-certificate sex or their lived sex.

In this chapter, I consider how transgender bathroom use became a political issue in North Carolina and how both those in support of and in opposition to HB 2 positioned their stances with regard to this issue and to sex. While this entire project considers transgender anti-discrimination law rhetorics as multiple, networked, interacting, and complex, this chapter will use the notion of networked rhetorics or rhetorical ecologies to consider how the legislative stances regarding HB 2 are linked to various histories, ideologies, and values. Particularly, I draw on the notion of "infected" rhetorical ecologies, which I develop below, to argue that these

stances emerged out of a rhetorical ecology affected by the heavily trafficked rhetorics and histories of discrimination and inclusivity.

Rhetorical Ecologies and Infected Arguments

Jenny Edbauer explains how understanding rhetorics as networked ecologies augments the notion of the rhetorical situation by drawing attention to the interactive and fluid nature of rhetoric.[267] While the notion of the rhetorical situation might compel us to focus on the rhetor, audience, and exigence as preexisting and stable elements, the notion of rhetorical ecologies suggests movement and a "fluidity that bleeds the elements of rhetorical situation."[268] In so doing, it helps us to see how rhetorics are always interacting and mutating. Augmenting the rhetorical situation, the notion of rhetorical ecologies draws attention to how rhetorics emerge, travel and mutate. A single rhetorical act, then, does not just impact the instant situation but everything to which it has been networked or linked. Building on Edbauer's work, Christa Olson emphasizes the importance of attending to place and context when mapping a rhetorical ecology: "Ecology is about populations and interactions … but it is also about paths and places."[269] A rhetorical ecology, then, attends to interaction and mutation by locating rhetorical activity in its specific contexts and following it as it moves. Particularly important to this notion of rhetorical ecologies is the way it illuminates how rhetorics gather affective force that compels their travel and mutation. In a sense, the notion of rhetorical ecologies helps to demonstrate how rhetorics themselves (and not just rhetors or audiences) traffic in affect and emotional force.

We can also use the notion of rhetorical ecologies to backwards map and network rhetorics linked to a single occasion. That is, the notion of rhetorical ecologies helps us to

[267] Edbauer, "Unframing Models of Public Distribution."
[268] Edbauer, "Unframing Models of Public Distribution," 19.
[269] Christa J. Olson, *Constituitive Visions: Indigeniety and Commonplaces of National Identity in Republican Ecudaor* (University Park, PA: Pennsylvania State University Press, 2014), 15.

consider a single rhetorical moment in robust context and relationship to other moments, ideas, and histories. Rebecca Dingo calls this tracing "ideological traffic" to "look at how arguments are networked within a single occasion to show how ideologies traffic over time and texts."[270]

While much of the work on rhetorical ecologies is forward-looking, tracing how rhetorics travel, mutate, and "go viral" (to paraphrase Edbauer), Dingo's work suggests that the notion of rhetorical ecologies might also be helpful in understanding particular rhetorical moments in their complex ecologies, using rhetorical ecologies to trace linkages backwards. Specifically, she uses the notion of "ideological traffic" as a means of describing how rhetorical acts can link together other rhetorics—borrowing, altering, and amalgamating their original affective forces.

Like Dingo, in this chapter I use the notion of rhetorical ecologies to consider a particular rhetorical moment—the HB 2 legislative debates. And while my analysis is concerned with historical linkages, "how arguments are networked to the past and then are reiterated in the present"[271] as Dingo puts it, I want to focus less on travel than emergence. That is, while a number of scholars (Dingo included) have used the notion of rhetorical ecologies to track how rhetorics travel, gathering affective force and circulating and mutating far beyond their initial context, less attention has been paid to the notion of already "infected" rhetorical ecologies. Edbauer writes: "A given rhetoric is not contained by the elements that comprise its rhetorical situation (exigence, rhetor, audience, constraints). Rather, it emerges *already infected* by the viral intensities that are circulating in the social field."[272] For the same reason that rhetorics can "go viral" (to paraphrase Edbauer) they can also emerge in social fields or ecologies already infected (or affectively charged) by certain rhetorics, histories, and connections. Importantly, the notion of rhetorical ecologies can help to explain not only how rhetorics gather affective force

[270] Dingo, *Networking Arguments*, 70.
[271] Dingo, *Networking Arguments*, 100.
[272] Edbauer, "Unframing Models of Public Distribution," 14 (emphasis mine).

and energy but also how emergent rhetorics are prone to infection and the consequences of contagion.

In the context of the HB 2 debate, this notion of infection helps to explain how the debate emerged in an ecology infected by the rhetorics of inclusion, progressive politics, and anti-discrimination and how this infection limited and impaired the effectiveness of HB 2 opponents' arguments. In other words, I use the notion of rhetorical ecologies to show how the HB 2 debates were entangled in a set of politically-charged rhetorics that were unresponsive to the particular situation and context. Ultimately, I argue that an understanding of infected ecologies may help in fashioning resistant rhetorics that can better respond to their specific contexts.

Commerce, Discrimination, and Carolina Values

I now turn to considering the floor debates over HB 2. For the most part, this analysis focuses on the House floor debate because, in comparison to the Senate, the debate was far more robust and lengthy in the House. HB 2 originated in the House and was, accordingly, debated there first. After about three hours of debate, the bill passed 82 to 26, with all but one Republican member supporting it and eleven Democrat members also voting in favor. Indicating that Republican leadership had every expectation that the bill would pass the Senate easily and within the day, House Speaker Tim Moore told House members that he expected there would be no changes to the bill in the Senate and that he didn't anticipate there needing to be another vote in the House that evening.[273] The bill was then sent to the Senate where debate was relatively brief because the Democratic senators had decided to protest their lack of involvement in the legislative process by refusing to debate the bill. Dan Blue, the Senate minority leader, delivered

[273] For a bill to pass both the House and Senate and be sent on to the governor for signing, the versions must be identical. Therefore, any change passed in the Senate would have had to pass the House and would have necessitated another vote. Speaker Moore's confidence that another vote would not be necessary evinces his belief that the legislative process would be brief and successful.

this message from the Democratic caucus along with his indictment of HB 2, but all other Democratic members were absent from the debate. Given the lack of debaters, only two Republican senators spoke in support of the bill before they moved for a vote. All Republican members who were present voted in favor of the bill and it passed 32-0. These results shouldn't be surprising given that Republican leadership called the special session and, given their majority, had every expectation that the bill would pass before the day was out. The following analysis, then, does not attend to why HB 2 supporters' arguments won the day (arguably, they did so because of partisanship). Rather, it maps how both supporters and opponents positioned their arguments and what these linkages can tell us about the rhetorical ecology of transgender bathroom access as political issue. In particular, this analysis attends to the ways in which the rhetorical ecology out of which both supporters' and opponents' arguments arose was infected with rhetorics and histories of discrimination and the presumed progressive battle against it.

Because HB 2 sought to outlaw local non-discrimination ordinances (which is why some LGBT advocates referred to it as pro-discrimination legislation), supporters' arguments necessarily emerged in a rhetorical ecology already infused and infected with rhetorics and histories of (anti-) discrimination. Accordingly, supporters employed various means of recasting the bill's relationship to discrimination and to protecting the citizens of North Carolina.

In introducing HB 2, supporters positioned the bill as safeguarding North Carolina commerce and economic viability. In this way, they sought to characterize HB 2 as promoting important governmental interests rather than merely responding to outrage over use of public toilets. Perhaps more interesting and important, by drawing the link between commerce and inconsistent anti-discrimination laws, they also relied upon arguments that had been the basis for upholding significant federal *anti*-discrimination statutes.

To make their argument about commerce and statewide economic health, supporters drew linkages to the founding of America and the establishment of the Constitution. Representative Paul Stam, a primary sponsor of the bill, reached back to the failures of the Articles of Confederation, citing a North Carolina law that protected debtors fleeing from Virginia as an example of how a lack of federal protection of interstate commerce contributed to economic instability. Referencing the creation of the Constitution and the virtues of federalism, Stam went on to proclaim "we realized that we needed a true nation and so the Constitution protects interstate commerce."[274] Calling upon the notion of a collective, founding "we," Stam suggested that a "true nation" is founded on stable commerce and economic prospects. He went on to argue that "free flow of commerce" is "why the United States is the economic powerhouse of the world." Forging a link between interstate commerce and United States supremacy, Stam then connected Charlotte's ordinance to the battle for free commerce and, presumably, North Carolinian supremacy: "If a person travels to Hickory, they don't expect a different rule in the government facilities of Hickory of who can be in a washroom. If they want to bid on a contract in Hickory, they can expect that they can pay their employees according to the law and there won't be some special deal just for Hickory." Beginning with the Articles of Confederation and debtor shield laws and then moving on to "washrooms in Hickory," Stam depicted the Charlotte non-discrimination ordinance as a matter gravely effecting commerce and economic prospects. Slipping from obviously harmful inconsistencies (debts not being honored across state lines) to inconsistences with dubious impact (who can be in which government-controlled washroom), Stam characterized any local difference in policy as a burden on free commerce. In this construction, the Charlotte ordinance is not only about bathroom access; rather, it is a significant

[274] North Carolina, House, Floor Debate, 2015-2016 legislature, Second Extra Session (March 23, 2016) (House audio recording) (hereinafter "House Floor Debate"). Unless otherwise indicated, all quotations in this chapter refer to this source.

impingement on commerce that hacks away at economic security and prosperity. Relatedly, HB 2 is linked to Constitutional values, the concerns of the Founding Fathers, and "true" government invested in promoting wealth and stability.

Others picked up on this thread in the floor debate. Representative Dan Bishop, another primary sponsor, argued that the Charlotte ordinance would create "a patchwork of inconsistent law governing these business practices across the state." Inconsistency itself rather than the impacts of that inconsistency were characterized as the problem. Representative John Blust built on this concern, proclaiming, "the Charlotte ordinance didn't just effect Charlotte, and I want to be sure on this, that, that the ordinance affects anyone who, anyone from the state, who visited Charlotte or who did business in Charlotte, and hence it had statewide implications." Emphasizing how people who traveled to Charlotte would be impacted by the ordinance, Blust worked to characterize the ordinance as a matter beyond local concern. Representative Pat McElraft parroted this language in arguing that "this doesn't affect just the people from Charlotte it affects all of us from all over the state that goes through that go through Charlotte. It affects businesses."

Interestingly, these concerns about the effects on commerce of inconsistent public accommodation policies are derivative of the primary argument used to uphold portions of the Civil Rights Act of 1964. The Act was historic and controversial—the first significant piece of federal anti-discrimination law. It was wide-ranging and included many provisions aimed at addressing racial discrimination and inequality; among them was a prohibition against discrimination in public accommodations, including hotels and restaurants. A hotel owner challenged the constitutionality this provision, arguing that it was beyond Congress's authority to regulate private business practices in this way and that he was entitled to exclude black patrons

from his hotel. Relying on the "commerce clause" of the Constitution,[275] the Supreme Court found in *Heart of Atlanta Motel v. United States* that because interstate travel was impacted by discriminatory public accommodation practices, Congress could forbid private hotels from discriminating on the basis of race.[276] In other words, because the hotel's discriminatory practices would impair black citizens' abilities to travel across state lines (that is, they might not be able to find a place to stay the night), those practices impacted interstate commerce and, accordingly, could be regulated by Congress.

