

William & Mary Journal of Race, Gender, and Social Justice

Volume 7 (2000-2001)

Issue 1 *William & Mary Journal of Women and the Law: Symposium: (De)Constructing Sex: Transgenderism, Intersexuality, Gender Identity and the Law*

Article 3

October 2000

Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights

Jennifer Levi

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Civil Rights and Discrimination Commons](#)

Repository Citation

Jennifer Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 Wm. & Mary J. Women & L. 5 (2000), <https://scholarship.law.wm.edu/wmjowl/vol7/iss1/3>

Copyright c 2000 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

PAVING THE ROAD:* A CHARLES HAMILTON HOUSTON APPROACH TO SECURING TRANS RIGHTS

JENNIFER L. LEVI**

I. INTRODUCTION¹

Securing the rights of transgender people² requires a comprehensive and long-term litigation strategy. As other commentators³ have explained, most courts that have addressed discrimination claims brought by transgender people have excluded us from the legal protections of the laws.⁴ The

* The title of this Article derives from the incisive documentary, *THE ROAD TO BROWN*, (California Newsreel 1989), which details the life and work of Charles Hamilton Houston.

** Jennifer Levi is a Staff Attorney at Gay & Lesbian Advocates & Defenders (GLAD), a public-interest legal organization working throughout New England for equality and justice for gay, lesbian, bisexual, transgender people and people with HIV/AIDS.

1. I owe a big debt of gratitude to Fatma Marouf, who provided extensive research and significant written contributions to this piece. Many thanks as well to the following people who talked to me at great length about the ideas contained in this Article, as well as legal issues relating to this topic: Paisley Currah, Susan Donnelly, Martha Ertman, Stephanie Gaynor, Shannon Minter and Liz Seaton.

2. This Article presumes that transgender people—people who do not conform to stereotypes of masculinity or femininity—should have the same rights to housing, credit, public accommodations, health care and equal treatment in employment that non-transgender people have. This right to equal treatment is what is meant in this Article by references to “trans rights.”

This Article takes a broad view of who transgender people are. By using broad nomenclature, trans rights are meant to include the rights of all gender nonconforming people (which may include pre- and post-operative transsexual people, feminine men and masculine women, as well as those people who are intersexed). For more comprehensive discussions of who may be categorized as transgender, see Mary Coombs, *Characteristics of Transgenderism*, 8 UCLA WOMEN'S L.J. 219, 237-42 (1998); Kristine W. Holt, Comment, *Reevaluating Holloway: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 319 n.3 (1997); see also MARTINE ROTHBLATT, *THE APARTHEID OF SEX* 16-19 (1995); Debbie Mitchell, *Defining Transvestism*, 70 TAPESTRY J. 35, 35-36 (1995).

3. See generally, Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. WOMEN & L. 37 (2000) (analyzing statutes and ordinances that purport to protect transgender people); Symposium, *Queer Law 1999: Current Issues In Lesbian, Gay, Bisexual and Transgender Law*, 27 FORDHAM URB. L.J. 279 (1999) (compiling articles and commentary).

4. The faulty reasoning in cases excluding transgender people from protections under sex discrimination laws suggests judges were motivated more by bias than legal reasoning. *E.g.*, *Ulane v. E. Airlines, Inc.* 742 F.2d 1081, 1085 (7th Cir. 1984) (carefully distinguishing among transsexuals, transvestites and homosexuals, but then lumping together transsexuals and homosexuals for the purpose of statutory construction). For a

Orwellian rhetoric⁵ in those cases suggests that it is bias and bigotry, rather than logic, that determined their outcomes. Because prejudice against trans people is extraordinarily ingrained and pervasive,⁶ there needs to be a long-term litigation strategy (rather than an immediate full frontal⁷ attack) to reverse the trend of earlier negative decisions and to build on recent precedent that establishes trans rights.⁸ In addition to creating the building blocks necessary to overturn earlier bad cases, a long-term strategy would provide the time necessary for political activists to continue to move forward, laying the groundwork through coordinated educational⁹ and legislative strategies.¹⁰ This work that has already begun in earnest is

detailed discussion of the problems of statutory construction, see Susan E. Keller, *Operations of Legal Rhetoric: Examining Transsexual and Judicial Identity*, 34 HARV. C.R.-C.L. L. REV. 329, 375-77 (1999).

In the earlier case of *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977), the court narrowly framed the issue as "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation." *Id.* at 661 (emphasis added). In reality, the issue raised by the case included pre- and post-operative transsexual employees alike.

5. See discussion and source cited *infra* note 133. The Ninth Circuit found a meaningful distinction between sex and "change of sex," which rendered discrimination because of the former, but not the latter, actionable under Title VII.

6. The National Coalition of Anti-Violence Programs Annual Report on Anti-Lesbian, Gay, Bisexual, and Transgender (LGBT) Violence reported that although anti-transgender violence accounted for only about two to four percent of incidents between 1995 and 1999, those incidents accounted for approximately twenty percent of all reported anti-LGBT murders, and approximately forty percent of total incidents of police-initiated violence. See *Sticks and Stones: The Nexus Between Hate Speech and Violence*, 27 FORDHAM URB. L.J. 283, 391-96 (1999). Despite these figures, the Hate Crime Prevention Act of 1999, S. 622, 106th Cong. (1999), H.R. 1082, 106th Cong. (1999), which would have amended 18 U.S.C. § 245 to include gender, was defeated. *Id.*

7. The use of the term "full frontal" (as in full frontal attack), including its graphic association with anatomy, is intentional. The power (and shock) of a full frontal is highlighted by recent movies like *THE CRYING GAME* (Miramax, 1992) and *THE FULL MONTY* (Fox, 1997). As the protagonists in these films understood, a full frontal view typically evokes a strong response. Getting the desired response, however, as the protagonists learned, often requires doing significant work to create the right context or set the stage for the full frontal. This Article argues that selecting the right time for a full frontal attack and taking the time and opportunities to do the educational work in the courts, as well as the culture, is critical to paving the road to trans rights.

8. See *infra* part IV.A.

9. Trans advocacy has begun in earnest with the establishment of several national advocacy groups dedicated to creating awareness of trans people and our concerns. Examples include It's Time America, Gender Public Advocacy Coalition and National Transgender Advocacy Coalition. The work of these groups includes educating individuals about the need to include trans people in non-discrimination laws.

10. For example, Minnesota enacted an anti-discrimination law in 1993 that expressly protects transgender and gender variant people in employment, housing and

critical to achieving the long term goals articulated in this Article.

The long, hard struggle to end segregation laws and practices in this country offers an analogous context from which trans civil rights activists can draw some guidance. Today, nearly¹¹ no one would argue that the principle of “separate but equal,” articulated in *Plessy v. Ferguson*,¹² was anything other than a specious attempt to use seemingly principled legal analysis to maintain white supremacy.¹³ Nevertheless, the Supreme Court waited nearly sixty years before overturning the

public accommodations. . Minnesota’s law also provides enhanced penalties for hate crimes committed against these groups. See PAISLEY CURRAH & SHANNON MINTER, POLICY INST. OF THE NAT’L GAY & LESBIAN TASK FORCE & NAT’L CTR. FOR LESBIAN RIGHTS, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 17, 67-68 (2000), available at <http://www.nglrf.org/library/index.cfm>. California amended its state hate crimes statute to include transgender and gender variant people in 1998 and Vermont and Missouri adopted similar measures in 1999. *Id.* In 2000, bills that would create state-wide non-discrimination laws for trans people were introduced in California, Hawaii, Illinois, Maine and Vermont. *Id.* On November 9, 2000, the Connecticut Commission on Human Rights and Opportunities issued a declaratory ruling that transgender people are covered by the state’s law prohibiting sex discrimination. See Declaratory Ruling on Behalf of John/Jane Doe (Conn. Comm’n Human Rights & Opportunities Nov. 9, 2000), at <http://www.state.ct.us/chro/metapages/hearingoffice/declaratoryrulings/DRDoe.htm> (Nov. 9, 2000) [hereinafter Declaratory Ruling]; see also *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 99 (D.D.C. 1994) (finding that the termination of a post-operative transsexual person for “retaining some masculine traits” violated the District of Columbia Human Rights Act that specifically prohibits discrimination due to appearance); *City of Chicago, v. Wilson*, 389 N.E.2d 522, 525 (Ill. 1978) (holding unconstitutional, as applied to transgender defendants, a Chicago ordinance that fined persons appearing in public “in a dress not belonging to his or her sex, with intent to conceal his or her sex”); *Doe v. McConn*, 489 F. Supp. 76, 79-80 (S.D. Tex. 1980) (holding a Houston ordinance that made it unlawful for any person to appear in public dressed with intent to disguise his/her true sex as that of the opposite sex unconstitutional as applied to individuals undergoing psychiatric therapy in preparation for sex-reassignment surgery). For a summary of ordinances protecting transgenders across the country, see Currah & Minter, *supra* note 3, at app.

11. The modifier “nearly” is used here only to note the persistence of racist voices that would turn back the clock on critical legal victories of the Twentieth Century that chipped away at the stranglehold of racism in this country. See Kim Murphy, *Jury Verdict Could Bankrupt Aryans*, L.A. TIMES, Sept. 8, 2000, at A1; Sean Scully, *Southern Party Ready to “Ride with Forrest,”* WASH. TIMES, July 3, 2000, at A1.

