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NATURAL LAW AND BONA FIDE DISCRIMINATION: THE EVOLVING UNDERSTANDING OF SEX, GENDER, AND TRANSGENDER IDENTITY IN EMPLOYMENT

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INTRODUCTION

The purpose of this Note is to discuss the existence and practicality of sex-based Bona Fide Occupational Qualifications BFOQs in the wake of the Equal Employment Opportunity Commission's *Macy v. Holder* decision. In *Macy*, using a social constructionist lens, the EEOC held that gender identity discrimination is per se sex discrimination. This Note argues that the nature of sex as a social construction, rather than as a biological determinant, makes the historical textualist and natural law approaches to sex-based BFOQs intellectually arbitrary, entirely impractical, and in some situations incredibly dangerous.

Part I of this Note will focus on definitions of the terms and classifications this Note will use and align them with the terms used by various judicial bodies over the course of the evolution of transgender terminology. This part will also develop a short background of the treatment of gender and sex in employment discrimination law and lay the foundation for the current natural law theory of gender and sex, as well as the understanding of sex from a social constructionist viewpoint. Part II of this Note will discuss and develop the *Macy v. Holder* decision and the evolution in employment law jurisprudence that allowed the outcome. It will also discuss the still-extant remnants of the natural law system in employment, and highlight the language, prejudice, and inequality that this school of thought produces and encourages. Part III of this Note will focus specifically on sex-based BFOQs, their traditional role and purpose under Title VII of the Equal Rights Act, and the harms they currently create in their role as bastions of natural law. These harms will be evaluated with respect to the interests of the employees to whom they apply and of the persons for whom those employees are responsible.

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I. DEVELOPING A BACKGROUND FOR DISCUSSION OF GENDER IDENTITY AND NATURAL LAW

Transgender persons are in a unique position with regard to the operation of the legal system. Different jurisdictions assign transgender persons their gender and sex roles—and therefore, their rights and responsibilities—in different ways depending upon one’s medical history, gender presentation, psychological evaluation, and sexual orientation. Gender identity is not limited to a particular race, class, religion, or orientation. Therefore, it creates intersectional issues unique to each individual it affects.¹ Medical standards of care have been evolving along with the terminology, leaving legal authorities who relied upon past psychological definitions with an antiquated understanding of gender identity and sex.² Only recently have courts embraced a constructionist understanding of those terms. Unified legal understandings are just beginning to emerge as a matter of practical jurisprudence.³

A. *Gender Identity Discovered and Defined*

It is useful to identify a standard vocabulary for the purposes of discussion because terminology relating to gender and sexuality has varied historically within American transgender-related jurisprudence.⁴ The word “transgender”⁵ is used here as an umbrella term for anyone who identifies or expresses their gender in a fashion different from normative standards

1. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 395 (1994). Valdes discusses Queer Theory and the necessity of understanding and analyzing each individual case with the particularity required to appreciate the way in which queer identity intersects with race, culture, class, and religion.

2. Transgender individuals have historically experienced significant pathologizing of their particular experience. Many legal authorities refer to diagnoses of “transgenderism,” which is fading as an accepted medical standard. Likewise, because gender and sex refer to identity rather than medical diagnosis, such diagnosis should be phased out of legal standards. The DSM-IV still pathologizes transgender individuals as having “gender identity disorder.” The new revision to the DSM, DSM-V, refines this terminology to “gender dysphoria” to reflect an understanding that the anguish transgender people sometimes experience is not an element of gender identity itself, but instead a reaction to the way they are treated by the external world. See Lisa Leff, *Transgender Advocates Seek New Diagnostic Terms*, WIS. GAZETTE, July 23 2012, <http://www.wisconsinstate.gov/breaking-news/transgender-advocates-look-for-new-diagnostic-terms.html>.

3. William N. Eskridge, Jr., *Sexual and Gender Variation in American Public Law: From Malignant to Benign to Productive*, 57 UCLA L. REV. 1333, 1357 (2010).

4. Transgenderism, Transvestitism, and Transsexualism, in particular, have been used interchangeably and frequently so.

5. National Center for Transgender Equality, *Transgender Terminology* (Jan. 2014), http://transequality.org/Resources/NCTE_TransTerminology.pdf.

of masculinity and femininity.⁶ For all individuals whose primary or secondary sexual characteristics, hormone levels, or chromosomal arrangement differ from normative beliefs of sex-ideal anatomy, hormones, or chromosomal arrangement, this paper will use the accepted term “intersex.” These definitions are also particularly useful from a critical theory perspective, as they disentangle and reunify the concepts of gender and sex. If sex is viewed as an immutable, biological constant, and gender defined by a deviation or adherence to norms that arise from that biological constant, then as a matter of legal necessity, courts are forced to deal with two sets of law where sex is concerned: they must deal with the natural law of sex and with the constructive law of gender.⁷ However, if sex and gender are both social constructs, and sex is defined by gender expression, then the law is not required to bifurcate sex and gender in order to create a comprehensive and consistent jurisprudence.