Though none of the HB 2 supporters directly referenced this history, it haunts their argument as exemplified by a) their reliance on the argument that inconsistent regulations impact travel and commerce and b) Stam's overt reference to the U.S. Constitution's protection of interstate commerce. Of course, in the case of the Charlotte ordinance, unless those traveling through Charlotte were people whose lived sex did not match that specified on their birth certificates, their bathroom use practices would be the same. The travel and commerce argument advanced by supporters of HB 2, then, relies on anxiety about sharing bathrooms while traveling rather than foreseen inability to use the bathroom while traveling. Thus, though the Civil Rights Act's basis in the interstate commerce clause haunts or infects this discussion, supporters' arguments attempted to rework the connection between anti-discrimination and commerce. It is inconsistency in anti-discrimination regulations and not the discrimination itself that purportedly impaired commerce in the case of the Charlotte ordinance. Though protection of commerce was what enabled the U.S. Congress to *ban* discrimination in public accommodations, it's what

[275] Under the United States Constitution, Congress has limited, enumerated powers that it cannot exceed (Congress's power to regulate interstate commerce or commerce "between the States" being among these. The rationale behind limiting Congress's powers is to reserve powers for the individual states. Any act of Congress must fall under one of these enumerated powers; otherwise, it is unconstitutional and invalid. Therefore, one of the great hurdles for the Civil Rights Act of 1964 was to articulate its wide-reaching anti-discrimination provisions as being within Congress's limited power. U.S. Const., art I, §8.

[276] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).

enables the North Carolina legislature to invalidate Charlotte's anti-discrimination ordinance. Supporters of HB 2 aligned themselves with protection of commerce and valid exercise of governmental power by emphasizing consistency and arguing that Charlotte had frustrated that consistency. In so doing, they also pre-empted the discrimination issue by locating their concerns in relation to valid and important exercise of governmental power—a power that had historical links to combatting discrimination.

The matter of jurisdiction and the limits of local authority became a primary topic of discussion during the debate and a means of recasting the discrimination issue. Supporters of HB 2 characterized the outrage over the Charlotte ordinance as not only (or even primarily) about the bathroom issue but as about egregious local overreach. Explaining why the bill required all three sections (including those that, in the words of Bishop, "clari[fied] the limits of local authority"), Representative David Lewis offered that the "entire bill deals with individual localities exceeding the authority that they have had without coming through the General Assembly." Representative Mike Hager added, "These cities and counties, especially in this case, have operated outside their boundaries and they're into the boundaries of the state." The offense was depicted as Charlotte not respecting its limited role and, in a sense, undertaking statewide legislation from its local domain. Some explicitly argued that the legislature was not reacting to the anti-discrimination ordinance but to Charlotte's overstepping its bounds. Representative Sarah Stevens declared, "This bill is not about discrimination. This bill was passed because Charlotte did an ordinance that would be effective prior to us entering regular session." Stevens suggested that Charlotte had intentionally set the ordinance to go into effect while the legislature was out of session and seemed to take offense at this perceived slight. She admonished the city of Charlotte, "You have limited authority. Stay within it." The two senators who spoke in favor

of the HB 2 during the Senate debate made a similar point. Both Senator "Buck" Newton and Senator Phil Berger argued that Charlotte had acted outside its authority and there would have been no need for a special session if Charlotte had only remembered its limited role.[277] In this way, Charlotte was cast as a wayward locality deserving of sharp reprimand and rebuke. HB 2 was cast as a means of disciplining local governments and reminding them of their place. By focusing on Charlotte's purported overreach, these supporters worked to expand the discussion about HB 2 to proper governance and move the conversation away from bathrooms, transgender people, and discrimination.

Supporters of HB 2 were well aware that they would be accused of trafficking in discrimination, which might explain why a statement of public policy against discrimination in public accommodations was included in the bill. In explaining the provisions of the bill, Bishop took great pains to argue that the statewide statement of public policy against discrimination in public accommodations was a great step forward, calling it "historic," marking it as the "first time," and declaring that there had "never been such a statewide non-discrimination statement on public accommodation." Opponents pointed out that the bill would end a state cause of action for employment discrimination, essentially gutting state anti-discrimination law. Nonetheless, supporters worked to rearticulate the connection to discrimination and to suggest that HB 2 was not pro-discrimination; rather, it took a reasonable and forward-looking approach to the issue.

In fact, Bishop even went so far as to accuse those in opposition to the bill of leveling claims of fear and discrimination to obscure the real issues: "I want to suggest to all of us that we'd be better served in our debating with one another if we did not ascribe the basest of motives to the opposition that we face. Fear and ignorance. I don't know how many times I've heard in

[277] North Carolina, Senate, Floor Debate, 2015-2016 legislature, Second Extra Session (March 23, 2016) (Senate audio recording) (hereinafter "Senate Floor Debate").

the last month or so that everyone who might be opposed to what Charlotte has done must be acting out of fear." He then went on to ascribe those very motives to the City of Charlotte (apparently defying his own advice to avoid leveling such allegations). In an attempt to delink the language of fear and discrimination from HB 2, he argued:

> I would submit that [what Charlotte did] implies fear. Can we not trust that people acting in goodwill will find ways to accommodate each other without having an ever expanding list of groups and subgroups and subsubgroups laid out in law so that we can divide each other up? It's got nothing to do with fear. I trust my fellow man, and woman, to do the right thing almost all of the time… this bill is a carefully crafted, integrated measure, reasonably [drafted] to deal with an abuse of authority.

Not only did Bishop try to sever HB 2 from the language of discrimination and fear but he tried to link the Charlotte ordinance itself to discrimination and fear. Suggesting that anti-discrimination law "divides" people and betrays a deep mistrust of others, Bishop tried to paint HB 2 as optimistic and good-willed and the Charlotte ordinance as pessimistic and distrustful. Emerging in a rhetorical ecology infected with the language of anti-discrimination and bigotry, Bishop's statements reworked the relationship between discrimination, fear, and ignorance, trafficking in the affective force these allegations normally bear.

However, no other supporter picked up this line of argument and Bishop himself betrayed his belief that the Charlotte ordinance was reprehensible not only because it overstepped local authority but also because trafficked in dubious liberal ideology. Citing a public statement he'd made back in January, Bishop related how he had warned the mayor of Charlotte not to pass this ordinance: "In January, January 19 I believe it was, I released a public statement in anticipation, because the mayor of Charlotte, newly elected had repeated time and again that this was gonna be at the top of the city council's priority list, amazing as that is." In that January statement, entitled "Why in the World Would Charlotte Follow NYC's Radical Transgender Regime?," Bishop elaborated on why he found this priority so amazing: "A small group of far-out

progressives should not presume to decide for us all that a cross-dresser's liberty to express his gender nonconformity trumps the right of women and girls to peace of mind in the intimate setting of a public bathroom or shower."[278] At the same time that Bishop and others were working to delink HB 2 from specific concerns about transgender people and bathrooms by characterizing the bill as protecting commerce through maintaining local governments' limited authority, they trafficked in outrage and references to "far-out" liberal subversion. In some ways, their arguments about the dire impact on commerce depended upon this outrage and the ordinance's assault on "peace of mind" because, otherwise, they would have been unable to demonstrate the significance of the impact on commerce and travel.

Cultivating this outrage, supporters of HB 2 worked to link the Charlotte ordinance to "outside" special interests invading North Carolina governance. Bishop implied that the Charlotte City Council had been unduly influenced by national LGBT activist groups. Contrasting the Charlotte City Council legislative process to that of the state legislature, he suggested that the city council was easily swayed by leftist lobbyists: "Or here's a neat trick. Let's just go to a city council where you can find a handful of radicals under the influence of an activist group, they've got a lot of money from out of state, and get six of those people to enact something that goes to the heart of statewide interests." Indicting both the influence wielded by outside, moneyed interests and the city council legislative process, Bishop suggested that the Charlotte ordinance was both unconstitutional (under the state constitution) and un-Carolinian.

Stam made a similar inference when, in response to Representative Henry Michaux's concerns about losing Title IX education funding he offered that the Federal Code of Regulations permitted bathrooms designated by sex and snipped, "Have they told you that in their little

[278] Dan Bishop, "Why in the World Would Charlotte Follow NYC's Radical Transgender Regime?," news release, January 19, 2016, http://www.votedanbishop.com.

talking points?" The obvious implication was that those who supported Charlotte's ordinance did not do so out of their own convictions or command of the facts but because of "their" (presumably national LGBT activist organizations') dark, outside influence. Bishop and Stam's comments depicted the Charlotte ordinance as undemocratic and far removed from real North Carolinians' concerns.

Representative Nelson Dollar built on this thread when he argued that Charlotte was acting outside its limited authority in passing the ordinance: "We do not need any municipal government acting outside of its appropriate authority, particularly when they are seeking to make political statements." Dollar dismissed the Charlotte ordinance as a "political statement," inferring that not only was it outside the proper scope of local authority but that it was also, regardless of that, an example of bad governance—a political gesture designed to ruffle feathers. Trafficking in the notion of outsider influence, Dollar painted the Charlotte ordinance as tainted, politically-charged policy. Stevens also indicted the process and the politics of the Charlotte ordinance, referencing Charlotte Mayor Jennifer Roberts's efforts to get the ordinance passed:

> Now there was a discussion of the person who went door to door politicking so that she could get this changed in her county. Well that's the problem, it's not just the county; it's the state. If she wanted that authority, she needs to be going door to door and getting all her friends together to replace everybody in this body, because that's where the authority lies.

In characterizing Roberts's efforts to get the ordinance passed as "politicking," Stevens seemed to suggest something untoward about the motives behind the ordinance. She then admitted that, given the current composition of the state legislature, there was no way that LGBT-friendly policy would pass when she said Roberts would have to "replace everybody in this body, because that's where the authority lies." In so doing, Stevens also contrasted the composition of the legislature—supposedly representative of the entire state of North Carolina and its values—

with this "politicker" who was able to influence the Charlotte City Council to pass something that would never pass the state legislature. The Charlotte ordinance, then, was depicted as foreign to North Carolina—a politically-motivated encroachment on North Carolinian values instigated by outsider activists.

There were echoes of this idea in the limited Senate discussion as well. Senators Newton and Berger both referred to the Charlotte ordinance as "very radical." Building on that theme, Newton argued that Charlotte had "bow[ed] to the altar of radical political correctness."[279] In selecting the word altar, Newton characterized the Charlotte City Council as practicing the religion of political correctness, forsaking God by worshipping this false idol. The inference was that the ordinance was both immoral and motivated by an almost fanatical belief in a false religion (that of "political correctness"). When Newton characterized the ordinance as "insanity" and Berger called it "just crazy" and argued that "I think most people in this state feel the same way," each portrayed Charlotte as under the sway of something dark, political, and un-Carolinian.