12. 163 U.S. 537 (1896), overruled by *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954).

13. Though there is nearly no remaining controversy regarding the sophistry behind the reasoning of *Plessy*, recalling the Court’s reasoning helps spotlight the bigotry behind the outcome. The Court wrote that “the underlying fallacy” of plaintiffs’ challenge to segregated conditions was “the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.” *Id.* at 551.

constitutional principle of "separate but equal" in *Brown v. Board of Education*.¹⁴

The sequence of legal events leading to *Brown* was not coincidental or happenstance. To the contrary, it was the result of an extraordinarily thoughtful and intricate strategy devised and implemented by the brilliant, idealistic and pragmatic Charles Hamilton Houston.¹⁵ This Article looks to those plans drawn up by the architect of the modern Civil Rights movement as the inspiration for a trans rights litigation strategy.

After briefly detailing the life of Charles Hamilton Houston, Section II focuses on the legal strategy he designed and carried out to overturn *Plessy*. It continues by drawing some conclusions about what Houston's plan teaches about the struggle for trans rights and a trans litigation strategy. Section III examines the reasons certain cases that challenge assumptions about sex and gender, such as those brought in the employment context that raise the specter of "men in dresses," as well as those that raise questions about who gets to use what bathroom, may not be ideal initial cases to pursue. This Article argues that avoiding such cases early on in the struggle for trans rights in favor of other, less emotionally charged ones, would be most effective in creating trans-positive law. This incremental approach, while far from ideal, would allow time to do the important work of educating society about the incorrect assumptions upon which sex stereotypes are based and the harm that results therefrom. Section IV details some of the construction materials that are already in place upon which to build a strategy based on Houston's model. Finally, Section V describes a recent case brought on behalf of a transgender person that fits into the strategy described here and explores how that case may provide the next step in this Charles Hamilton Houston model of pursuing trans rights through impact litigation.

II. CHARLES HAMILTON HOUSTON—PROVIDING A PLAN

Surely a visionary, Charles Hamilton Houston was the primary architect of the legal strategy for overturning the principle of "separate but equal" established in *Plessy*. Sadly, he

14. 347 U.S. at 494-95; see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status—Enforcing State Action*, 49 STAN. L. REV. 1111, 1127-29 (1997).

15. RICHARD KLUGER, *SIMPLE JUSTICE* 106 (1976); GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* 4, 134 (1983).

died four years before the culmination of his life's work. It is his patience and long-term view that provide inspiration and legal strategies for others involved in other civil rights struggles. Other authors have chronicled his life's work and penned worthy tributes to his opus.¹⁶ This Article does not purport to be a biography of Houston, nor can it do justice to the depth and breadth of his work. Rather, it hopes to draw some guidance from his life, highlighting some of his thoughts and strategies in the process.

Houston was born in 1895,¹⁷ one year before the Supreme Court's decision in *Plessy v. Ferguson*. Educated at Harvard Law School, he was considered to be "one of the brightest men on campus."¹⁸ After graduating from Harvard, having served on the editorial board of its law review, he spent a period of time traveling and studying abroad, practicing in a private firm, teaching law and serving as the dean of Howard University's law school. He was the "central figure in Howard's efforts to gain accreditation,"¹⁹ thus legitimating the legal education of African-Americans and building the basis for educating an army of lawyers to carry out the civil rights litigation plan he was in the process of designing.²⁰

In 1935, Houston took a crucial step in implementing this plan, leaving Howard University Law School so he could serve as Special Counsel to the National Association for the Advancement of Colored People (NAACP). Although he was initially reluctant to accept the position with the NAACP, he eventually did so "on the condition that the program of litigation be conducted as a protracted legal struggle based on . . . cases.' He opposed an immediate frontal attack on the 'separate but equal' doctrine, favoring a more methodical approach at the state and federal levels."²¹ He defended his approach on the grounds that it would: (1) "lay the groundwork for the test cases that would ultimately come before the United States Supreme Court"²² and serve as the foundation for overturning *Plessy*, (2) provide the

16. E.g., KLUGER, *supra* note 15, at 105-280; MCNEIL, *supra* note 15; J. Clay Smith, Jr., *Forgotten Hero*, 98 HARV. L. REV. 482 (1984) (reviewing GENNA RAE MCNEIL, *GROUNDWORK: CHARLES HAMILTON HOUSTON AND THE STRUGGLE FOR CIVIL RIGHTS* (1983)).

17. MCNEIL, *supra* note 15, at 24; Smith, *supra* note 16, at 483.

18. See MCNEIL, *supra* note 15, at 51 (quoting Interview with R.P. Alexander (Sept. 18, 1972)).

19. See Smith, *supra* note 16, at 486.

20. *Id.*

21. *Id.* at 488 (quoting MCNEIL, *supra* note 15, at 134).

22. *Id.*

time necessary to engage in broadscale educational efforts to change minds in the "court of public opinion,"²³ and (3) "[a]llow Houston time to develop competent Black lawyers to 'wage the fight that no white men could be expected to sustain.'"²⁴

One of the key pieces to the foundation Houston laid was the choice not to wage an immediate and direct attack on "separate but equal," but rather to target cases in which related issues²⁵ would be decided, destabilizing the foundations of *Plessy* in a piecemeal fashion.²⁶ Houston's plan worked, in part, because he focused on areas in which whites were most vulnerable to attack and least likely to respond emotionally.²⁷ For example, Houston chose to focus his efforts first on desegregating graduate and professional schools, only later moving to secondary and eventually primary education, which stirred stronger racist emotions.²⁸ When Houston did shift his focus to elementary education, he started outside of the classroom. For example, Houston sought to equalize the transportation available to black and white school children during a time when white children were bused to school if they lived far away but black schoolchildren had to walk regardless of the distance.²⁹ Although many moderate whites would not express anger at the idea of providing additional facilities to black school children, they might be more easily angered at the notion of providing for blacks when they perceived these provisions as detracting from whites.³⁰

23. In an article published in the official NAACP magazine, Houston wrote, "Law suits mean little unless supported by public opinion." MCNEIL, *supra* note 15, at 139 (quoting Charles Hamilton Houston, *Don't Shout Too Soon*, CRISIS 43, Mar., 1936, at 79).

24. KLUGER, *supra* note 15, at 136 (citation omitted).

25. For example, Houston proposed initially targeting school systems that were separate but clearly unequal. *E.g.*, *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938). To make the point even clearer, Houston began targeting educational facilities in states that provided no graduate professional programs for blacks, much less separate ones. *E.g.*, *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936) (holding that a black applicant meeting the University of Maryland law school's requirements for admission was entitled to a writ of mandamus compelling his admission).

26. MCNEIL, *supra* note 15, at 134.

27. KLUGER, *supra* note 15, at 136.

28. MCNEIL, *supra* note 15, at 135.

29. Earlier cases upheld segregated school programs even though their existence forced black schoolchildren to walk farther than their white counterparts. *E.g.*, *Dameron v. Bayless*, 126 P. 273, 274-75 (Ariz. 1912) (holding that distance, inconvenience and the existence of railroad tracks on the route to school were irrelevant to the issue of equality of schools). Houston saw challenges to school transportation as a way to create a bulwark in elementary education long before he thought the time was right for a direct challenge to segregation in elementary education. MCNEIL, *supra* note 15, at 137.

30. Houston pointed to two other reasons for focusing on transportation: First, the consolidation of rural schools depended on getting children to school at a reasonable

Only a step-by-step process could generate the long-term effects that Houston desired. Houston recognized that the "[l]aw [is] . . . effective . . . always within its limitations,"³¹ and it would be "too much to expect the court to go against the established and crystallized social customs."³² White people strongly supported segregation, relying largely on essentialist notions about differences between whites and blacks.³³ Such notions about the racial differences and moral inferiority of some races are today largely rejected, but still firmly held with regard to sex.³⁴ At the time of Houston's work, many whites still subscribed to the nineteenth century idea that blacks were inherently intellectually and morally inferior and could weaken the white race just by interracial association. Those whites who were more "progressive" feared interracial marriage and the attendant fears of amalgamation or marginalization of the white race.³⁵ One Southern school principal expressed his support for segregation by suggesting that African-Americans were not as fully human as whites: "[Black children] are like little animals. There is no civilization in their homes. They shouldn't hold up white children who have had these things for centuries. They are not as clean. . . . Why should we contaminate our race?"³⁶ This reasoning was hardly isolated. Even in the North, the number of segregated schools increased dramatically between 1910 and 1940, especially at the elementary school level.³⁷

time; and second, plodding to school did psychological damage by creating an "inferiority complex." MCNEIL, *supra* note 15, 137.

31. *Id.* at 134 (quoting Charles Hamilton Houston & Leon Ransom, *The George Crawford Case: An Experiment in Social Statesmanship*, NATION, July 4, 1934, at 18).

32. *Id.* at 135 (quoting Charles Hamilton Houston, "Proposed Legal Attacks on Education Discrimination," 8, C429, NAACP Records (on file with author)).