Traditionally, the social understanding was that gender is defined by one’s sex.⁸ Judith Butler and Katherine Franke posit that it is now more accurate to state that sex and gender are both social constructions based upon gender stereotype.⁹ Gender and sex are both performative traits from birth.¹⁰ As a result, rather than determining sex on the basis of biology and anatomy, the way in which one acts and presents oneself may indicate gender separately from sex.¹¹ In this way, individuals may be outwardly identifiable as masculine women, feminine men, and other combinations

6. This umbrella includes identities that are nuanced and distinct from each other, and does not limit itself to strict binary identities. Genderqueer persons (who maintain a gender identity neither strictly male nor strictly female), drag queens and kings, transsexuals, and others who do not necessarily identify specifically as “transgender” are included for the purpose of utility. *Id.* This use is only to help align legal definitions through a constructionist lens, not to restrict, subsume, and/or label those or any other identities. This use does not intrinsically incorporate sexual orientation. This is primarily because the U.S. legal system has so far segregated gender and sex from sexual orientation when laws refer to “sex” or “gender,” and therefore separation is necessary for the purpose of articulating this particular argument. Lesbian, gay, bisexual, queer, and asexual individuals certainly experience discrimination because those orientations are not gender-normative, i.e., heterosexual, expressions of attraction. When quoting holdings, I will hew to the terms used by the authority in question, noting when those terms are used by the authority to connote meanings different from my use of “transgender.” All names used will be the preferred names of the parties in question, and pronouns will reflect those parties’ gender identity. Again, I will note when legal authorities use pronouns or names that differ from the individual’s preferred name or pronoun, to retain clarity while respecting the party in question.

7. Eskridge, *supra* note 3, at 1343.

8. Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 5 (1995).

9. JUDITH BUTLER, *GENDER TROUBLE* 136 (1990); Franke, *supra* note 8, at 5.

10. Franke, *supra* note 8, at 52.

11. Valdes, *supra* note 1, at 134.

that affirmatively indicate both gender and sex, whether or not these traits align with typical social expectations.

There is a key absurdity to a determination of sex based upon biology as well. Determination of “biological sex” is typically made by a single doctor, based solely on one’s appearance at birth. This appearance is not determinative of sex or of gender; it only tests external shape, which can be fundamentally misleading.¹² This determination is put down onto a piece of paper, and for almost all of the state’s purposes, one’s legal sex is whatever appears on that piece of paper. It is relevant that this determination is a matter of law rather than fact, since there is no jurisdiction that submits a person’s sex to a jury as a fact to be found.¹³ This method reflects the arbitrary nature of legal sexual classification. Courts may turn to medical reports, family histories, or to religious doctrine for this determination.¹⁴ Tellingly, this is purely a legal imposition: the matter may be settled without recourse to testimony of the person whose sex is being determined. Either physical appearance or anatomy¹⁵ is used as the sole justification for the determination.¹⁶

Even without gendered complication, the “plain meaning” of sex is still internally fallacious. A significant portion of the population is born with anatomy, genetic patterns, or other gender markers that do not fit a normative understanding of “male” or “female” biology. These persons, and anyone else whose biology does not match a normative idea of a binary sex, are typically grouped under the umbrella of “intersex.” It has been accepted practice to surgically alter intersex children shortly after birth in order to create a more socially normative anatomy long before they have had any chance to form a gender identity. In such a case, the doctor decides based upon ease and safety of procedure which of the perceived binary roles the child will be altered to fit. Many children who

12. Franke, *supra* note 8, at 52. Anatomical genital shape at birth can be misleading, as it does not necessarily determine the child’s gender identity and it does not necessitate the existence (or nonexistence) of any other physical sexual characteristic, including hormones, gonads, and chromosomes, as will be discussed later in this Note.

13. Matthew Gayle, Note, *Female By Operation of Law: Feminist Jurisprudence and the Legal Imposition of Sex*, 12 WM. & MARY J. WOMEN & L. 737, 747 (2006). To ask whether sex is a matter of fact or law is a difficult and troubling question. To have one’s sex voted on or determined by a third party is a terrifying and intrusive prospect, whether that party is a judicial authority or a body of fact-finders, and such a proceeding is an indignity to which few people of any gender or sex would willingly submit.