In linking the Charlotte ordinance to radical liberal influence, "politicking," and government overreach, those in support of HB 2 worked to present the bill as responding to and protecting the interests of North Carolinians. Importantly, this characterization hinged upon linking the Charlotte ordinance to statewide interests, expanding its context from something local to something that affected people from all over the state. Supporters did this by arguing that the ordinance disrupted intrastate commerce, but they also suggested an even greater effect—disrupting Carolina values. By indicating that the ordinance had been dreamt up, funded, and inspired by outside activist groups, HB 2 supporters portrayed the ordinance as an encroachment on North Carolina values and self-determination. The purported threat, then, was not only to

[279] Senate Floor Debate.

public safety or commerce but to North Carolinian values. HB 2 was championed as protecting North Carolinians from being compelled, by the radical forces influencing the City of Charlotte, to worship at the altar of radical political correctness. In a sense, supporters navigated the rhetorical ecology's contagious rhetorics of discrimination by depicting Charlotte as discriminating against North Carolinians and their values.

Linking Local Control to Promoting Inclusivity

As supporters of HB 2 worked to reorient rhetorics of discrimination and democratic values, opponents sought to connect the importance of local control with historically-rooted rhetorics of inclusivity and anti-discrimination.

Arguing that the state legislature was wresting control from the people, opponents sought to characterize the legislature as distant and unresponsive. They tried to show that HB 2 was an example of state government inappropriately seeking to extend its reach to meddle in local legislation aimed at local concerns. Representative Kelly Alexander emphasized local government's connection to its people, arguing that the legislature should not "substitute consistently the will of the people at the country and at the municipal level with the will of one-hundred-and-seventy folk from all over everywhere." Emphasizing the anonymity of "folk" from "everywhere," Alexander linked local governance to people's immediate needs and contexts. Representative Henry Michaux similarly argued that "cities and counties should act within their legal authority as long as it's for the betterment of their communities. They are the ones that are closer to the people than we are." Working to link the Charlotte ordinance to the virtues of local control, opponents of HB 2 suggested that it was the state legislature, and not Charlotte, that was overreaching. They characterized this overreach as a distant state legislature resting control from the lower levels of government—those most representative of and closest to the people.

Importantly, these opponents stressed that the problem was not just that HB 2 invalidated the Charlotte ordinance but that it invalidated all local non-discrimination ordinances, many of which had been in place for decades. North Carolina's history with discrimination infected and inflected these arguments. In the Senate debate, Senator Dan Blue provided some of this historical context arguing that rescinding local non-discrimination policies would "roll back forty plus years of anti-discrimination activity."[280] The overreach did not just concern the single Charlotte ordinance but anti-discrimination ordinances and activities across the state. HB 2 was portrayed both as legislative overreach and as backward, regressive policy-making with wide-reaching effects. Blue argued that HB 2's invalidation of these ordinances was "pul[ling] the rug from under millions of voters" who "entrust the five-hundred plus local governments … to decide best how they want to proceed."[281] Characterizing these ordinances as important policies upon which local citizens depend, Blue, by inference, suggested that the state legislature was undependable and failing with respect to anti-discrimination. Local governments were characterized as most active and willing with regard to stemming discrimination and protecting the people. Emphasizing this point, Blue went on to characterize HB 2 as "roll[ing] back the clock in the state."[282]

Like Blue, many opponents of the bill tried to link their stances to the importance of stemming discrimination. Many referenced North Carolina's ongoing history of racial discrimination. Representative Rodney Moore located HB 2 in a long line of discriminatory action: "We've been here before, we know the ugly history of the state and of this nation as it relates to LGBT, as it relates to people of color, immigrants, and other things." In referencing this "ugly history" and listing different classes of people who historically had been discriminated

[280] Senate Floor Debate.
[281] Senate Floor Debate.
[282] Senate Floor Debate.

against, Moore implied a relationship between all types of discrimination. HB 2 was articulated as one of many injustices perpetrated by North Carolina. This had the virtue of characterizing transgender bathroom access as a civil rights issue. However, because there was no specific discussion of how and against whom this discrimination was manifest, it also risked glossing the particulars of the situation. Transgender people were depicted as one group in a long line of others who were discriminated against because of who they are.

Representative Tricia Ann Cotham made a similar move when, without specifically referencing which classes of people would be protected by the expanded Charlotte ordinance she argued, "We must not allow fear-mongering and discrimination against others." She went on to reference the virtues of inclusiveness, linking all anti-discrimination efforts together, "What we are doing here today on this House floor is a bill that flies in the face of inclusiveness. You all know this. This is no surprise. Many of us, on my side of the aisle especially have focused very hard on inclusiveness. I would hope that you would join our fight." Cotham painted this as another progressive battle for inclusivity. In referencing her "side of the aisle," she highlighted divisions and insinuated that her colleagues' stances toward HB 2 would likely be dictated by their party affiliations. Inclusivity was posited as a rallying cry for Democrats and, by inference, anathema to Republicans. By linking opposition to HB 2 to inclusivity and then linking inclusivity to the Democratic Party, Cotham rendered the Republican Party the party of exclusion. Inclusivity was staked as the exclusive province of Democrats despite Cotham's imploring others to "join the fight." This tactic isn't a surprising given that Cotham and her Democratic colleagues had every reason to believe that, because Republicans controlled both the House and Senate and were able to force the special session, HB 2 would be passed that day. However, by linking the Charlotte ordinance to inclusivity and inclusivity to the Democrats, she

rendered HB 2 as one among many anti-discrimination-informed partisan issues, the resolution of which would depend on one's party affiliation and requisite orientation to inclusivity. Like Moore, then, Cotham painted the debate over HB 2 as another battle against discrimination and those who discriminate. In so doing, she failed to articulate a good reason for understanding restricting bathroom use as harmful discrimination or for encouraging her colleagues to consider and wrestle with the issues presented.

Representative Carla Cunningham also associated the debates over HB 2 to histories of discrimination. But rather than breathlessly linking all types of discrimination, she provided context and invited investigation. She began by speaking at length about the ongoing struggle for civil rights in North Carolina:

> Over fifty years ago Martin Luther King Jr professed that you cannot legislate people to have a change of heart. That's why we had the civil rights movement. Did it change people's hearts? Still today people's hearts are not changed. Still today in this chamber peoples' hearts have not changed. Every day in public all over the state of North Carolina we still see acts of racism, acts of violence against people that are just slightly different from us all over.

She then went on to posit a legislative principle of "do no harm" and, in so doing, connected opposition to HB 2 to this principle and to the ongoing struggle for civil rights:

> When I make a major decision I first ask myself, am I doing any harm? I don't know how many people do that but maybe we should start saying, am I doing any harm?… So are we exercising good judgment or are we inciting more violence and discrimination and prejudice? I cannot support the bill, but I ask you are we doing more harm?

Unlike Cotham and Moore, who explicitly linked HB 2 to histories of discrimination and prejudice, Cunningham invited legislators to consider the linkage. Her invitation obviously didn't impact the legislative outcome, but it did frame the issue a bit differently. Rather than seamlessly linking HB 2 to other histories of discrimination, she invited comparison. In pointing out that despite the Civil Rights movement, more than fifty years later, "people's hearts are not

changed" including people "in this chamber," Cunningham stressed that legislation cannot on its own end discrimination. But in articulating her principle and practice of doing no harm and inviting others to consider this principle, she framed the future in terms of careful consideration rather than a partisan battle of inclusivity versus discrimination. The link to histories of discrimination is there, but it's a link she calls people to consider rather than to immediately forge. Though the difference is subtle, it's significant that Cunningham, following Bishop's advice, resisted assigning the "basest of motives" to supporters of HB 2. Rather than naming discrimination and discriminators, she positioned non-harm as a universally-adoptable principle.

Representative Verla Insko similarly invited legislators to consider the relationship between the current debate and histories of discrimination, characterizing the debate as an opportunity for contemplation:

> The only thing that I can think of that's good about this is that we're finally talking about it in public. That means our consciousnesses are being raised. There was a time when we didn't know someone who was gay, now we all know someone who is gay and have gay friends. There was a time when we didn't know anyone who was transgender. Some day that will be all, we'll be all familiar with that issue and tolerant of it but for now, we're really struggling.

Insko's comments suggest that this isn't necessarily an easy issue—another simple matter of inclusivity. Rather, through the use of the collective "we," she suggests that everybody is "struggling" and that they will have to talk and work through how to meet the needs of transgender people. Nobody is quite comfortable and nobody has all the answers yet. This stands in contrast to both her Democratic colleagues' simple equating of all types of discrimination and to her Republican colleagues' astonishment at "hav[ing] to talk about these things."[283] Insko invites reflection and consideration and resists insisting that this is a simple open-and-shut case. At the same time, her comments suggest that someday in the future, things will be different,

[283] Senate Floor Debate.

which is reminiscent of a Martin Luther King Jr.-like view on the "arc of the moral universe" bending "toward justice."

Encouraging her colleagues to struggle through the implications of HB 2, Insko asked her colleagues to consider whom the bill would protect: "This bill is supposed to protect girls and women. This bill doesn't protect transgender girls or transgender women. Transgender girls now who will be forced to go into the male bathroom or the male locker room. Are they going to be treated well?" In questioning how the bill would impact transgender girls, Insko drew attention to the way in which supporters of HB 2 implicitly denied the safety concerns of transgender people and failed to recognize transgender girls as girls or even as people who need public bathroom access.

Representative Pricey Harrison made a similar point when she related that she had constituents with an adult transgender daughter who, if this type of legislation had been in place when she was younger, would have been "forced to use the boys locker room in high school—a transgender girl and forced to use the boy's bathroom at high school." Harrison invited members to "imagine what kind of harassment and bullying and potential harm might come to that young woman." In this way, both Harrison and Insko worked to challenge HB 2's stated purpose of ensuring public safety by drawing attention to how HB 2 would, in fact, endanger transgender citizens. Resisting the contagious abstract rhetorics of anti-discrimination and inclusivity, Cunningham, Harrison, and Insko each made *particular* arguments about the potential harms of HB 2. These "resistant" rhetorics invited consideration and contemplation rather than trafficking in well-worn arguments about the value of inclusivity.

"Common Sense" and Confidence in Sex

Ultimately, though Insko and Harrison both worked to draw a connection between the violence and harassment of transgender girls and HB 2's stated goal of ensuring public safety, this did little to address HB 2 supporters' overarching argument about safety. This concern is best highlighted by Senator Berger's argument that "a majority of the people should not have to compromise their safety and privacy in public bathrooms."[284] Berger constructed this as an instance of the tyranny of the minority. In his characterization, efforts to secure the rights of transgender people imperil the safety of everybody else. Thus, the Charlotte ordinance was cast, in Berger's words, as a "reckless"[285] abandonment of the concerns of the many.

Of course, this argument relies on the premise that permitting transgender people to use bathrooms and locker rooms that comport with their gender identities (or lived sex) does indeed pose a significant danger to others. For the most part, supporters indicated this danger by referring to HB 2 as "common sense" legislation. These references to common sense excused supporters from having to detail what they found objectionable about the Charlotte ordinance and why HB 2 was good public policy. Instead, the relied on inferences of male sexual predation to suggest the threat posed by the ordinance.