33. Herbert Hovenkamp, *Social Science and Segregation Before Brown*, 1985 DUKE L.J. 624, 637-42.

34. See *Ashlie v. Chester-Upland Sch. Dist.*, No. CIV.A.78-4037, 1979 U.S. Dist. LEXIS 12516, at **14-15 (E.D. Pa. May 9, 1979) (analogizing a transsexual individual's right of privacy to that of an individual who sought to be surgically changed into a donkey); *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) ("There are some things we cannot will into being. They just are.").

35. STEVEN J. GOULD, *THE MISMEASURE OF MAN* 105-73 (1981) (discussing and criticizing nineteenth century studies on race).

36. Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. REV. 677, 711-12 (1997) (quoting CHARLES S. JOHNSON, *PATTERNS OF NEGRO SEGREGATION* 198 (1943)).

37. *Id.* at 705-10 (discussing the increase in segregation of primary schools in New Jersey, Ohio and Illinois between 1910 and 1940). Segregation took the form of "separate schools, separate buildings on the same plot of land, and separate classrooms within the same building." *Id.* at 709.

Even courts that understood the inequity of racial segregation as a basic social construct, as well as "neutral" judges, often minimized glaring discrepancies between white and black schools when analyzing "equality" under the "separate but equal" doctrine.³⁸ One article published in the 1954 *Harvard Law Review* openly recognized that decisions "inevitably result[ed], at least in part, from subjective influences which have little to do with the law or the bare facts in the record."³⁹ Perhaps the most powerful influence was the essentialist idea that "[t]he separation of the human family into races . . . is as certain as anything in nature."⁴⁰ Instead of analyzing the complex distinctions between substantial and insubstantial equality, judges invoked comfortable, clear categories that most whites seemed to accept.

Just as white people feared interracial mixing because it could lead to miscegenation, a disruption of the "natural" state of belonging definitively to one race or another,⁴¹ transgender people seem to unsettle what sociologists term the "natural attitude," the assumption "that every human being is either a male or a female."⁴² For those who subscribe to this view of binary sexes as natural, transgender people are extraordinarily threatening because we "call into question the idea that [existing] gender categories are discrete, mutually exclusive, and stable."⁴³ This fear of destabilization of gender categories seems to lead courts to act in irrational ways. For example, in *Littleton v. Prange*,⁴⁴ a Texas appeals court refused to recognize a transsexual woman as legally female despite the fact that she underwent sex-reassignment surgery and legally changed her birth certificate.⁴⁵ The court's primary justification for refusing to recognize Christie Lee Littleton's medical and legal status

38. Robert A. Leflar & Wylie H. Davis, *Segregation in the Public Schools—1953*, 67 HARV. L. REV. 377, 399 (1954).

39. *Id.* at 394.

40. *Berea Coll. v. Commonwealth*, 94 S.W. 623, 626 (Ky. 1906), *aff'd*, 211 U.S. 45 (1908) (upholding a law prohibiting racially integrated education in Kentucky). For a more extensive discussion of this case, see Hovenkamp, *supra* note 33, at 630-31.

41. The Kentucky court stated that "from social amalgamation it is but a step to illicit intercourse, and but another to intermarriage." *Berea*, 94 S.W. at 628.

42. SUZANNE KESSLER & WENDY MCKENNA, *GENDER: AN ETHNOMETHODOLOGICAL APPROACH* 1 (1978).

43. Adrienne Hiegel, Note, *Sexual Exclusions: The Americans with Disabilities Act as a Moral Code*, 94 COLUM. L. REV. 1451, 1483 (1994).

44. 9 S.W.3d 223 (Tex. App. 1999).

45. *Id.* at 231; see also *In re Estate of Gardiner*, Estate No. 9908 PE 00119, slip op. at 7-9 (Dist. Ct. Kan. Jan. 21, 2000) (using language from *Littleton* verbatim in granting summary judgment against the surviving transsexual spouse in a probate action).

sounds very much like a dictatorial parent who refuses to explain a decision by pulling rank, saying "because I say so." The *Littleton* court ignored medical and legal evidence and concluded that Littleton is male by saying tersely that some things "just are."⁴⁶ This court's irrational, knee-jerk analysis demonstrates the need for a long-term strategy to secure trans rights, one that accounts for social, as well as legal impediments to trans rights, just as Houston's did. The strategy proposed here, which sketches out guidelines for cases to litigate, analogizes gender binarists⁴⁷ to the racist opponents Houston faced.

III. EARLY CASES TO AVOID TRAVELLING ON THE ROAD AHEAD

Viewing the road ahead to securing trans civil rights through the Houston lens counsels in favor of crafting an analogous long-term litigation strategy. Identifying cases in which gender binarists are both most vulnerable and least likely to react out of anger or other emotions is key to any long-term strategy to secure rights for transgender people. Like Houston's, this approach requires a concurrent, aggressive cultural education component focused on exposing the myths of sex stereotypes and highlighting the damage they do.

Generally speaking, gender binarists seem most threatened, angriest, and irrationally emotional⁴⁸ when faced with cases in

46. *Littleton*, 9 S.W.3d at 231.

47. For lack of better term, I use "gender binarists" to refer to people who cling tightly to a binary division of the sexes. That is, people who believe one is born either a woman or a man and that there is neither fluidity nor permeability to those categories. Further, most gender binarists think that the categories of male and female are discrete, having no points of overlap. The fiercest of gender binarists would support the outcome in *Littleton*, see *supra* note 34 and accompanying text, where a Texas appeals court determined that despite both legal and medical evidence to the contrary, Christie Lee Littleton was a man because the doctors had ascribed to her that sex category at her birth. Other gender binarists may be more "moderate" in their beliefs. For example, I would still ascribe the term gender binarist to those who "do not view the recognition of different dress norms for males and females to be offensive or illegal stereotyping," even though they may object to a particular justification for a given dress code. *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1033 n.17 (7th Cir. 1979) (striking down dress code based on the premise that "women cannot be expected to exercise good judgment in choosing business apparel, whereas men can").

48. Cases involving transgender school teachers have yielded negative precedent that relies upon the style of rhetoric used by nineteenth century white separatists. *Grossman v. Bernards Township Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *2 (D.N.J. Sept. 10, 1975) (holding that by changing sex, Grossman "underwent a fundamental and complete change in [her] role and identification to society, thereby rendering [herself] incapable to teach children . . . because of the potential her presence in the classroom presents for psychological harm to the students"); see also *Ashlie v. Chester-Upland Sch. Dist.*, No. CIV.A.78-4037, 1979 U.S. Dist. LEXIS 12516, at *8 (E.D.

two categories: (1) any claim involving a bathroom and (2) those raising the specter of "men in dresses" in the workplace.⁴⁹ It is the motivating forces behind these fears on which the next sections focus.

A. *About the Bathrooms*

The separation of men's and women's bathrooms is a well-established cultural practice, and indeed, one mandated by law in some jurisdictions.⁵⁰ The specter of unisex bathrooms apparently strikes fear in the heart of many Americans. In fact, the threat of mandatory unisex bathrooms was an argument used to defeat the Equal Rights Amendment in the late 1970s.⁵¹ Even when the person who uses the "wrong" rest room is not transgender, violating "urinary segregation"⁵² can provoke hysterical reactions.⁵³ The situation may, however, be far worse for a transgender person whose idea of the "right" rest room differs from that of his/her co-workers and employer.

Pa. May 9, 1979) (analogizing a transsexual teacher to an animal: "It might just as easily be argued that the right of privacy protects a person's decision to be surgically transformed into a donkey."). The *Ashlie* court heard extensive expert testimony as to the "grave, psychological effects" that a transsexual school teacher would have on students. *Id.* Keller argues that the *Ashlie* court worried that a male role model who became a female role model might influence the sexual orientation of teenage boys. See Keller, *supra* note 4, at 378. Keller's argument is even more powerful when one takes into account Craig Lind's assertion that "[t]he legal regulation of childhood sexuality is . . . the sphere in which the passion for the promotion of heterosexuality is most striking." Craig Lind, *Law, Childhood Innocence and Sexuality*, in *LEGAL QUEERIES* 81, 84 (Leslie J. Moran et al. eds., 1998). Lind points out that while people fear that "[u]nrestrained sexual tolerance may produce divergent sexualities on a much larger scale," social historians have shown that queer identities emerged when formal tolerance was very low. *Id.* at 90. This irrational fear of transgender people teaching school was most recently seen in the case of Dana Rivers, a popular and award-winning California schoolteacher. Rivers was fired after she notified her principal that she intended to undergo sex-reassignment surgery. See Eric Bailey, *Teacher Quits in Settlement of Sex-Change Furor*, L.A. TIMES, Nov. 16, 1999, at A3.

49. See CURRAH & MINTER, *supra* note 10, at 57-60.

50. See, e.g., MASS. GEN. LAWS ANN. ch. 149, § 133 (West 1996).

51. GINETTE CASTRO, *AMERICAN FEMINISM: A CONTEMPORARY HISTORY* 208 (Elizabeth Loverde-Bagwel trans., 1990).

52. MARJORIE GARBER, *VESTED INTERESTS: CROSSDRESSING AND CULTURAL ANXIETY* 47-48 (1992) (questioning Jacques Lacan, *The Agency of the Letter in the Unconscious*, in *ECRITS: A SELECTION* 151 (Alan Sheridan trans., Norton) (1977)).