14. *Id.*

15. Again, I am not asserting that the use of genes, genetic markers, or anatomy to determine sex is a prudent or useful procedure. I only wish to illustrate the temptation to believe that this particular course is somehow simpler, more accurate, or more indicative of fact than any other.

16. Gayle, *supra* note 13, at 747.

have undergone these procedures are never told the true purpose of the surgeries that they must continue to undergo every few years in order to maintain that normative structure.¹⁷ In this fashion, the illusion that only two biological sexual configurations exist is maintained and a veil is drawn over the truly constructive nature of sex.

B. Natural Law and The Plain Meaning of Sex

The trend within the judiciary of using the “plain meaning” of the word “sex” in the context of discrimination is itself a throwback to natural law, enforced by textualist jurisprudence. A plain meaning reading requires that jurists hew to ancient definitions of “male,” “female,” and “sex” rather than develop their own constructive understanding of these words based upon history and modern usage. The natural law history forces those words into traditional normative biological frames. Within these frames, “sex” is defined as anatomical structure. “Male” is defined as a person whose anatomical structure at birth is composed of external testes and a penis alone. “Female” is defined as a person whose anatomical structure at birth is composed of internal ovaries, a vagina, and uterus. There is no frame at all for individuals whose biology or identity does not hew to those standards, which has resulted in a sparse jurisprudence regarding intersex¹⁸ and transgender persons. Over the past few decades,

17. Milton Diamond, *Pediatric Management of Ambiguous and Traumatized Genitalia*, 162 J. UROLOGY, 1021, 1024 (1999). The practice of surgically altering ambiguous genitalia has a particularly tragic history. Pioneered initially by Dr. John Money of Johns Hopkins University, it became accepted practice to perform “corrective surgery” on children under two years of age whose genitalia were ambiguous. *Id.* Diamond goes on to write:

Since the appearance of the genitalia is considered crucial, surgery should decrease genital ambiguity. In females any large clitoris is to be reduced or removed. In males with a less than adequate penis the preferred surgical approach is sex reassignment There should be no change in gender after [two] years.

Id. at 1021. For intersex children surgically altered and raised as a particular gender, a pattern emerges: they discover discontent with their gender identity, but counseling and access to their medical records was denied them. *Id.* at 1024. This surgery and the subsequent denial of access to records was the prevalent manner of treatment for over forty years. *Id.* Patients were children with androgen insensitivity, chromosomal conditions such as Klinefelter Syndrome, conditions referred to at the time as “hermaphroditism,” and any individual child whose penis was deemed “too small” or whose clitoris was deemed “too large.” *Id.* at 1021. Note that the primary feature linking all cases of surgery stems from the appearance of genitalia, which was considered “crucial” by the medical establishment. Not only is this procedure incredibly cruel, but it effectively forces ambiguous individuals against their will into the natural law sexual binary, thus preserving, either intentionally or through common but separate normative values, the illusion that sex is a strictly binary and immutable physical trait rather than simply a label imposed upon an individual.

18. “Intersex” as a term is itself inclusive of a large range of physical, chromosomal, and hormonal differentiations, including and replacing the now-pejorative terminology “hermaphrodite.”

jurisprudence has drifted away from natural law definitions of gender and sexual orientation.¹⁹ This model of gender theory developed as a legal institution in the nineteenth century: sex meant gender, and gender, in turn, meant biology.²⁰ This ancient model links gender roles and traditions to sex, and out of those roles and traditions grows a social order. Gendered values—Man as breadwinner, Woman as housewife; Man as aggressive, Woman as passive—were enshrined in law, with the purpose of discouraging or eliminating contra-gender behavior.²¹ These values do not grow out of any rational purpose but a will to cleave to the status quo. For the in-power group—white, heterosexual, gender-normative men—it became important to preserve a power structure centered around the political and moral dominance of white, heterosexual, gender-normative men.²² As time passed, however, in the century between 1861 and 1961, and in response to increasingly visible deviations from natural law gender and sex standards, “America’s governing classes responded by modernizing and medicalizing the morals-based natural law model, and mobilizing state administrative structures to give legal force to the traditionalist norm.”²³ Voting rights, marriage rights, and property rights grew out of this adjustment, but prescriptions remained at the core. Gender and sex still both meant biology, and to stray too far from those norms was to risk being labeled as “unnatural” or “perverted.”²⁴