Representatives Stam, Arp, Susan Martin, and McElraft referred to HB 2 as "common sense," offering varying degrees of explanation. Stam flatly stated "this is a common sense bill that protects the privacy expectations of our citizens." Dean Arp offered that it was "common sense" that "biological men should not be in women's bathrooms," suggesting that it was this particular scenario that should disturb all those with sense. Susan Martin and Pat McElraft situated their evaluations of HB 2's common sense in reference to their roles as mothers. Martin,

[284] Senate Floor Debate.
[285] Senate Floor Debate.

credentialing herself as the "mother of two teenage daughters," talked about the "appall" her daughters had at "the idea of it being wide open for anyone to come into the restrooms at school." McElraft positioned her support of HB 2 similarly: "I will let you know that as a mother and a grandmother of a 14 year old grandchild, this is about common sense." The inference, of course, is that HB 2 will protect these vulnerable young women from male sexual predation and that mothers with sense must understand that. "Common sense" is understanding that bathrooms are separated by sex for a reason and that reason needs little elaboration because it is the very basis of "common sense."

Martin and McElraft both qualified their concerns to imply that they weren't necessarily suggesting that transgender women posed a risk to other women. Martin offered that she understood "certain intentions" (presumably the Charlotte City Council's desire to ensure that transgender people could use bathrooms that comported with their lived sex) but that, regardless of these intentions, "the result was just wide open ability without any discrimination at all for anyone to walk into either restroom at any time." Her argument, like Berger's tyranny of the minority argument, is that, regardless of these "certain intentions," the ordinance is dangerous because it "opens" up bathroom use to "anyone." Martin suggests that, any good intentions aside, the Charlotte ordinance was disturbing because it created a bathroom free-for-all. Contributing to this theme, Martin's selection of the word "discrimination" works to untether this word from critiques of HB 2 and attach it to the *in*discriminate behavior of potential predators. What is needed is discrimination and discernment with regard to who can enter bathrooms. These legislators characterized discrimination in bathroom access as a public good designed to protect citizens.

Similarly, in speculating that, under the Charlotte ordinance, "a predator" would have "the authority" to enter the women's bathroom, McElraft hedged that she wasn't talking about "a transgender necessarily." In both Martin's and McElraft's comments, transgender people are either overwritten or dismissed in favor of focusing on potential threat. Martin failed to specify what "certain intentions" were and McElraft converted transgender people into objects outside normal language ("a transgender") and decency (by implying that transgender people wouldn't "necessarily," which implies that they just might, prey on women and girls). Transgender people and their concerns, then, fall outside of consideration and "common sense." By juxtaposition and suggestion, they are also linked to sexual predation. Discrimination in bathroom access is a necessary safeguard, whether against transgender people or other predators.

This version of "common sense" also relies upon male predation of women as expected or common. Arp, Martin, and McElraft all expressed horror at men presumably being able to enter women's restrooms under the Charlotte ordinance (never alluding to the opposite scenario), trafficking in the notion of all men as potential sexual predators and all women as potential victims. Martin and McElraft both mentioned teenage women and high school girl's bathrooms, stressing the vulnerability of young women to male predation and attempting to depict HB 2 as serving the interests of women and girls. Arp expanded on this notion of female vulnerability in his elaborate description of an imagined consequence of the Charlotte ordinance:

> Opponents, I don't want opponents to distract from what we're doing here. Summer's coming. Spring is here, summer's coming. Emily and Ashante, seven year old girls, are so excited to go to the pool. Their mother's taking them to the pool. They go into the locker rooms; they're bouncing off the walls with excitement. They have been good all winter long, and now their mother is taking them to the community pool to go swimming. All right girls, calm down. Go ahead and take off your clothes and put on your bathing suits and we will go to the pool. As they begin to do so, in walks a biological male. Sits down on the wooden bench in front of the lockers, right beside them, and begins to disrobe. What just happened? Emily, Ashante, and her mother just lost their privacy.

Note the details Arp chose to include. The girls are seven—young and blameless; they've been "good all winter long"—innocent and hopeful; and they're "bouncing off the walls with excitement"—full of child-like enthusiasm. Arp's emphasis on these ingénues undressing is somewhat pedophilic itself. He provides their mother's reported speech—"go ahead and take off your clothes"—encouraging the mostly older male membership of the House to imagine little girls undressing. Contributing to this sexually-charged, pornographic tone, is his commentary on the bill. Arp repeatedly (six times in short succession) uses the verb "strip" to refer to what the Charlotte ordinance had done to citizen's privacy rights. In both richly painting a picture of purported lost innocence and repeatedly using the word "strip," Arp further linked the Charlotte ordinance to sexual predation. In encouraging the House membership to imagine little girls undressing, he painted these girls as the victims of the Charlotte ordinance and, in a sense, invited the House membership to imagine themselves as victimizers, pedophiles. Arp conjured a scene where the House members became the older men preying on little girls, vividly depicting the problem that HB 2 purportedly would prevent.

In addition to these discussions in the House, both senators who spoke in support of the bill referenced the same man in the girl's bathroom scenario. Newton stressed, "common sense tells us that men don't belong in the ladies' bathroom"[286] and Berger characterized the Charlotte ordinance as "allow[ing] grown men to share bathrooms and locker facilities with girls and women."[287] Again, this served to articulate the Charlotte ordinance and transgender bathroom use to male sexual deviance and exploitation of girls. Supporters of HB 2, then, linked their position to discourses about violence against women, suggesting that Charlotte had overlooked the needs of women and girls by subjecting them to violations of privacy and potential violence.

[286] Senate Floor Debate.
[287] Senate Floor Debate.

HB 2 was articulated an anti-violence, anti-sexual exploitation measure by insinuating that men are predisposed to prey on women and that, given the chance, they will. For these "common sense" politicians, it's indiscriminate bathroom use and not discrimination or violence that we must be vigilant in combatting.

Opponents of HB 2 sought to address this concern by pointing out that other localities had passed similar ordinances without incident. Moore argued, "there has not to my knowledge been any catastrophic incident of rapes in these bathrooms." Alexander listed specific cities, to which he assumed that many North Carolinians had likely traveled, that had passed similar ordinances:

> [A] little town called Orlando that has the same kind of ordinance that Charlotte has adopted. And I don't think any of you had any problems when you went to the toilets down there. Or any of your constituents have reported predators lurking around Shamu's pool. You know, it just hasn't been an issue. I don't know how many of you may have gone down to Myrtle Beach where they have a similar ordinance or gone down to Charleston where they have a similar ordinance.

Citing non-incident, both Moore and Alexander argued that HB 2 was preying on and stoking unfounded fears. In so doing, they worked to combat the public safety concerns but could not really address the privacy or propriety concerns that HB 2 supporters leveled. In Arp's scenario, the "biological male" doesn't rape the seven-year-olds. Rather, it is his very presence that "strips" the girls of their privacy. While supporters of HB 2 did cite concerns about sexual assault, it was not just violence but the issue of "citizens … hav[ing] confidence about who is sharing the locker room with them."[288] This concern relies upon the notion that we know "biological males" when we see them and the denial of the fact that some people have been using bathrooms that comport with their gender expressions (and not necessarily their birth certificates) for years. The Charlotte ordinance and HB 2, in a way, actually give rise to a *lack* of "confidence

[288] Senate Floor Debate.

about who is sharing the locker room." Rather than reassuring his colleagues, Alexander's reference to similar ordinances in Orlando and Myrtle Beach may have raised further anxieties. Not only are future bathroom experiences suspect, but now previous ones are as well.

Navigating the Landscape

In some ways, the Charlotte ordinance and the politicization of transgender bathroom access compel people to contemplate the presence and existence of transgender people in ways that they may never have done before. This contemplation leaves some feeling as though permitting transgender people to access bathrooms that accord with their gender expression (whether or not others are able to determine if this matches "biological sex") is fundamentally incompatible with others' privacy interests and expectations. While they may not have thought much about who enters one bathroom or the other before, they are now mortified to think that they might be sharing a bathroom with somebody who was once identified as the opposite sex.

Of course, transgender bathroom access is now a public political issue. Whether this is a good thing or a bad thing is not the question; rather, the question is how to engage and understand it. In mapping the rhetorical ecology of this debate, I've shown that responses to transgender bathroom access and HB 2 emerged in a rhetorical ecology infected with rhetorics and histories of discrimination and the progressive movement to combat it. In some sense, this infection was a warrant for HB 2. Supporters characterized the Charlotte ordinance as an example of how "radical," moneyed, liberal lobbyists peddled their extreme and ever-expansive message of inclusivity to the City of Charlotte, subverting North Carolinian values and governance. Opponents were, for the most part, unable to produce resistant rhetorics that either complicated or existed outside these infectious rhetorics of inclusivity and anti-discrimination. Critically, by relying on these affectively-charged, historically-rooted arguments about

discrimination, opponents failed to significantly discuss or relate their arguments to the specific needs of transgender people or the concerns and anxieties of supporters. Rather, they trafficked in the language of anti-discrimination and inclusivity, seemingly relying upon the prepackaged affective force of these rhetorics and, significantly, failing to account for how this reliance might actually impair their arguments. Ultimately, then, for both supporters and opponents of HB 2, transgender bathroom access is characterized as both a simple issue and as something much greater than transgender rights themselves.

For supporters, transgender people are a threat not necessarily because of who they are but because of the way that they destabilize sex and give rise to uncertainty. The political battle over transgender bathroom access is a battle for certainty. In a sense, transgender people are an aside—a pawn in a larger cultural war about the meaning and stability of sex. For supporters of HB 2, "biological sex" is a simple matter, one so simple that it merits little discussion and can be enfolded under the label "common sense." Men are men and women are women. And we can expect men (presumably because they are men) to prey on women and girls. Interestingly, the text of HB 2 itself betrays that the matter is not so simple. Legislators must have recognized that the label "biological sex" would be insufficiently specific and therefore defined it as the sex designated on one's birth certificate. So while "biological sex" is the referent in both the legislation and the debate, it actually indexes birth-certificate sex. And, as Bishop references in his comments, in North Carolina, one can petition to change birth-certificate sex after medically-verified sex reassignment surgery. In other words, even the drafters of HB 2 recognized that sex was an unstable referent, and, in part, the entire legislative battle is an exercise in obscuring that instability. "Common sense" and "biological sex" work to paper over this uncertainty and stem the tide against "radical political correctness." Though supporters of HB 2 do indicate that

protecting transgender citizens is an inadequate basis for concern, their opposition to the Charlotte ordinance is positioned less as an opposition to transgender people than it is as opposition to "radical" political encroachments. This unsettling of "biological sex" is one such encroachment.

When opponents of HB 2 failed to center their arguments on the needs of transgender people and instead cast the Charlotte ordinance as a simple matter of inclusivity and HB 2 as a clear matter of discrimination, they aligned transgender bathroom access with this "radical" agenda. Relying on the contagious rhetorics of inclusivity and anti-discrimination, they inferred that it's "common sense" (that is, meriting little discussion or consideration) that transgender people be permitted to use bathrooms that comport with their gender expressions. To do otherwise is simply to discriminate. A vote for HB 2 is a vote for discrimination, a vote against it is a vote for inclusivity. Case closed.