53. The city of Houston, for example, spent \$10,000 prosecuting a woman who used the men's room at a concert because the line for the women's room was too long. *Woman Is Acquitted in Trial for Using the Men's Room*, N.Y. TIMES, Nov. 3, 1990, at A8.

In several reported cases, employers instructed pre-operative male-to-female transgender individuals not to use the women's bathroom.⁵⁴ This situation escalated into a written disciplinary warning in *Doe v. Boeing, Co.*⁵⁵ after several co-workers complained.⁵⁶ Similarly, in *Sommers v. Budget Marketing, Inc.*,⁵⁷ "a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel."⁵⁸ The court upheld Budget's dismissal of Sommers for "misrepresenting" herself as female and causing "a disruption of the company's work routine."⁵⁹ The disruption, however, goes both ways. In *Holloway v. Arthur Anderson Co.*,⁶⁰ co-workers found Holloway's use of the men's room while she was transitioning "very disruptive and embarrassing to all concerned."⁶¹ Although Holloway was anatomically male, she caused "disruption" in the men's room because her appearance was feminine. Thus, for a transgender person, awkward situations can arise *regardless* of which bathroom is used. Although sex segregation of bathrooms has been distinguished from racial segregation of bathrooms on the basis that sex segregation is not degrading,⁶² transgender people *are* degraded if segregation effectively prevents them

54. *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982); *Dobre v. Nat'l R.R. Passenger Corp. (AMTRACK)*, 850 F. Supp 284, 286 (E.D. Pa. 1993); *Doe v. Boeing, Co.*, 846 P.2d 531, 536 (Wash. 1993).

55. 846 P.2d 531, 536 (Wash. 1993).

56. *Id.* at 533.

57. 667 F.2d 748, 749 (8th Cir. 1982).

58. *Id.* at 748-49.

59. *Id.*

60. 566 F.2d 659 (9th Cir. 1977).

61. *Id.* at 661 n.1 (quoting affidavit describing "personal problems" created by Holloway's transitioning appearance).

62. RICHARD A. WASSERSTROM, PHILOSOPHY AND SOCIAL ISSUES: FIVE STUDIES 20-21 (1980); see also Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1, 4 (1998).

The purpose of segregating bathrooms [by race] was not simply to keep whites and blacks apart, but to keep blacks from defiling the bathrooms used by whites; it was . . . instituted by whites without any consideration of the needs and desires of blacks. The situation appears to be different, though, with the sexual segregation of bathrooms; here the arrangement seems as much desired by women as by men, and there is no presumption that members of one sex can defile members of the other by using the same toilets.

Id. This kind of analysis reinforces the notion that the essentialist's perceptions of sex are so deeply rooted that they support the conclusion that recognizing these "differences" has neither negative consequences nor reflects bias.

from using *either* the women's room *or* the men's room⁶³ or forces them to leave the workplace to use their bathroom of choice.⁶⁴

Why does boundary crossing in bathrooms generate so much anxiety? Two common explanations for sex-segregated bathrooms are privacy and safety. Neither of these reasons are immune to attack. Enclosed stalls with locks would provide sufficient privacy; urinals may be placed in such stalls or eliminated.⁶⁵ The objection that a mixed bathroom jeopardizes security has been compared to homophobic myths about the problems gays cause in the military.⁶⁶ Furthermore, the argument that single-sex bathrooms reinforce that "same sense of mystery or forbiddenness about the other sex's sexuality which is fostered by the general prohibition upon public nudity and the unashamed viewing of genitalia"⁶⁷ presumes heterosexuality and compares bathroom use to much more explicit sexual activities.

There are at least three possible solutions to the bathroom problem. Perhaps the best solution would be the one used in places of public accommodations, including airplanes and a growing number of restaurants, eliminating sex segregated bathrooms altogether and replacing them with unisex facilities.⁶⁸ A second solution (that creates problems of its own) is the creation of a third bathroom labeled "other."⁶⁹ Finally, a feasible and short-term legal solution would be to prevent employers

63. See PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 122-23 (1991) (discussing a transsexual law student who was not allowed to use either the male or female bathroom by fellow students after sex change reassignment surgery).

64. See *Doe v. Boeing Co.*, 846 P.2d 531, 533 n.2 (Wash. 1993). After Boeing warned Doe not to use the women's room at work, "Doe limited her use of rest rooms to offsite women's rest rooms at lunchtime." *Id.*

65. MARTINE ROTHBLATT, *THE APARTHEID OF SEX: A MANIFESTO ON THE FREEDOM OF GENDER* 91-95 (1995).

66. CURRAH & MINTER, *supra* note 10, at 58-59 (arguing that the "bathroom debate" and gays in the military are both based upon false notions of behavior); see also ROTHBLATT, *supra* note 65, at 92-95 (arguing that single-sex bathrooms are actually *less* safe than unisex bathrooms because an attacker knows that only members of the "victim" sex will be inside).

67. WASSERSTROM, *supra* note 62, at 20-21.

68. See ROTHBLATT, *supra* note 65, at 95. Rothblatt advocates ending "sexual apartheid [by] pass[ing] laws that mandate secure, reasonably clean, unisex restrooms for all." *Id.*

69. Terry Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other,"* 48 HASTINGS L.J. 1223, 1252-55 (1997). Kogan argues that Rothblatt's call for *only* unisex bathrooms "do[es] not respect the choices of MTF [male to female] transsexuals who want to use the female restroom as an important component of the gender identity they have assumed for themselves." *Id.* at 1250.

from dictating which of the two bathrooms employees must use.⁷⁰

Unfortunately, courts remain adverse even to the feasible short-term legal goal proposed herein. *Boeing* demonstrates that “urinary segregation” categorizes people perhaps even more rigidly than clothing.⁷¹ Although Boeing’s dress code incorporated a flexible category of “unisex clothing,” which included “nylon stockings, earrings, lipstick, foundation, and clear nail polish,”⁷² Boeing restricted Doe’s use of the restroom to her genitally ascribed sex.⁷³ The court in *Boeing* refused even to engage in a discussion of bathrooms. The court maintained, “[t]he issue of rest room use does not alter our analysis since neither party contends this was a basis for her discharge.”⁷⁴ The disingenuousness of this conclusion is highlighted by the court’s other conclusion that Doe’s attire was “deemed unacceptable when, in the supervisor’s opinion, *her dress would be likely to cause a complaint were Doe to use a men’s rest room.*”⁷⁵ The court in *Sommers v. Budget Marketing, Inc.*⁷⁶ similarly dismissed the idea of permitting people to use bathrooms that did not correspond to their anatomical sex, arguing that such a decision would create “limitless” problems.⁷⁷

Disability laws mandating accessible toilets certainly have loosened our society’s rigid notions of what public facilities should be made available to individuals.⁷⁸ Nevertheless, it may

70. A recently enacted ordinance, No. 7040, in Boulder, Colorado, which amends the city’s laws to protect transgender people, permits transitioned transsexual people to use the locker room and showers appropriate to their sex and states that transitioning transsexual people will be granted “reasonable accommodation” in accessing locker rooms and showers. CURRAH & MINTER, *supra* note 10, at 43-44. Unfortunately, the bill defines “transitioned transsexual” as “a person who has completed genital reassignment surgery,” which may exclude most female-to-male transsexuals. *Id.* Furthermore, the ordinance exempts people under age twenty-five from housing provisions. *Id.*

71. GARBER, *supra* note 52, at 47-48.

72. Doe v. Boeing, Co., 846 P.2d 531, 533 (Wash. 1993).

73. *Id.*

74. *Id.* at 533 n.2.

75. *Id.* at 534 (emphasis added).

76. 667 F.2d 748 (8th Cir. 1982).

77. *Id.* at 749.

78. Although much progress has been made on the bathroom front, there is a long way to go. Urinary segregation continues to keep even non-transgender women from equal treatment and job advancement opportunities. See, e.g., DeClue v. Cent. Ill. Light Co., 223 F.3d 434, 436 (7th Cir. 2000) (finding that a female employee required to use the woods as a bathroom facility, just as male co-workers did, could not bring a Title VII claim despite the risks the accommodations posed to her privacy). Although all three judges on the panel agreed that denying a female employee a restroom facility may constitute impermissible discrimination under Title VII as a matter of disparate impact, only Judge Rovner, dissenting, recognized that it may also give rise to an actionable

take some time before society understands that in pursuing equal access of transgender people to public accommodations, no one is looking to have "men in dresses' invading women's bathrooms."⁷⁹ As the next section explains, courts unfortunately demonstrate the same emotional, irrational response to bathroom cases that they showed in dress code cases. As a result, these emotional issues continue to constrain judges from issuing principled, legal decisions, a weakness that harms trans people, civil rights law generally, and the legitimacy of the legal system as a whole.