While this characterization works to articulate transgender bathroom access as a clear civil rights issue, it does little to address the uncertainty to which this issue gives rise and which so deeply concerned supporters. The result is that the bathroom access issue could be dismissed as another fringe liberal fantasy—a barometer of political progressiveness unconnected to the concerns of "real" North Carolinians. For their part, progressives have been quick to embrace transgender rights as the next civil rights battle and have equated the struggles that transgender people face with intolerance and bigotry, as in Cotham's construction of Democratic inclusivity versus Republican discrimination. The liberal embrace of transgender rights is certainly not a bad thing, but the inclusivity/discrimination dichotomy that seems to have been imported with it might be. That is, marking this affectively-charged binary through the use of these contagious rhetorics might actually discourage rather than encourage people to think about what it means to

do justice to and for transgender people. This rhetorical terrian encourages citizens to encounter this as a cultural battle where they are compelled to stake a position not only with regard to transgender bathroom access but with regard to a larger "radical" agenda. What is lost are the particular struggles of transgender people. Despite the discussions of inclusivity and anti-discrimination, there is little recognition that transgender people are seeking to navigate sex and that this task is difficult in a society that continues to insist and rely upon discriminating on the basis of sex.

Alternatively, when Insko and Harrison question what the impact of HB 2 will be on transgender people, they remove their arguments from the infected and abstract rhetorics of discrimination and inclusivity. Rather, they begin to describe the underlying issue. Namely—HB 2's language about birth-certificate sex aside—a transgender girl, to take their example, can't really be said to "belong" in the boy's locker room. At the same time, it's reasonable to anticipate that her locker-room-mates might not initially accept her presence and might be uncomfortable. Arguments that a commitment to inclusivity requires her presence there don't really address HB 2 supporters' concerns that this is *un*common (that is, against purportedly "common" ways of understanding "biological sex"). These responses might be born of hatred, bigotry, and transphobia. They might also be born of limited exposure to and contemplation of the nature of sex and sexed identities. When supporters argue that the entire issue of transgender bathroom access is ridiculous, calling them bigots doesn't do much to disabuse them of this notion. Instead, it might reinforce their conviction that this is another pile of liberal nonsense. In other words, to do so is to recirculate infected and ineffective arguments about discrimination and inclusivity that ultimately reproduce a bigot/progressive dichotomy. Rather, the response

should be to explain why it is indeed outrageous that some North Carolinians (for example, those who are transgendered or seemingly ambiguously gendered) fear using public bathrooms.

Thus, I want to suggest that this entire rhetorical ecology can be best understood through Insko's observation that "we're really struggling." When Arp opines that voting to regulate bathroom use by birth certificate sex "is not hard," he is precisely wrong. Despite "certain intentions" and trying to be on the right side of history, as Harrison put it, transgender rights—particularly bathroom and locker room access—are, at the moment, difficult because people don't know what to make of the notion that sex-designated bathroom use is not necessarily an open and shut case.

When Harrison asks her colleagues to consider whether a transgender girl would be treated well in the boy's locker room, she avoids ascribing discrimination or malicious intent. Rather, she calls them to consider the situation of this transgender girl and how a law designating bathroom use by birth certificate sex might impact her. Political scientists conducted a study in South Florida to determine if canvassing might have an effect on transphobia. They found that ten-minute sessions in which canvassers encouraged participants to actively consider the perspective of transgender people durably and substantially reduced transphobia and increased support for nondiscrimination laws, regardless of whether the canvassers were transgender or merely describing transgender perspectives.[289] This again suggests that broad-brush, abstract arguments about inclusivity might not be the most effective means of encouraging people to support transgender rights and lives.

I'm not arguing that there's any way the Democrats could have convinced the Republicans not to pass HB 2. I *am* arguing that the debates over HB 2 are a manifestation and

[289] David Broockman and Joshua Kalla, "Durably Reducing Transphobia: A Field Experiment on Door-to-Door Canvassing," *Science*, no. 352 (2016): 220-24.

furtherance of how transgender anti-discrimination law is often articulated as a civil rights issue championed by the most progressive among us. As a result, transgender peoples' concerns and struggles become radically politicized (in the sense of partisan politics and perhaps, paradoxically, less robustly considered and deliberated over) and, for those opposed to a "radical," progressive agenda, easily discarded. By identifying the Republican party with discrimination and the Democratic party with inclusivity, opponents of HB 2 made it easy for the bill's supporters to cast their opposition as kowtowing to radical, liberal interests. Transgender people thus become one among many "fringe" special interests rather than real people with real concerns. These "fringe" interests are then pitted against "real" North Carolinians trying to travel through Charlotte without being "stripped" of their privacy. The struggle may be less about getting people to "join the fight" for inclusiveness and more about getting people to consider, "am I doing any harm?" As I'll discuss more in the final chapter, by trafficking in the infected and abstract rhetorics of inclusivity, justice, and anti-discrimination, opponents failed to represent and adequately frame the issue as an ethical one. They discouraged reflection and encouraged thoughtless reaction.

With regard to rhetorical ecologies, this analysis suggests that the notion of infection may be useful in identifying stale and ineffective rhetorical patterns. Viral rhetorics gain an affective intensity such that they are deployed, almost unthinkingly, across situations and contexts. This intensity and circulation can draw new connections and forge new relationships. However, it can also infect and impair invention. When rhetorics come prepackaged with affective force, we may too easily rely upon them without thinking about what affective baggage they carry and whether that baggage might actually impair responsivity and connection.

CHAPTER 5 - BETWEEN LAW'S CRACKS: SURFACING THE ETHICAL BY READING LAW RHETORICALLY

Throughout this dissertation I've referenced (both directly and indirectly) the notion of justice, seeking to understand the relationships between transgender anti-discrimination law, as it's variously enacted and understood, and justice. As I outlined in the opening chapter, in part, this investigation responds to ongoing debates about the efficacy of anti-discrimination law and advocacy as a means of pursuing meaningful political change and gender justice. Of course, as the previous chapters begin to illuminate, meaningful political change is not necessarily synonymous with justice. Throughout these analyses, I've used rhetorical theory and criticism as a means of charting the political and ethical implications of various rhetorics of transgender anti-discrimination law. In this final chapter, I more directly position these analyses in relation to underlying questions about anti-discrimination law, politics, and justice. In so doing, I explain why and how rhetoric is uniquely able to surface the ethical from beneath the political (particularly the legally-inflected political) and how this approach may alter assessments of both anti-discrimination law and transgender political advocacy.

To position this argument, I begin by revisiting the debate over the political efficacy of anti-discrimination law and situating it as embroiled in larger conversations about the pitfalls of the politics of recognition. I then describe how a rhetorical approach moves beyond these generalized critiques to highlight the possibilities and openings outside a simple recognition paradigm and use my analyses in the foregoing chapters to illustrate this approach. Ultimately I argue that rhetoric can serve as a vehicle for understanding and engaging the law more fruitfully and ethically.

Anti-Discrimination, Oppression, and Justice Imagined

As I outlined in the first chapter, the argument against anti-discrimination law as political advocacy is that it functions primarily on a symbolic level—granting recognition in the name of equality while, in actuality, failing to address the systemic roots of discrimination and the material circumstances of those most marginalized. Those who support this approach argue that this recognition is not merely symbolic; it raises awareness, secures material gains for some, and expands the notion of citizenship in ways that challenge dominant structures and make space for alternative political subjectivities. The point of contention is less over what specific material gains anti-discrimination law directly advances (both proponents and opponents seem to recognize that the gains are marginal and that anti-discrimination statutes do not single-handedly or overnight address discrimination) and more over the political impact of recognition itself. That is, for proponents of anti-discrimination law, recognition isn't an empty symbolic act; it represents a significant reordering of power relations and political possibilities.

It seems to be precisely this understanding that animates Isaac West's investigation of transgender political advocacy in *Transforming Citizenships.*[290] Throughout the text, West seeks to demonstrate how trans advocates' engagements with the law are not compromised appeals to normativity but tactical engagements aimed at securing citizenship while, at the same time, altering what citizenship means and entails. In discussing efforts to amend a local non-discrimination ordinance to include gender identity as a "discrete identity category,"[291] he writes, "when trans advocates articulate themselves as citizens who want the ability to recognized as equally valued members of a polity, it may be the case that this is a public transcript, and one that allows for entrance into the cultural imaginary without being beholden to all the trappings of

[290] West, *Transforming Citizenships*.
[291] West, *Transforming Citizenships*, 89.

liberal individualism."[292] This "entrance into the cultural imaginary," this inaugural scene of recognition, seems to be the essence of the political potential and value of this engagement. In this line of thinking, it is this entrance, this recognition that then engenders the ability to alter "the trappings of liberal individualism."

It is not entirely clear, however, what trappings of liberal individualism advocates might aim to dismantle. West tells us that in working to pass anti-discrimination ordinances, advocates are "working through cultural engagements to alter the power and meaning of sex,"[293] but that also "the goal of protecting gender-variance and educating people about it is to allow everyone, not just trans people, to be who they want to be."[294] These goals might be read as synonymous but they might also be read as, though not incompatible, at least far removed from one another. We might think that part of the "power and meaning of sex" is the ways in which sex as category suppresses individual expression and identity, which seems to be the notion conveyed throughout West's text. However, as much feminist theorizing would remind us, we might also acknowledge the ways in which individual expression and identity are *produced* by sex as category and that part of the power of sex is that sex itself functions as an instrument and axis of oppression. So, if sex is at least in part constitutive of "who we want to be," a politics with pure self-expression as its end may fail to acknowledge the relationship between sexed identities and sexed oppression. That is, if the end goal of this work is to ensure that people can "be who they want to be," as if that were a destination or a telos, that may be an insufficient aim in terms of altering the material circumstances of the most marginalized (as critics of anti-discrimination law point out) or even the marginally marginalized. That is not to say that honoring sexed identities or facilitating the ability to live them is anathema to confronting sexed oppression, but it is to say that if sex as

[292] West, *Transforming Citizenships*, 94.
[293] West, *Transforming Citizenships*, 126.
[294] West, *Transforming Citizenships*, 127.

category and site of maldistribution is left undisturbed by recognition, the power of sex (particularly its power to oppress and diminish life chances) remains essentially unaltered.

In West's evaluation, it seems that recognition itself is a political and ethical good, not a vehicle, but a desired end. West makes this clear when he argues that the "impure politics" he advocates are the "only politics available to those who want to engage strangers in the quest for recognition and justice."[295] Recognition as political aim is a foregone conclusion. The appropriateness of its appearing alongside justice as a worthwhile and meaningful political goal is unquestioned. However, those who critique anti-discrimination law as ineffective and potentially dangerous, like Dean Spade and Wendy Brown, are concerned precisely with the premise that recognition, if not synonymous with justice, is at least consistent with it. Their argument is that rather than furthering justice, a politics of recognition may actually undermine it.

For Spade, part of the danger lies in recognition's tendency to monopolize political will and vision. He writes:

> Narrowing political resistance strategies to seeking inclusion in anti-discrimination law makes the mistaken assumption that gaining recognition and inclusion in this way will equalize our life chances and allow us to compete in the (assumed fair) system. This often constitutes a forfeiture of other critiques, as if the economic system is fair but for the fact that bad discriminators are sometimes allowed to fire trans people for being trans. Defining the problem of oppression so narrowly that an anti-discrimination law could solve it erases the complexity and breadth of the systemic, life-threating harm that trans resistance seeks to end.[296]

Spade's argument is that not only does anti-discrimination law fail to help those most marginalized but, far worse, it may actually frustrate the aims of a larger "trans resistance" dedicated to equalizing life chances. This is because of the ways in which anti-discrimination law tends to figure discrimination as the cause rather than a symptom of oppression. In other

[295] West, *Transforming Citizenships*, 191.
[296] Spade, *Normal Life*, 43-44.

words, staking recognition as a political goal risks blinding both advocates and society to the roots of systemic oppression and the necessity to address these larger concerns.

In a related but slightly different vein, Wendy Brown argues that anti-discrimination law explains and institutionalizes discrimination through fixing identities. She argues that in anti-discrimination statutes

> persons are reduced to observable social attributes and practices defined empirically, positivistically, as if their existence were intrinsic and factual, rather than effects of discursive and institutional power; and these positivist definitions of persons *as* their attributes and practices are written into law, ensuring persons describable according to them will now become regulated through them.[297]

For Brown, one of the problems with anti-discrimination law is that it reduces to empirical facts the various notions of social difference upon which vulnerability and oppression are unequally distributed. In turn, people become reducible to these attributes and the discrimination and oppression they experience becomes rooted in their beings. For both Spade and Brown, then, one of the dangers of anti-discrimination law is that, by locating discrimination as between individual victims and perpetrators, it detracts from systemic analysis and action. And, further, for Brown, those victims are figured as perpetual victims by virtue of their legally and supposedly empirically-rooted identities. In other words, Brown argues that through anti-discrimination law, specified identities become codified as "injured identities" that unendingly "see[k] to avenge the hurt even while [and through] reaffirm[ing] it."[298] In this sense, anti-discrimination law is premised on alleviating injury through continually reinscribing it.

Both critiques rest on a concern that anti-discrimination law obscures rather than alleviates oppression and, relatedly, that it stabilizes subordinating relationships. My analysis in the foregoing chapters, however, challenges some of these assumptions by highlighting specific

[297] Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton, NJ: Princeton University Press, 1995), 66 (emphasis mine).
[298] Brown, *States of Injury*, 74.

instances in which anti-discrimination law appears to do more than recognize the discriminated and name discriminators and at least gestures toward the systemic roots of oppression. Of course, my analysis also demonstrates that there is indeed a tendency to represent and argue anti-discrimination law in what I will call a simple recognition paradigm. And my analysis demonstrates that reliance on this simple recognition paradigm does indeed risk the pitfalls that Spade and Brown so compellingly outline. Yet rhetorical analysis and practice can help avoid these pitfalls and lead to more ethical framing of anti-discrimination law and politics by refusing or moving us beyond a simple recognition paradigm. To begin to map this argument, I turn first to the notion of a simple recognition paradigm.

Unearthing the Ethical beneath Recognition's Surface

Recently, recognition has received a significant amount of attention within (and outside) rhetorical studies. While some of this work adopts a static definition of recognition (either to celebrate or critique it), other work (particularly within rhetorical theory) centers on the question of what recognition is and could be. In the introduction to a special issue of *Philosophy & Rhetoric* considering "the rhetorical contours of recognition," Sarah Burgess writes, "To study recognition, to read for its potential or its limits, is to pose the inevitable question: to what does recognition refer?"[299] As that collection makes clear, how we understand recognition—how it is constituted, where and how it arises, what it does and doesn't do—necessarily has a bearing on how we evaluate its effects and its potential. So, when political theorists, like Brown, decry the politics of recognition, it's important to understand what vision and operation of recognition they have in mind.

[299] Sarah K. Burgess, "Introduction: The Rhetorical Contours of Recognition [Special Issue]," *Philosophy & Rhetoric* 48, no. 4 (2015): 372.

Using rhetoric to read recognition scenes, Wendy Hesford draws our attention to that which haunts so-called legal recognition and moves us to consider recognition as something other than an act or end. For Hesford, legal recognition on its own is insufficient to address racial violence and oppression. This is because legal recognition rests on the paradoxical position of "state as both a violator and protector of rights."[300] Legal recognition, then, (as Brown and Spade also point out) risks obscuring the state's role in perpetuating violence and oppression. As such, it "cannot guarantee the fullness or virtue of a life lived that many want to find in recognition."[301]But that isn't the end of the story for Hesford. In her rhetorical analysis of recognition scenes, she shows how "there appears within any scene of recognition that which, by virtue of the scene, remains unintelligible but present."[302] And different recognition scenes "arrest" or capture this unintelligibility or what I might call *excess* more pointedly. By excess, what I mean is that which exists beyond a recognition paradigm—beyond seeing as and simple understanding. In excess of recognition scenes are always the forces constituting that scene, the relationships, suppositions, and presumptions that undergird that scene and make it possible. These hauntings make scenes of recognition fragile, and in this fragility lays the ethical potential of the recognition scene. For example, Hesford rejects the understanding of the #BlackLivesMatter movement as a simple recognition campaign, arguing that, in addition, it "turns to the ontological realm and critiques universalized notions of the 'human.'"[303] In other words, #BlackLivesMatter is not merely a demand for inclusion; it is also an opening, raising questions about the nature of inclusion and the very bases and relationships of privilege and subordination. It calls us not only to consider

[300] Wendy S. Hesford, "Surviving Recognition and Racial In/justice," *Philosophy & Rhetoric* 48, no. 4 (2015): 553.
[301] Hesford, "Surviving Recognition," 538.
[302] Hesford, "Surviving Recognition," 553.
[303] Hesford, "Surviving Recognition," 552.

but to inhabit "social interdependences and shared interests."[304] Drawing on Arabella Lyon's Arendt-informed notion of deliberative action, Hesford conceives of #BlackLivesMatter as initiating a recognition scene "in-between" where the scene "impl[ies] responding, if not responsible, relationships and commitments."[305] In these in-between scenes, it is interdependence and shared political potential that is recognized, not identities or individual actors.

In this way one problem with legal recognition is that it is understood as a singular act, an exchange that can only be carried out through a relationship of dominance. The state (standing in for the people) confers recognition and, in so doing, sets the terms of recognition. However, for Hesford, the potential within scenes of recognition (a potential whose intensity varies between specific scenes but that is always present) is the way that these scenes might draw attention to interdependence and engage "a process of political becoming"[306] rather than a static close-ended act carried out by an autonomous state.

Hesford's critique of legal recognition and her interest in recognitions in between has much in common with political theorist Patchen Markell's incisive critique of the politics of recognition and his proposal of "acknowledgment" as an alternative.[307] Also drawing on Hannah Arendt's political philosophy, Markell identifies the liberal fantasy of self-sovereignty and autonomy as the source of and problem with the politics of recognition. For Markell, the danger of the politics of recognition lies in its drive to shore up sovereignty and paper over human finitude and the "openness and unpredictability of the future."[308] The (mythical) telos of full mutual recognition, as he sees it, is complete knowledge of the other, which will provide certainty in action and reaction. But this, of course, is an impossibility specifically because of

[304] Hesford, "Surviving Recognition," 553.
[305] Hesford, "Surviving Recognition," 552 (quoting Lyon).
[306] Hesford, "Surviving Recognition," 554.
[307] Patchen Markell, *Bound by Recognition* (Princeton, NJ: Princeton University Press, 2003).
[308] Markell, *Bound by Recognition*, 4.

human finitude and interdependence. For Markell, it is the quest for sovereignty (the denial of finitude) that is the cause of social subordination and the animating idea behind recognition: "Social and political subordination" are not "systematic failures by some people to recognize others' identities, but … ways of patterning and arranging the world that allow some people and groups to enjoy a semblance of sovereign agency at others' expense."[309] In other words, subordination is not born of discrimination or misrecognition. Rather, discrimination and misrecognition are symptoms of oppression and, specifically, the uneven distribution of the "burdens of our common condition of finitude."[310] Particular identities are constituted as vulnerable to secure a sense of sovereignty and autonomy for others. Importantly, Markell notes that such an understanding does not require the rejection of identity or the constant destabilizing of identity but, instead, the uncoupling of identity and action. It isn't necessarily identity that is the problem but the confidence in identity and its relationship to political action and position.

Markell links certainty of identity to "confident mastery"[311]and contrasts this with Arendt's understanding of the relationship between action and identity. He explains, "Rather than treating identities as antecedent facts about people that govern their action, Arendt conceives of identities as the *results* of action and speech in public, through which people appear to others and thereby disclose who they are."[312] Agents do not have control over their identities and identity is only recognizable in retrospect. For Arendt, the problem, the reason that we behave as though identity precedes action, is the fear of non-sovereignty. The solution, then, is not necessarily to surrender identity but to acknowledge that essential non-sovereignty.

[309] Markell, *Bound by Recognition*, 5.
[310] Markell, *Bound by Recognition*, 25.
[311] Markell, *Bound by Recognition*, 13.
[312] Markell, *Bound by Recognition*, 13 (emphasis original).

Thus, Markell's practice of acknowledgement is premised on embracing the indeterminacy and open-endedness of political and intersubjective action. Acknowledgement refers not to acknowledging the other but to acknowledging our own situation (*not* identity) and lack of sovereignty. What matters, in a justice-oriented sense, is not having perfect knowledge of the other but how we respond to the other. And for Markell, this requires locating our own vulnerability and finitude. Recognition will always be a failed and dangerous project if it's premised on a knowledge of the other that reinforces knowledge and autonomy of the self. As Judith Butler reminds us, ethical intersubjective relations are constituted by our inherent exposedness and vulnerability:

> Where the ethical does enter, it seems, is precisely in that encounter that confronts me with a world I never chose, occasioning that affirmation of involuntary exposure to otherness as the condition of relationality, human and nonhuman. Acted on, I act still, but it is hardly this "I" that acts alone, and even though, or precisely because, it never quite gets done without being undone.[313]

Importantly, Butler emphasizes that the ethical arises in uncertainty, in confronting the world we never chose and in which our actions are always interrelational, never fully autonomous. And it is the embrace of this uncertainty that Kelly Oliver stakes as the critical difference between politics and ethics and, relatedly, the unfulfilled promise of recognition. Oliver argues that while "politics is about general principles and universal laws for the good of the whole, ethics is about the singularity of each being."[314] Therefore, political recognition can never guarantee justice because it rests on certainty, seeing and knowing the other (by association with either the universal or a specified identity group) in perpetuity. In so doing, it collapses the response and capacity to respond that constitute ethical intersubjective relationships. Similar to Butler, Oliver argues that the essence of ethics is that we "act in ways that open up the possibility of

[313] Judith Butler, *Senses of the Subject* (New York, NY: Fordham University Press, 2015), 16.
[314] Kelly Oliver, "Witnessing, Recognition, and Response Ethics," *Philosophy & Rhetoric* 48, no. 4 (2015): 475.

response,"[315] even and especially in the face of uncertainty, "for it we knew with certainty, it would no longer be ethics but social or even natural science."[316]