B. Who Cares if Men Wear Dresses?

Americans' irrational fear of unisex bathrooms is apparently rivaled in magnitude and scope only by our fear of men wearing dresses in the workplace. Although it is well settled that employees should not be penalized for conduct⁸⁰ and appearance outside of the workplace, there is unanimity that employers may enforce dress and appearance requirements at work.⁸¹ Such dress codes may, at the very least, require employees to adhere to professional and socially acceptable "personal appearance, grooming, and hygiene standards."⁸² In fact, the majority of jurisdictions allow employers to enforce even sex-specific dress codes,⁸³ as long as such codes do not reinforce negative sex stereotypes⁸⁴ or apply differently to men and women without any

hostile environment claim. *Id.* at 440 (Rovner, J., dissenting); see also *Kline v. City of Kansas City Fire Dep't*, 175 F.3d 660, 668 (8th Cir. 1999) (reversing exclusion of evidence of unequal bathroom facilities as support for a hostile environment claim brought by female firefighters).

79. CURRAH & MINTER, *supra* note 10, at 58.

80. See, e.g., N.H. REV STAT. ANN. § 275:37a (1999) (prohibiting discrimination in employment for tobacco use outside the workplace); N.Y. LAB. LAW § 201 (Consol. Supp. Feb. 2000) (prohibiting discrimination in employment decisions on basis of lawful recreation activities pursued by employee outside work hours).

81. Marc A. Koonin, *Avoiding Claims of Discrimination Based on Personal Appearance, Grooming and Hygiene Standards*, 15 LAB. LAW. 19, 20 (1999).

82. *Id.*

83. See *Fountain v. Safeway Stores, Inc.*, 555 F.2d 753, 756 (9th Cir. 1977) (holding requirement that a male employee wear a tie is not sex discrimination for purposes of Title VII); *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091-92 (5th Cir. 1975) (upholding sex-specific hair length requirement).

84. See, e.g., *Carroll v. Talman Fed. Sav. & Loan Ass'n*, 604 F.2d 1028, 1030 (7th Cir. 1979) (striking down dress code that required women to wear a uniform but allowed men to wear business suits); *O'Donnell v. Burlington Coat Factory Warehouse, Inc.*, 656 F. Supp. 263, 266 (S.D. Ohio 1987) (holding dress code requiring female sales clerks to wear

permissible justification.⁸⁵ Although recognizing trans people's inclusion in existing non-discrimination laws would not alter these underlying principles, many employers faced with the issue have voiced a concern that trans rights would create disarray in the workplace.⁸⁶

Despite the clarity and consistency of existing appearance rules as they have evolved over time, "opposition to cross-dressing in the workplace is perhaps the most commonly voiced objection to transgender rights."⁸⁷ In other words, a fear of "men in dresses" in the workplace fuels most of the political opposition to amending non-discrimination law to include transgender people and, therefore, may be viewed as one of the knee-jerk and arguably irrational concerns of those who oppose trans rights.⁸⁸ What is behind this fear of "men in dresses" in the workplace that causes otherwise confident employers and co-workers to respond so irrationally? The three articulable explanations are (1) sexism, (2) concerns about customer expectations and preferences and (3) fear of eroding employer control in the workplace.

Laws enforcing sex-specific appearance requirements have old roots. Sumptuary laws date at least as far back as the thirteenth century, reflecting government-enforced social and economic status distinctions.⁸⁹ Early Colonial American law also incorporated strict dress restrictions.⁹⁰

Because strict, gendered clothing requirements have perpetuated the subordination of women, the feminist movement in the United States has long focused on changing norms of

"smock" while allowing male sales clerks to wear shirt and tie impermissible because it perpetuated sex stereotypes).

85. See, e.g., *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 605-06 (9th Cir. 1982) (finding Continental's desire to compete by featuring attractive female cabin attendants insufficient to support discriminatory weight requirement); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 853-55 (9th Cir. 2000) (holding that United's discriminatory weight requirement bore no relation to female flight attendant's ability to carry out her duties).

86. CURRAH & MINTER, *supra* note 10, at 55.

87. *Id.*

88. *Id.*

89. See ALAN HUNT, *GOVERNANCE OF THE CONSUMING PASSION: A HISTORY OF SUMPTUARY LAW* 214-15 (1996).

90. See DAVID H. FLAHERTY, *PRIVACY IN COLONIAL NEW ENGLAND 184-88* (1972) (describing sumptuary laws in Colonial New England). By the eighteenth century, these laws were rarely enforced. *Id.* at 185.

permissible appearance requirements.⁹¹ Despite their focus on changing appearance requirements for women, feminists have also realized that “[a]pppearance regulations are . . . of particular importance to women, even when men are the apparent victims.”⁹² As a result of focused efforts to alter strict clothing requirements that subordinate women, it is absurd to think that anyone would support an employer firing a woman for wearing a masculine styled tailored suit. In fact, some jurisdictions have prohibited such an action.⁹³ Apparently, the same adverse action when taken against a man in a dress does not draw the same ire. Reconciling this inconsistency is difficult or impossible and can hardly be justified other than by stark sexism.

Similarly, the rationalization that a man in a dress in the workplace would provoke negative customer responses cannot be reconciled with the case law regarding customer preferences and race. An employer who refused to hire an employee of color using the same justification would be seen by a court as engaging in a pretext for impermissible discrimination.⁹⁴

Finally, the explanation that one opposes “men in dresses” in the workplace because employers would lose control of the workplace is difficult to understand as anything other than a misunderstanding about transgender people in the first place. The justification is rooted in a misperception that some individual (male) employees would want to wear female gendered clothing simply to antagonize his employer. This could only happen if an employer were invested in enforcing gendered appearance norms. In other words, even if an employer could not prohibit a man from wearing a dress in the workplace, it could still enforce non-sex specific appearance norms that allow

91. Professor Katherine Franke submitted an amicus brief in *Rosa v. Park West Bank & Trust Co.*, detailing the history of sex-based appearance requirements and the role clothing has played in the struggle for women's equality. Brief of Amicus Curiae NOW Legal Defense et al., at 2-23, *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (No. 99-2309).

92. Mary Whisner, Note, *Gender-Specific Clothing Regulation: A Study in Patriarchy*, 5 HARV. WOMEN'S L.J. 73, 75 (1982).

93. CAL. GOV'T CODE § 12947.5 (West Supp. 2001); CURRAH & MINTER, *supra* note 10, at 43-50.

94. See *Sarni Original Dry Cleaners, Inc. v. Cooke*, 447 N.E.2d 1228, 1232-33 (Mass. 1983) (perceived safety problems of anticipated racial attacks no justification for discrimination); cf. *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276-77 (9th Cir. 1981) (“Nor does stereotyped consumer preferences justify a sexually discriminatory practice.”); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 808-10 (N.D. Cal. 1992) (firing of an unmarried pregnant librarian at a Christian school because of possible “offensiveness” raises an issue of fact for Title VII purposes); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 302-04 (N.D. Tex. 1981) (rejecting customer preference argument for Southwest Airlines’ policy to only hire women as flight attendants).

the employer to make even unreasonable rules (as long as not sex discriminatory ones) regarding appropriate professional attire.⁹⁵

Unfortunately, there may be no quick fix for the apparently pervasive emotional response to the specter of “men in dresses” in the workplace. The optimal solution would be for everyone to get over their strongly held sexist beliefs about appropriate attire for men and women. Short of that, there may be some near-term solution that allows employers to self-identify their gender and require employees to dress consistent with prevailing gender norms. For example, at least one transgender non-discrimination law limits the number of times employees can alter their expressed gender in the workplace.⁹⁶ This solution does not seem to get at the heart of the problem regarding sexism and is, therefore, far less than optimal.

In any case, the lesson to be drawn from Houston’s work is that in order to secure trans rights, advocates may have to wait to tackle head-on the most difficult cases until some smaller victories can be secured. Where that is not possible, advocates should recognize the full implications of going forward in such cases, including the heightened emotional responses they may elicit from the judiciary.

Consistent with Houston’s model, one can conjecture that courts would be more rational and, one can hope, more even-handed in applying relevant law in cases that question assumptions of gender binarism, but do not pose a full frontal attack on widely shared core beliefs about the normativity of sex. In other words, courts may act irrationally and out of bias and bigotry when confronted with cases that pose a direct attack on the sex discrimination inherent in practices premised on the belief that sex binarism is “natural.” Clearly that will be the situation in cases challenging sex discriminatory practices that preclude a transgender person (ascribed male at birth, for example) from wearing feminine attire in the workplace or a case in which a transgender person wishes to use a restroom facility designated for the sex the transgender person was not ascribed at birth.

Fortunately, steering clear of these two narrow categories of cases, segregated bathrooms and “men in dresses” in the workplace (though admittedly very important ones in the day-to-day lives of trans people), does not preclude the possibility of

95. See, e.g., Koonin, *supra* note 81, at 21.

96. CURRAH & MINTER, *supra* note 10, at 44.

bringing other, less emotionally volatile cases to challenge the sex discrimination many transgender people face. For example, many transgender people also face serious discrimination in the context of public accommodations, health care, lending, recreational sport, prison and the "quasi-employment" context where discrimination comes from some non-employer entity.⁹⁷ This Article argues that bringing cases in these areas first will lay the groundwork, like the gradual assault on race discrimination led by Houston, for challenging historic misinterpretations of sex discrimination prohibitions that irrationally exclude transgender people from coverage under existing laws.