The danger with political recognition as Oliver understands it is that it risks ossifying relationships and identities. If political recognition is an event, an achievement, then the possibility for response and consideration—for ethics—is foreclosed. As Oliver puts it, "If we think that recognition is something that can be attained, or given, the risk is that once we feel it has been, then we can be confident that we have satisfied the conditions of justice."[317]

Like Markell, Oliver focuses her critique of political recognition on the ways in which recognition seems to paper over uncertainty. For both, justice is an ongoing process and a question, not an achievement or a destination. While both critiques rely on the notion of interdependence and non-sovereignty, Oliver more forcefully stresses the relationship between ethics and that interdependence and indeterminacy. She stresses that ethics arises in the space between our subject positions—historically-constituted (shifting) relationships to the finite world—and our subjectivity—"the sense of agency and response-ability that are constituted in the infinite encounter with otherness."[318] Oliver writes, "To conceive of oneself as a subject is to have the ability to address oneself to another, real or imaginary, actual or potential."[319] So, when the possibility of address and response are damaged, subjectivity is imperiled.[320] And it is for this reason that political recognition risks forsaking ethics—if recognition is about seeing and knowing, this fixity forecloses the possibility of response. Returning to Markell, it's this

[315] Oliver, "Witnessing," 490.
[316] Oliver, "Witnessing," 491.
[317] Oliver, "Witnessing," 478.
[318] Oliver, "Witnessing," 483.
[319] Oliver, "Witnessing," 485.
[320] Chris Earle's work on dispossession and prisoner subjectivity is an excellent illustration and contemplation of this point. Earle calls us to think of prisoner agency not in terms of willful resistance but in terms of affectability—a subjectivity that requires response in spite of, not because of, reason. Chris S. Earle, "Dispossessed: Prisoner Response-Ability and Resistance at the Limits of Subjectivity," *Rhetoric Society Quarterly* 46, no. 1 (2016): 47-65.

"confident mastery," this sense that action will proceed from identity that takes us out of the realm of ethics and into the false security and sovereignty of recognition. In other words, politics encourages us to respond with certainty as if to say, "I know who you are, I know what you want, I know what you're about." Ethics, on the other hand, requires that we be relentlessly open to not knowing, to response, to being acted upon. This, then, is the source of the inherent tension between politics and ethics that Oliver identifies. If politics (particularly law) is about promoting stability and certainty, ethics—the requirement that we remain exposed, responding, and responsible—will always call us to undercut that certainty.

If that's the case, if there is a necessary and irreparable tension between politics and ethics, what are we to do? How, if at all, do we pursue justice through politics? Oliver's suggestion is that "[w]hile recognition may be necessary for politics and to change public policies, the ethical foundation of this politics must always take us beyond recognition, beyond seeing as, to a realm where our confidence as seers or knowers is shaken to its foundation."[321] In essence, she argues that we can pursue generalizable political goods and goals but must never rest upon the achievement of those goals or assume that political outcomes are synonymous with justice. Markell's suggestion is similar. He argues that we understand democratic citizenship as "a matter of taking part in the activity of politics [in ways] quotidian and extraordinary, through which authoritative acts are subjected to the unpredictable responses of those whose lives they touch."[322] For both thinkers, ethics require that sovereignty and certainty can never be the ultimate aims of democratic politics. Calling the political toward the ethical requires maintaining the possibility of response and unpredictability.

[321] Oliver, "Witnessing," 486.
[322] Markell, *Bound by Recognition*, 188.

Hesford's work on recognitions in between demonstrates how rhetoric has an important role to play in bridging this space between the political and the ethical. In showing the fissures and openings within recognition scenes, in calling our attention to those excesses that remain unanswered and inexplicable within the frame of recognition, Hesford reveals how rhetoric can help us to read *and* interact in (and beyond) recognition differently.

Sarah Burgess provides another example of how rhetoricians might close the gap between politics and ethics through reevaluating recognition scenes. Taking the United Kingdom's Gender Recognition Act as her illustrative example, Burgess reveals how law acts as an interlocutor rather than the frame for scenes of legal recognition. Burgess writes that there is a "picture of recognition painted by political theorists" understanding it as "the marked moment in which recognition transforms individuals into full members of community."[323] However, she demonstrates how, through the demand for recognition, those not yet recognized by the law call law to a scene of recognition that law does not fully contain. This scene of recognition, like all intersubjective relations, has the potential to undo both parties. In law's case, it must confer recognition without betraying how it sets the terms of recognizability (that is, it doesn't just recognize "men," it specifies what constitutes "man" before the law). This is so because to maintain its sovereignty law cannot be understood to create legal subjects; it must be understood to order them per preexisting and universal rules. Law, too, struggles for recognition. However, in understanding both the one demanding recognition and law as interlocutors in the scene of legal recognition, we can see how this relationship is contingent and these subjects (law and the demander) are in transition. So, as Hesford calls us to read the fissures within scenes of recognition, Burgess calls us to see these fissures within the law itself. In both cases, the upshot is to shine light on those uncertainties, those possibilities for ethics.

[323] Burgess, "Exposing the Ruins of Law," 524.

Importantly, it is rhetoric that enables Hesford and Burgess to highlight the ethical within these scenes. Rather than accepting the socio-legal model of recognition as a given, they use rhetoric to interrogate how the recognition scene is framed, how it comes into being. In other words, rather than evaluating recognition scenes from the premise that they already understand how recognition functions—a "seeing as" singular moment—Hesford and Burgess read these scenes rhetorically to investigate, in particularly, what is happening within these scenes (or further, how these scenes come into being). In attending to that which haunts recognition, Hesford draws attention to the rhetorical constructions and presuppositions that constitute scenes of recognition, highlighting the relationships that are suppressed and illuminated within them. She demonstrates how the logic of simple recognition obscures these relationships. Critically for Hesford, a rhetorical reading of recognition scenes highlights what is suppressed or sublimated beneath the scene when we take it to be a simple site of recognition and how investigating how the scene is constituted might actually help expand ethical possibilities.

Burgess also uses rhetoric to draw our attention to the constitution of the scene of recognition. Again, eschewing the logic of recognition, she investigates how the scene of legal recognition is staged. She shows that recognition is not something that law does; rather, law and subjects-to-be-recognized are interlocutors who co-construct the scene of recognition. In attending to how rhetoric—language and encounter—constitute this scene, Burgess is able to demonstrate that recognition does not work in a predetermined fashion and that law is a participant and not a frame. Importantly, for both Hesford and Burgess, it is rhetorical investigation—the careful attention to how arguments, subjects, and sites are framed—that enables them to interrogate how recognition scenes come to be and what exists outside, alongside, beyond, and underneath those scenes. Unlike the political theorists they cite, Hesford

and Burgess don't assume that recognition is a singular thing or that in operates consistently across spaces. Their rhetorical approach—its attention to activity and interaction—demonstrates the fragility of recognition scenes in ways that political theorists' approaches cannot.

In this way, rhetorical readings of recognition scenes, like Hesford's and Burgess's, help to contextualize complicate political theorists' generalized notions of how recognition operates. In a sense, these readings draw our attention to the ethical presence that haunts any given scene of recognition. For Hesford, the trick is to "read for that which is made impossible by the logics of recognition."[324] These rhetorical readings, then, should not be understood as defenses of the politics of recognition, but as means of taking those critiques seriously to surface the ethical from beneath the political. In other words, rhetoric serves as a tool for supplementing recognition, for moving us beyond "seeing as" to the ethical space of unpredictability and capacity to respond. In so doing, rhetoric challenges a simple recognition paradigm—one that understands recognition as a moment—and draws our attention to justice as ongoing project. We might think of this as the difference between regarding recognition as a transaction and regarding it as an interaction. And part of that (ongoing) interaction is how we evaluate the scene of recognition, up to and including regarding it as a recognition scene at all.

Responding to Discrimination

My analysis in the foregoing chapters has been both an exercise in this work and an illustration of the ways in which the simple recognition paradigm nonetheless colors both analysis and engagement and obscures the call of ethics. Critiques, analyses of, and stories about anti-discrimination law circumscribe what it is and can do. West and Spade seem to both accept that trans engagements with anti-discrimination law are recognition projects. But my analysis

[324] Hesford, "Surviving Recognition," 553.

suggests that isn't necessarily the case. Throughout this work, I've illustrated how rhetoric can help us to read, understand, and argue the law in ways that are attentive to the ever-present fissures within legal recognition. If justice is an open-ended question, rhetorical reading can show how law actually betrays that reality and reveals possibilities for ethics. However, such work requires an insistence on using rhetoric to think beyond recognition and to exploring law's possibilities rather than assuming its prejudices.

Returning to the *Schroer* case, we can see how the typical readings of this case are premised on a simple recognition paradigm. By reading *Schroer* as expanding the notion of what constitutes sexed identity, these commentators suggest the *Schroer* marks a recognition event, a singular moment when the law enfolds trans sexes within its purview, recognizing and validating a certain way of being sexed. Such a reading risks exactly the pitfalls that Markell, Oliver, and others chart. If we read *Schroer* as establishing new rules or norms about how one is sexed before the law, it does indeed appear as though the case asserts both law's capacity to order and trans workers' proper location within that ordering. The question of sex is closed and law's role in securing (preexisting) sexed identities is reinforced. The simple recognition paradigm proceeds from the idea that the law recognizes Schroer for who she really is and affirms that she has been discriminated against on the basis of that duly recognized identity. In so doing, law names discriminators, discrimination, and the discriminated, reaffirming law's ability to recognize and order while, at the same time, locating the problem in individual discriminator/discriminated pairs. In this construction, anti-discrimination law's obvious aim is to make discriminators stop discriminating. The mutual scene of recognition enfolds Schroer's identity and claim of discrimination within law's purview and, through this, Schroer recognizes her place in and before the law.

But, as my analysis of *Schroer* and the shifting stasis in Title VII case law suggests, law's operations are more complex than that. As I've pointed out, though the *Schroer* court recognized discrimination on the basis of sex, it did not officially recognize Schroer as belonging to a particular identity category nor did it recognize the discrimination as being rooted in Schroer's identity. Rather, it focused on sex as category and, incidentally, rhetorical construction. As I've explained, this is significant because: 1) it sheds light on the systemic roots of discrimination (contrary to the way Spade and Brown understand anti-discrimination law to function) and 2) it is actually *through* efforts to preserve its sovereignty and constancy that law arrives in this place.

What I want to stress here is that while the law's refusal to grant the full recognition that Schroer sought (in the form of a definitive ruling as to her sex) might be understood as a failure with respect to the simple recognition paradigm, the law in this instance itself succeeds (perhaps but not necessarily in spite of itself) in beckoning us beyond this recognition and toward the ethical. When the *Schroer* court suggests that changing sex is a difficult and ongoing process, it fails to provide the certainty about sex that both Schroer and the Library of Congress sought and instead shifts our attention to how sexed identities (not just Schroer's but all of them) are fragile achievements. In this way, the opinion actually highlights rather than obscures the intersubjective nature of identity and of ethics. Rather than handing us specific rules for how to understand sex and how to regard the other, the *Schroer* court punts. And in so doing, it calls us to that ethical space of responsivity and contemplation. In part, what's important is law's implicit admission that it doesn't completely resolve this problem. In this way, law can keep us attuned to the need for justice. It can remind us that law's power is important, even critical, but limited. Law can name and end isolated events of discrimination but it cannot, on its own, instruct us how to

respond to the other or how to sustain the possibility of subjectivity. For as Oliver reminds us, rules suppress the ethical and turn response into convention.

Through using stasis theory to read how courts navigate the anxiety over sex induced by trans plaintiffs' demands for recognition, I show the fissures and openings submerged beneath these recognition scenes. In other words, a careful rhetorical reading of this line of cases shows how law *itself* can and does refuse the logic of recognition even in (failed) efforts to preserve its sovereignty. Importantly, then, surfacing the ethical from beneath the political does not necessarily require reading against or outside the law. In some cases it requires rhetorically reading the law, tracking its movements and interventions, rather than assuming we already know its logic and its presumptions. As Burgess reminds us, law is not a frame, it is an interlocutor. Therefore, we must attend to how law responds and how law itself is undone and remade in its encounters.

While my analysis of the *Schroer* case is an example of how rhetorical reading of the law and of recognition scenes may highlight the ways in which law might already beckon attention toward the ethical, my analysis of the California anti-discrimination statutes and ensuing litigation demonstrates how legal arguments might remain attuned to the ethical.

We can read the California legislature's concern about over-expansiveness as a desire to both protect the stability of sex and, relatedly, shore up law's sovereignty and its ability to recognize only valid subjects. While the proposed anti-discrimination statutes made no mention of gender identity or of authentic transgender identities, that the debates centered on these issues suggests that both opponents and supporters of the amendments to the law understood anti-discrimination law through a simple recognition paradigm. The question was *who* was to be covered, not which behavior or phenomena were being prohibited. In this construction, anti-

discrimination law's job is to locate pre-existing identity groups and to then adequately describe those groups so as to enfold them within the law's protection. Importantly, this construction rests on the notion that those identity groups precede and are not constituted by the law.

Of course, as my analysis of the Lozano cases demonstrates, even if law's constitutive function is obscured in legislative debates, it may rise again in litigation. For all the legislature's assurances that law would be able to distinguish between "true" transgender people and fakes, as the Lozano case demonstrates, the law was unequipped for the task. While the parties to the litigation proposed various tests for authenticating sexed identities, the Legal Aid brief showed another way. By arguing that transition is ongoing, not a destination, the Legal Aid brief drew attention to contingency and to the need for response (both from and outside the law). In this construction, the problem is not that the parties disagree as to when to consider Lozano properly male; it's that they assume that they (and the law) can and should determine this point.

Legal Aid's implicit suggestion—that assertion of gender identity should be the basis for legal recognition—may seem like an unsatisfactory result for the law. This appears to figure law a "rubber stamp,"[325] not so much conferring recognition as affirming it after the fact. The imagined transformative moment of mutual recognition is converted into a formality where law appears impotent. Law's role in ordering and recognizing is undermined and law's "magic wand of visibility"[326] is revealed as nothing more than a plastic baton. But this is so only if we consider recognition to be law's primary purpose in anti-discrimination law. What if, as the *Schroer* case suggests, we understand anti-discrimination law to be less about locating the "discriminated" and more about locating (if only contingently) discrimination? Both the Legal Aid brief and the *Schroer* decision shift attention away from the demand for recognition *as something* and toward

[325] Burgess, "Exposing the Ruins of Law," 524.
[326] Williams, *The Alchemy of Race and Rights*, 164.

the ongoing process of being sexed and of being. In both instances, law still has the power to name and proscribe discrimination but law surrenders its hold on sex by suggesting that law's role has never been to fix sex but, rather, to make it easier to live sex. Taking Lozano at his word when he asserts his gender identity implies that law has a limited role to play in setting the terms of recognizability and in recognition, the brief also shifts attention away from identity and toward interactions that support a sense of identity and subjectivity.

While the law may say (and strive toward the ideal) that sex is to be irrelevant to employment decisions, the very existence of the case suggests that this is far from the case. If we let it, anti-discrimination law can call us to consider why that might be so. By resisting the pull of recognition, we begin to pull at sex itself. And it starts to unravel. Not to the point where it does not matter anymore but to the point where we may be made to account for what sex is and what it does. When law admits that sex can be a question and a struggle, sex subordination becomes less naturalized. And we are called to investigate our position and our investment in it.

Of course, as Schroer's attorney Sharon McGowan recounts,[327] some trans plaintiffs may be asking law for just the certainty that the Legal Aid brief and the *Schroer* decision appear to avoid. In part, this may be because these scenes of legal recognition are sites where impossible subjects call the law to respond and to account for them. Earle writes that "any sense of self, any ability to act and resist, is dependent on others, on our very address-ability and response-ability."[328] In a sense, the law is the ultimate respondent. This is the pull of legal recognition. It need not (and likely cannot) be completely resisted. But what we can resist is the tendency to understand these interactions as simple recognition scenes where law enfolds the once impossible subject into its purview and justice is done. Importantly, the ability to make claims, to

[327] McGowan, "Working with Clients."
[328] Earle, "Dispossessed," 52.

"make a scene" with the law does not disappear. But the way we read these scenes and understand the concerns they raise does change. What happens to discrimination when law cannot explain and dispose of it so easily as an isolated instance of bigotry?

Again, what Oliver says about the difference between politics and ethics is important here: "Calculation, rules, and laws turn what should be an ethical response to the singularity of the other or the event into a mere reaction or reflex determined by convention."[329] Understanding and arguing anti-discrimination law through a simple recognition paradigm enables us to hide behind the simple declaration that we don't discriminate rather than examining what ending discrimination might actually entail.

The North Carolina HB 2 debates are illustrative of this phenomenon. As my analysis demonstrates, the debates reveal the way in which concerns over transgender bathroom access are a symptom of larger anxieties about the uncertainty of sex. Supporters of HB 2 continually referenced how simple and common sense the legislation was, relying on the presumed obviousness that permitting "men in girl's bathrooms" was dangerous nonsense. However, as the legislative difficulty in defining "biological sex" evinced, the matter of sex is not nearly so simple or so common sense. A rhetorical reading of these debates that is attuned to the seductions of simple recognition shows why opponents' reliance on the language of discrimination and inclusivity was both inadequate to address supporters' concerns and ethically suspect. Rather than inviting the sort of investigation and contemplation that ethics requires, these allegations of discrimination framed transgender bathroom access as a simple and isolated issue—an instance of close-minded bigotry. Such a characterization not only isolates the particular issue from larger questions about sex subordination and injustice, it also isolates those

[329] Oliver, "Witnessing," 487.

alleging discrimination from any complicity in the system of sex. Further, it suggests that sexed identities are themselves simple matters.

To illuminate the ethical concerns raised by this double removal, I turn to a *New York Times* editorial that functions similarly. A few years ago, the paper ran a several-part series it called "Transgender Today" that was designed to expose readers to the experiences and struggles of transgender Americans. In the introductory piece, entitled "The Quest for Transgender Equality," the Editorial Board notes that "[s]cientists have no conclusive explanation for what causes some people to feel dissonance between their gender identity and aspects of their anatomy" and ends by declaring that "[a] generation from now, scientists will most likely know more about gender dysphoria and physicians will undoubtedly have found better ways to help people transition. This generation should be the one that stopped thinking that being transgender is something to fear or shun."[330]

What's fascinating is the way in which being better able to empirically explain transgender identities seems to be posed as a necessary component of gender justice. It seems clear that ethically-attuned medical care and guidelines are a component of securing better and more just futures for transgender people, but what troubles me is the logic of recognition that undergirds these twin statements about the lack of "conclusive explanation" and the likelihood that we will "know more" in the future. This logic leaves sex as system undisturbed (it is only those with gender dysphoria we must learn more about) and suggests that better knowledge leads to better understanding and more ethical relations.

Yet ethics calls for remaining responsive and vulnerable to the other despite and because of not knowing. This is not to say that knowing is bad but that when this search for knowledge is

[330] The New York Times Editorial Board, "The Quest for Transgender Equality," *The New York Times*, May 4, 2015, http://www.nytimes.com.

directed at better describing and understanding identity categories, it becomes dangerous and risks foreclosing ethical engagement. Knowledge stands in for responsiveness. It also locates the problem of discrimination in lack of knowledge rather than in inequitable distribution of vulnerability and certainty. What remains undisturbed in the quest for more knowledge about gender dysphoria is sex itself and its various political and economic implications.

For example, David Valentine suggests how we might "imagine transgender" and our relationships differently:

> The goal is not to identify the perpetrators of fraudulent categorization but to open up the question of how all of us are responsible for—and subjects to—the limits and possibilities of self-making in a broader and stratified political-economic context. The goal is to reveal how the categories we live by—must live by—have histories, politics, and economies and produce effects that can be debilitating for some as they can be liberating for others. The goal is to question how, why, when, and with what effects self-making is other making.[331]

In Valentine's ethically-attuned call, any investigation of identity must necessarily be an investigation of not just our own identities but our own social, political, historical contexts and, as Markell would say, our own finitude. Valentine illuminates how any question of identity is necessarily a question of justice if we move beyond the recognition paradigm and toward a notion of interdependence.

It is precisely this interdependence that the North Carolina legislators' reliance on the "infected" rhetorics of discrimination and inclusion obscured. While anti-discrimination and inclusion appear to be rallying calls for justice and ethical treatment of the other, when these rhetorics are used to foreclose consideration of particular circumstances and to insulate those proclaiming them from responsibility, they actually impede justice. The rhetoric of inclusion, absent a rigorous investigation of what that might *actually* entail, submerges the ethical and lets us off the hook.

[331] Valentine, *Imagining Transgender*, 246.

Doing Justice to the Law through Rhetoric

Ultimately, what my analyses of these various articulations of transgender anti-discrimination law reveal is that anti-discrimination law is not necessarily the conservative force that critics claim it is. My rhetorical analyses have demonstrated that anti-discrimination law *can* serve to draw our attention to the structural roots of discrimination and, in so doing, can gesture toward our ethical responsibilities to each other. But it can only do with when we approach law outside a simple recognition paradigm and when we acknowledge law's inherent frailties. A rhetorical sensitivity that understands law as an interlocutor rather than a frame can be responsive to how law, like its subjects, its prone to anxiety over its lack of sovereignty and its inability to grant the recognition that is demanded of it.

This is not to argue that law is impotent but that its abilities, particularly its ability to project and protect certainty, are limited. Law can acknowledge injustice, but it cannot completely remedy it. Law can identify discrimination, but it cannot eliminate it. And law might be most powerful, most useful in pursuing justice, precisely when it betrays its own limited capacities in this regard. A rhetorical approach to law can help us to understand law not as a resolution, but as an ethical opening. That is, law's inability to grant the recognition that is demanded of it, it's inability to secure justice can be understood as provocations, those ethical hauntings and in-betweens. Law's fragility can highlight our own ethical responsibilities and shortcomings.

Of course, such a sensitivity runs counter to the certainty we (often) hope law will provide. We expect law to project and protect certainty. We pretend as if law already had the answers, abdicating our responsibility. Law's order is supposed to insulate us but in these moments when law cracks, that's when ethics (and politics) begins

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