IV. CONSTRUCTION MATERIALS ALREADY IN PLACE

Despite early failures in the Title VII context,⁹⁸ there is no principled way to exclude transgender people from the coverage of sex discrimination prohibitions, whether in employment, housing, credit, public accommodations or sports. Nonetheless, insights gained from Houston's model suggest certain cases that evoke irrational fears could be avoided early on in the struggle to secure trans rights in order to create the legal building blocks, which will become the foundation for these other, "harder" cases. The key to the proposed model is to use existing precedent, already firmly in place, to reverse the trend of exclusion for trans plaintiffs, a redirection that has already begun.⁹⁹

The first and perhaps strongest argument is that older Title VII cases bringing sex discrimination claims on behalf of transgender plaintiffs are no longer controlling after *Price Waterhouse v. Hopkins*¹⁰⁰ and *Oncale v. Sundowner Offshore Services, Inc.*¹⁰¹ In addition, the court in *Schwenk v. Hartford*¹⁰² explicitly overruled the Ninth Circuit decision that spawned the exclusion for trans people from Title VII in the first place.¹⁰³ Second, the case of *Price Waterhouse* made explicit the legal

97. *Id.* at 9-10. Consider the sex-specific dress requirements imposed by courts on female and male attorneys. In one "quasi-employment" case, a judge told a black attorney he could not wear a kente cloth in the courtroom. John Murawski, *Colorful Cloth Has Judges Seeing Red*, LEGAL TIMES, July 6, 1992, at 6.

98. *E.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-87 (7th Cir. 1984); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661-64 (9th Cir. 1977).

99. See discussion *infra* Part IV.A-B.

100. 490 U.S. 228 (1989).

101. 523 U.S. 75 (1998).

102. 204 F.3d 1187 (9th Cir. 2000).

103. *Holloway*, 566 F.2d at 659.

principle that sex stereotyping is an impermissible form of sex discrimination.¹⁰⁴ Therefore, discrimination because of an individual's failure to meet sex stereotypes is actionable.¹⁰⁵ Third, an emerging body of law decided under state and international sex discrimination prohibitions rejects the Orwellian logic upon which the early Title VII cases rely.¹⁰⁶ Finally, looking at the root of discrimination against transgender people in nearly any fact-specific context reveals the sex discrimination that underlies the anti-trans animus. According to the logic drawn from Houston's experiences, over time and by pursuing a carefully crafted litigation strategy, trans people will receive the protections we deserve under existing laws.

A. Outdated Title VII Case Law Is Inapplicable After Price Waterhouse and Oncale

In most cases brought by trans plaintiffs, litigants can anticipate that defendants will move to dismiss claims in reliance on outdated Title VII case law.¹⁰⁷ Judges may not rely upon those cases to dismiss a claim of discrimination under state or federal sex discrimination law where the reasoning behind them has been vitiated by subsequent United States Supreme Court decisions. As the Ninth Circuit recently explained, "[t]he initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."¹⁰⁸

In those "cases such as *Holloway*,"¹⁰⁹ courts found that the parameters of Title VII's prohibitions against sex discrimination did not apply to protect transgender people who faced discrimination in employment for two reasons, neither of which can be justified in light of recent case law. First, they narrowly held that Title VII's sex discrimination prohibitions did not "apply to anything other than the traditional concept of sex."¹¹⁰ Second, "[a]lthough the maxim that remedial statutes should be

104. *Price Waterhouse*, 490 U.S. at 239-40.

105. *Id.* at 258.

106. *See infra* Part IV.C-D.

107. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Holloway*, 566 F.2d at 659.

108. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (footnote omitted). In *Schwenk*, the transgender plaintiff stated a claim of sex discrimination by evidence of "her assumption of a feminine rather than a typically masculine appearance or demeanor." *Id.* at 1201.

109. *Id.*

110. *Ulane*, 742 F.2d at 1085.

liberally construed is well recognized,"¹¹¹ courts found nothing in the legislative history of Title VII that suggested Congress ever intended to expand the definition of sex "beyond its common and traditional interpretation."¹¹²

The Supreme Court, in more recent decisions, has toppled both of the pillars upon which *Ulane* and its progeny rest. In 1989, the Supreme Court soundly rejected the notion that sex discrimination only contemplates sex as it is traditionally understood, that is the sense of one being either a biological male or a biological female.¹¹³ As Justice Brennan explained, Price Waterhouse could not defend a sex discrimination charge by arguing that sex stereotyping "lacks legal relevance."¹¹⁴

In *Price Waterhouse*, the Supreme Court answered the question, begged by the Seventh Circuit in *Ulane*, of whether Congress meant to include the nontraditional within the term "sex" as used in Title VII.¹¹⁵ As Justice Brennan explained, in passing Title VII, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."¹¹⁶ As explained in *Price Waterhouse*, Title VII covers more than a narrow concept of sex.¹¹⁷

The United States Supreme Court overturned the basis for the second pillar upon which *Ulane* and the other Title VII cases relied even more recently, in a case in which the Court considered whether Title VII prohibits same-sex sexual harassment.¹¹⁸ In an opinion by Justice Scalia, the Supreme Court determined that nothing in the legislative history of Title VII suggests Congress intended to prohibit same-sex sexual harassment.¹¹⁹ Nevertheless, the Court recognized that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."¹²⁰ The Court stated explicitly that sex discrimination includes sexual harassment and this holding

111. *Id.* at 1086.

112. *Id.*

113. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-58 (1989).

114. *See id.* at 250-51.

115. *Ulane*, 742 F.2d at 1086.

116. *Price Waterhouse*, 490 U.S. at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

117. *See id.* at 228.

118. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 76 (1998).

119. *Id.* at 79.

120. *Id.*

"must extend to sexual harassment of any kind that meets the statutory requirements."¹²¹

In *Holloway* and its progeny, the courts mistakenly limited sex discrimination prohibitions to only one type and declined to prohibit employers from discriminating against transgender people,¹²² even if such discrimination met the statutory definition of sex discrimination under Title VII. The *Oncale* case clarifies that, although not the principal evil Congress had in mind, Title VII's sex discrimination prohibitions must extend to any kind of sex discrimination. This is particularly true where statutory prohibitions against sex discrimination are recognized to include sex stereotyping.¹²³

B. Discrimination Against Trans People Is Impermissible Sex Stereotyping

Discrimination against a transgender person is impermissible sex discrimination when an employer treats a transgender employee adversely because of a failure to meet sex stereotypes.¹²⁴ As the Ninth Circuit recently explained, "What matters, for purposes of this . . . analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim."¹²⁵ In the case of a trans plaintiff, the allegation may be that the defendant's actions stem from the fact that the defendant believed the plaintiff to be a man or woman who "failed to act like one."¹²⁶

In *Price Waterhouse*, the Supreme Court considered a case in which Ann Hopkins, a female associate, was denied partnership at a nationwide accounting firm, in part because some of the partners reacted negatively to her manner of dress and "macho" personality.¹²⁷ Hopkins was told that in order to improve her chances for partnership she should "walk more femininely, talk

121. *Id.* at 80.

122. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084-86 (7th Cir. 1984); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 661-64 (9th Cir. 1977).

123. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 228 (1989).

124. *Id.*; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260-61 n.4 (1st Cir. 1999) (indicating that "a man can ground a [sex discrimination] claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity"). See generally *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (arguing that discrimination based on failure to conform to gender stereotypes is impermissible).

125. *Schwenk*, 204 F.3d at 1202.

126. *Id.*

127. See *Price Waterhouse*, 490 U.S. at 234-35.

more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹²⁸ Holding that decisions based on sex-typical behavior constitute impermissible sex discrimination, the Court affirmed that “we are beyond the day” when employers may insist that employees “match . . . the stereotype associated with their group [because] ‘[i]n 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.’”¹²⁹

Indeed, rejecting the need for expert testimony to prove that sex stereotyping had played a role in Hopkins’ case, Justice Brennan commented that it requires no expertise in psychology to know that if an employee’s abilities can be “corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not” her abilities that has drawn criticism.¹³⁰ In other words, the *Price Waterhouse* Court held as a matter of law that it constituted sex discrimination for Hopkins’ employer to require her to conform her appearance to stereotypical norms of gender.¹³¹

Like Hopkins, a transgender plaintiff can root a discrimination claim in sex discrimination when it is the plaintiff’s failure to meet sex stereotypes that gives rise to the discriminatory treatment.¹³² Thus, a biological male plaintiff who transitions to become female (a transsexual woman) may state a claim of sex discrimination against her employer when

128. *Id.* at 235 (citation omitted).

129. *Id.* at 251 (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

130. *Id.* at 256.

131. *Id.* Several courts have recently applied the *Price Waterhouse* analysis to Title VII and analogous state anti-discrimination laws to protect employees who are targeted for harassment because of their failure to conform to sex stereotypes. *E.g.*, *Schmedding v. Tnemec Co.*, 187 F.3d 862, 863-65 (8th Cir. 1999); *EEOC v. TruGreen Ltd. P’ship*, 122 F. Supp. 2d 986, 993 (W.D. Wis. 1999). The First Circuit also recently affirmed the viability of such a claim where properly pled by, for example, a feminine-appearing male. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 260-61 (1st Cir. 1999).

In affirming that transgender people are protected by state sex discrimination laws, the Connecticut Commission on Human Rights and Opportunities accepted the analysis in *Price Waterhouse* as “more in keeping with the letter and spirit of Connecticut anti-discrimination law than the more restrictive interpretations found in earlier cases.” Declaratory Ruling, *supra* note 10, at 19-20. A Massachusetts Superior Court recently found that a transgender student could bring a sex discrimination claim against a school that imposed a sex-specific clothing requirement. *See Doe v. Yunits, et. al.*, No. 00-1060-A, slip op. at 1 (Mass. Super. Ct. Oct. 11, 2000), *aff’d sub nom.*, *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, slip op. (Mass. App. Ct. Nov. 30, 2000). The school admitted that it would allow girls, but not boys, to wear skirts or dresses. *Id.*

132. *See Price Waterhouse*, 490 U.S. at 256.

she is treated adversely because the defendant prefers people to look "stereotypically masculine" or "stereotypically feminine."

C. Sex Discrimination Prohibitions Extend to Cover Trans People Under State Law

In recent cases decided under state and federal laws prohibiting sex discrimination, courts have recognized discrimination against transgender people as sex discrimination. This emerging body of law rejects the Orwellian notion that there is a meaningful legal distinction between discrimination because of sex and discrimination because of a change of sex.¹³³ As one Southern District of New York Court explained:

[A]lthough the state antidiscrimination statute is similar to Title VII, New York courts are not bound by interpretations of the federal law and . . . the overriding remedial purpose of the state statute "was by blanket description to eliminate all forms of discrimination, those then existing as well as any later devised."¹³⁴

The *Rentos* court held that post-operative transsexuals were protected from sex discrimination and harassment under New York State and New York City human rights laws.¹³⁵ The court denied the defendant's motion to strike the plaintiff's complaint for failure to provide a more definite statement of her claim because the court found that the plaintiff adequately identified her protected class status as a "transgender female."¹³⁶

In *Maffei v. Kolaeton Industry, Inc.*,¹³⁷ the plaintiff, Daniel Maffei (born Diane), was considered an exemplary employee who "executed his duties in a stellar fashion, was frequently praised

133. See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (holding that Title VII does not proscribe discrimination due to a change of sex). Although some courts have relied on that purported distinction to justify excluding transgender plaintiffs from protection under sex discrimination laws, it seems doubtful that any court would accept such a distinction as valid in an analogous civil rights context. It is improbable, for example, that a court deciding a case in which an employee was fired for converting from one religious faith to another would dismiss the case on the ground that the employee had failed to state a claim for discrimination on the basis of religion.

134. *Rentos v. OCE-Office Sys.*, No. 95 Civ. 7908LAP, 1996 WL 737215, at *8 (S.D.N.Y. Dec. 24, 1996) (quoting *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995)).

135. *Id.* at *9.

136. *Id.*

137. 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995).

about his work performance, and received salary increases and bonuses on a consistent basis"¹³⁸ until he underwent sex re-assignment surgery. After Daniel had undergone some surgery,¹³⁹ the president of Kolaeton degraded him, ostracized him from other employees and berated Daniel for being immoral.¹⁴⁰ Finding that such harassment was impermissible sex discrimination, the court explained that "derogatory comments relating to the fact that as a result of an operation an employee changed his or her sexual status, creates discrimination based on 'sex.'"¹⁴¹ The Connecticut Commission on Human Rights and Opportunities also recently issued a declaratory ruling consistent with this trend.¹⁴²

D. Growing Trend in International Law Is to Recognize Claims Brought by Transgender People as Sex Discrimination.

The legal analysis applied in *Maffei* and *Rentos* is similar to that applied in a recent European Court of Justice (ECJ) decision, *P. v. S. & Cornwall County Council*,¹⁴³ which held that discrimination against a transgender person who transitioned in the workplace was discrimination on the basis of sex.¹⁴⁴ In that decision, the ECJ concluded that a person is the subject of disparate treatment when "he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment."¹⁴⁵ As a practical matter, this seems obvious in a case, like *Maffei*,

138. *Id.* at 392.

139. The court noted that the record was not clear on what physical changes had taken place and to what extent Daniel had "completed his metamorphosis." *Id.* at 391. Nothing in the outcome of the case turned on whether Daniel had undergone complete, partial, or any surgery, for that matter. *Id.*

140. *Id.* at 392.

141. *Id.* at 396.

142. See generally Declaratory Ruling, *supra* note 10 (stating that transgender people are covered by the state's law prohibiting sex discrimination).

143. Case C-13/94, *P. v. S. & Cornwall County Council*, 1996 E.C.R. I-2159, [1996] 2 C.M.L.R. 247, 263 (1996) (P's employer issued a three month dismissal notice when P was pre-operative, which took effect after P's sex reassignment was complete).

144. *Id.*

145. *Id.* at I-2165. In *P. v. S.*, the ECJ determined that the Equal Treatment Directive (Directive) includes transgender persons. Article (1) of the Directive provides in relevant part: "[T]he purpose of the directive is to put into effect in the Member States the principle of equal treatment for men and women . . . as regards access to employment . . ." *Id.* at I-2162. Article 5(1) of the Directive provides: "Application of the principle of equal treatment with regard to 'working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex." *Id.* at I-2163.

where an otherwise exemplary employee faces discrimination only when others in the workplace learn that he/she is transgender. This approach has recently been endorsed by a Canadian tribunal, which held that "it is not clear how discrimination based on transsexualism or on the process of transsexualism could be anything other than sex-based."¹⁴⁶

E. As a Factual Matter, Most Instances of Discrimination Against Transgender People Can Be Fairly Characterized as Sex-Based

In order to more fully understand why discrimination against transgender people is properly characterized as sex discrimination, it is helpful to consider examples of situations involving discrimination against transgender persons. Although each fact scenario is slightly different, each can be understood as sex discrimination when broken down to the factual elements that form the basis of the different treatment.

These examples are illustrative rather than exhaustive. As with any other form of discrimination, discrimination against transgender people can and does take a wide variety of forms. These examples do not intend to provide a rigid or definitive taxonomy or to suggest that there is any one "right" way to analyze the facts in a particular case. Rather, the point is to describe a few common scenarios in which discrimination against transgender people takes place and to show how those scenarios can (1) be analyzed under established principles of sex discrimination law and (2) be brought as early cases consistent with the Houston model proposed here. These examples attempt to provide sample scenarios outside the "hot button" areas identified in Section III.

For example, consider a regular customer at a hair salon (a biological male) who after putting off regular hair appointments for several months returns as a female. If the barber refuses to provide hair-cutting services for this regular customer because the customer transitioned from male to female, that barber has engaged in sex discrimination.¹⁴⁷ Perhaps the clearest way to see sex as the basis for the discriminatory treatment is that but

146. See *Commission Des Droits De La Personne Et Des Droits De La Jeunesse v. Maison des Jeunes*, Canada Province of Quebec, Human Rights Tribunal File No. 500-53-00078-970, at 21.

147. Such a case would have to be brought under a state anti-discrimination law prohibiting sex discrimination in public accommodations or the provision of goods and services. See, e.g., MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West 1990).

for the new sex of the customer, the business owner would not have taken any adverse action against the customer. If the only reason the barber is now refusing to serve the customer is because of a changed sex, the discriminatory treatment is prohibited because it is on the basis of sex.

A second example involves a transgender employee who had undergone sex reassignment from female to male before he was hired. Assume that at the time he is hired, neither the employer nor any co-workers are aware that he is transgender. If it is disclosed publicly that the employee was female at birth and he becomes the subject of adverse treatment or harassment in the workplace because it is learned that he is a transgender man, the root of the discrimination is that he was born female. In other words, the transgender discrimination experienced by the employee is sex discrimination based on the sex that he was born. The sex ascribed to him at birth is being used to limit his current actions and choices. Using the test from the last example, but for the birth sex of the employee the adverse action would not have occurred. For example, if he had been born male he would not have been subjected to the adverse treatment.

As a final example, consider again a customer in a public accommodation who informs a proprietor that she is a transgender person and will be transitioning from male-to-female. Assume that the proprietor has a negative response and refuses to serve the customer because the proprietor is offended by or uncomfortable with the idea of a man changing his sex to become a woman. In refusing to serve the customer on that basis, the proprietor has engaged in sex discrimination because the transgender customer is being singled out for adverse treatment on the basis of the proprietor's attitudes and beliefs about men, in particular, the proprietor's belief that a man should not alter his biological sex. Although the owner may attempt to articulate some basis, apart from those related to sex, to create a separate and distinct anti-trans animus, it is difficult in the extreme to logically understand these explanations as anything other than normative beliefs about the nature of men and women. Although the owner may believe that he is not motivated by sex discrimination, but by a moral imperative to preserve a perceived natural order of sex, in reality these justifications are indistinct. While the owner's irrational fear may derive from unfounded assumptions widely taught, his actions are still prohibited. Disparate treatment justified by normative beliefs about sex can only be understood legally as

discrimination on account of sex, and, therefore, may not survive challenge.

V. A CASE STUDY

With the building blocks already in place, the key to securing trans rights may be the selection of proper plaintiffs. In light of this Article's counsel to avoid bathroom¹⁴⁸ and some employment cases until more can be done to educate courts and the public at large, a recommended case scenario is demonstrated by an Equal Credit Opportunity Act¹⁴⁹ case filed in 1998 in the District of Massachusetts.¹⁵⁰ In *Rosa v. Park West Bank & Trust Co.*,¹⁵¹ the plaintiff, a biological male who looks like a woman and lives as a woman, went into a bank to request a loan application.¹⁵² A loan officer asked her¹⁵³ to produce photo identification.¹⁵⁴ Rosa gave the loan officer three pieces of identification containing her photograph.¹⁵⁵ In one photograph Rosa appeared traditionally masculine, in one she appeared traditionally feminine and in one she appeared gender ambiguous.¹⁵⁶ The loan officer responded with disgust and would not help her until she "went home and changed"¹⁵⁷ to look more like the identification card in which she appeared traditionally masculine.¹⁵⁸

148. It bears mention that in a recent important victory, a Minnesota appeals court recently affirmed that a transgender (male-to-female) employee prohibited from using the women's restroom established a case of sexual orientation discrimination. *Goins v. West Group*, 619 N.W.2d 424, 428-29 (2000). Unlike the other states with sexual orientation non-discrimination laws, Minnesota defines sexual orientation to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness," thereby including transgender people within its purview. *Id.* at 428.

149. 15 U.S.C. § 1691 (1994).

150. For purposes of full disclosure, the author represents that she was counsel of record in the case along with GLAD's Civil Rights Director, Mary Bonauto.

151. 214 F.3d 213 (1st Cir. 2000).

152. *Id.* at 214.

153. The plaintiff in the case is biologically male but self-identifies as female. In order to minimize confusion for the court, the plaintiff is referred to in court documents as "he" or "him." Out of respect for the plaintiff's self-identity, Rosa is herein referred to as "she" or "her." The recent practice of most courts is to respect the self-identity of litigants. *See, e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1192 n.1 (9th Cir. 2000); *Meriwether v. Faulkner*, 821 F.2d 408, 409 n.1 (7th Cir. 1987); *Smith v. Rasmussen*, 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999).

154. *Rosa*, 214 F.3d at 214.

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

Rosa filed a complaint against the bank under both state and federal law.¹⁵⁹ The relevant state claim was for sex discrimination in a public accommodation¹⁶⁰ and in lending. The federal claim was brought under the Equal Credit Opportunity Act which has been construed consistently with the federal employment non-discrimination laws (Title VII).¹⁶¹ By avoiding bathrooms and "men in dresses" in the workplace, this case provided a good test of the hypothesis advanced by this Article. Moreover, to the extent that sex-specific dress codes have been upheld based on "legitimate business needs," those cases could not be used here by the bank. There is no legitimate business justification for requiring a bank customer to wear sex-specific clothing.¹⁶² Nor could the bank proffer any economic justification for a sex-specific clothing requirement. To the contrary, all of the economic rationalizations support allowing customers to wear whatever clothing they want.¹⁶³

The difficulty the district court had with the case early on illustrates what an uphill battle it may be to secure trans rights. Perhaps largely because normative beliefs about sex are so firmly held, the district judge dismissed this case on a Rule 12(b)(6)¹⁶⁴ motion for failure to state a claim. In the words of the judge, "[d]espite Rosa's strenuous argument to the contrary, the issue in this case is not his sex, but rather how he chose to dress when applying for a loan."¹⁶⁵ Going farther, the court found Rosa's reliance on *Price Waterhouse* misguided, saying that that

159. *Id.*

160. Massachusetts' public accommodation law prohibits discrimination on the basis of sex and sexual orientation. See MASS. GEN. LAWS ANN. ch. 272, §§ 92A, 98 (West 1990). Federal public accommodations law prohibits only race discrimination, not sex discrimination, in such circumstances. See 42 U.S.C. § 2000a (1994).

161. See Equal Employment Opportunity Act, 42 U.S.C. § 2000e-2 (1994 & Supp. IV 1998); *Mercado-Garcia v. Ponce Fed. Bank*, 979 F.2d 890, 893 (1st Cir. 1992) (applying interpretive standards of EEOA to an ECOA claim for age discrimination in lending). *But see* *Latimore v. Citibank Fed. Sav. Bank*, 151 F.3d 712, 713-14 (7th Cir. 1998) (distinguishing plaintiff's claim for race discrimination in lending under ECOA from EEOA employment discrimination cases).

162. Although a bank might plausibly offer a customer preference justification, such justifications have been rejected in the race context and it is extremely doubtful that a court would accept it in the context of sex. See, e.g., *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for sex discrimination).

163. Nor could the bank justify its request by arguing it could not properly identify the applicant from the photographs presented. If the loan officer could not identify Rosa, the request would reasonably have been for additional corroborating documentation, not to go home and change. *Rosa*, 214 F.3d at 214.

164. FED. R. CIV. P. 12(b)(6).

165. *Rosa v. Park W. Bank & Trust Co.*, Civ. Action No. 99-30085-FHF, slip op. at 1 (D. Mass. Oct. 16, 1998), *rev'd*, 214 F.3d 213 (1st Cir. 2000).

case does not prohibit a lender "from requesting someone to change their clothes, and it does not render denying someone consumer services or employment based upon their dress illegal discrimination."¹⁶⁶ Perhaps forgetting that sex discrimination law clearly covers men and women,¹⁶⁷ the judge concluded by saying, "[s]imply put, neither a man nor a woman can change their status from unprotected to protected simply by changing his or her clothing."¹⁶⁸

This case is informative with respect to developing a long-term strategy for securing trans rights. The judge's apparent resolution of "the issue in this case,"¹⁶⁹ without even acknowledging it as such, demonstrates how firmly held normative beliefs are about sex. The way in which the judge dismissed this case parallels the dismissive way courts have addressed discriminatory dress codes in recent times.¹⁷⁰ Missing the point about *Price Waterhouse*, the court failed to understand that the loan officer's refusal was based on the applicant's sex, despite the allegation that the refusal was because the applicant was a man who failed to look like one.¹⁷¹

On appeal, the United State Court of Appeals for the First Circuit reversed.¹⁷² The court summarily dismissed the bank's argument that federal anti-discrimination law cannot apply to a plaintiff that the defendant characterized as a "crossdresser."¹⁷³ Moreover, the court found that:

[I]t is reasonable to infer that [the loan officer] told Rosa to go home and change because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application. That is, the Bank may treat, for credit

166. *Id.*

167. *See, e.g., Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (citing *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983)).

168. *Rosa*, Civ. Action No. 99-30085-FHF, at 2.

169. *Id.* at 1.

170. *Whisner*, *supra* note 92, at 75.

171. *Rosa*, Civ. Action No. 99-30085-FHF, at 2; *see also* *Schwenk v. Hartford*, 204 F.3d 1187, 1199-1203 (9th Cir. 2000) (failing to conform to gender expectations is impermissible sex discrimination); *Higgins v. New Balance Athletic Shoe, Inc.* 194 F.3d 252, 261 n.4 (1st Cir. 1999) (noting that failure to conform to gender expectations violates Title VII).

172. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000).

173. *Id.*

purposes, a woman who dresses like a man differently than a man who dresses like a woman.¹⁷⁴

In short, the court found that the facts in *Rosa* constituted a claim of sex discrimination.¹⁷⁵

The remarkable thing about *Rosa* is that a federal appellate court recognized two theories that earlier courts had rejected in previous cases with analogous facts, arguably because these earlier cases raised the specter of unisex bathrooms or "men in dresses." First, if an individual would not have been treated adversely but for his/her sex, such facts constitute a claim of sex discrimination.¹⁷⁶ In addition, the First Circuit applied the reasoning of *Price Waterhouse*, finding that, if a plaintiff can show that the basis for the adverse treatment was sex stereotyping, that supports a sex discrimination claim.¹⁷⁷ That these very basic theories of sex discrimination could be seen in a case involving credit and public accommodations suggests that it is not the legal theories that are hard to grasp, but that they pertain regardless of the factual circumstances in which they are presented.

VI. CONCLUSION

The tide is clearly turning since the low point in the 1970s when transgender people were completely excluded from the protections of civil rights laws. Numerous jurisdictions have explicitly expanded the scope of their laws' protections to ensure that transgender people are protected against discrimination.¹⁷⁸ In addition, the earlier case law that created the exclusion has been overruled and newer high court decisions¹⁷⁹ have made it clear that transgender people may seek redress under existing law. Despite this dramatic shift in the legal landscape, not all courts, and clearly not all defendants, understand that existing sex discrimination laws also cover transgender people.

As Charles Hamilton Houston understood, sometimes having the law on one's side is not enough. Reversing a historic

174. *Id.* at 215-16.

175. *Id.*

176. *Id.* at 215.

177. *Id.* at 216.

178. See CURRAH & MINTER, *supra* note 10, at 38-50. Over twenty-five local jurisdictions have ordinances or orders that prohibit discrimination against transgender people. *Id.*

179. *E.g.*, *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

exclusion from civil rights law requires a well thought out strategy that includes coordinated education and legislative components. Bringing a range of cases on behalf of transgender people, focusing on those that avoid some of the strong, deep-seated and pervasive ideas held by gender binarists, is a critical first step toward securing trans rights. Paving the way to this much needed expansion of civil rights to protect transgender people will in turn allow law to function as it is meant to—through principled applications of statutes—rather than through irrational, emotional expression of judges' bias.