These natural law values underpin our basic modern sex discrimination practices as a result. Sex discrimination laws are built upon the essentialist concept that “masculine” and “feminine” are packages in which all gendered behaviors are packed up and bundled together with a physical sex organ. Looking deeper into this essentialist natural-law concept,

The latter term is still occasionally in use in medical and scientific terminology. This Note does not intend to conflate the concerns and difficulties faced respectively by intersex and transgender persons. Both groups see a wide variety of challenges to identity and authenticity in every range of life, and these challenges are certainly unique both to the individual and to the individual’s identity. For the purposes of understanding the effects of strictly sexed natural law language on the workplace, however, it is necessary to understand that both intersex and transgender persons are affected, and their experiences erased. A natural law jurisprudence requires such erasure, because if transgender and intersex persons are recognized as authentic then the natural-law sex binary is revealed to be either a constructed falsehood or an absurdity of assumption; as a result, both demographics suffer consequences in both sexed and gendered circumstances, though such consequences take very different form.

19. Eskridge, *supra* note 3, at 1340. “Sex,” however, has not seen the same movement in the eye of the law.

20. *Id.* at 1336.

21. *See id.* at 1339.

22. *Id.* at 1336.

23. *Id.* at 1340.

24. *Id.* at 1339–40.

however, causes the assumed structure to crumble. Almost all sex discrimination is itself gender stereotyping. Ilona Turner notes that when an employer wishes to limit job applicants to men or women, that employer is not doing so because it requires particular sexual organs to do the job in question.²⁵ Instead, the employer desires the normative values, abilities, and securities that are generally thought to arise from biological sex.²⁶ These normative values include heterosexuality; an attraction to women is entangled within an assumption of maleness, and vice versa.²⁷ By linking sex to gender, linking both to sexual orientation, and then manufacturing a purpose for doing so, jurists continue to uphold the essentialist order of natural law.

In contrast, a constructionist view draws from the understandings set forth by queer and feminist theorists such as Franke and Butler. Specifically, the construction view asserts that the performative nature of gender and sex mean that we must take into account each individual identity and performance before or instead of categorizing them for the purpose of legal definition and evaluation.²⁸ By following this model, I believe that it is possible to create a more organized, flexible body of law than one that must torment itself by aligning with outdated and erroneous understandings of sex.

II. *MACY V. HOLDER* AND TRANSGENDER EMPLOYEE PROTECTION

A. *Gender Stereotyping and Pathologizing: Ulane v. Eastern Airlines*

In considering transgender classification for employment purposes, many federal courts treat sex discrimination as a “plain language” natural

25. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 565 (2007).

26. *Id.* at 564–65.

27. *Id.* at 572. Sexual orientation, perhaps wrongly conflated with gender identity, remains a sticking point in the adoption of constructionist philosophies of sex. This difficulty is because while transgender identity is not a sexual orientation, nor does it denote a particular sexual orientation, sexual orientation is itself primarily found objectionable both socially and under the law because the act of being attracted to a person of the same sex, or people of all sexes, or of no sex, is itself a deviation from the normative gender standards for men and women. Valdes, *supra* note 1, at 14–17. Turner notes that the prevention of sex discrimination based on a theory of sexual orientation, while “logically and morally persuasive,” is unlikely to succeed at a federal level “because of a near unanimity of the federal courts” to accord sexual orientation protection under such a theory. Turner, *supra* note 25, at n.66. With the recent recognition of LGB people as a potentially protected class under *Windsor*, however, such standards may be due to change.

28. Eskridge, *supra* note 3, at 1359–60. Eskridge refers to a similar model as the “post-liberal” model of sex and gender theory. *Id.* at 1358.

law issue rather than a constructionist one. In *Ulane v. Eastern Airlines*,²⁹ the Seventh Circuit held that the plaintiff, a commercial airline pilot and decorated Vietnam War veteran, was not protected by Title VII after undergoing gender transition because the language of the statute spoke only to “sex” and not to what the court termed “sexual identity” or “sexual preference.”³⁰ The court restricted Title VII claims to issues of discrimination regarding “biological males” and “biological females”³¹—thereby excluding transgender³² individuals entirely.³³ The language the court uses is telling: it did not treat Ms. Ulane’s gender identity as authentic. The language itself is laced with suspicion and prejudice.³⁴ The court “viewed Ulane as essentially an impostor, merely masquerading as female”³⁵ This view serves as a perfect example of the central injustice in plain meaning jurisprudence regarding transgender persons. This pattern of pathology extends across several circuits within the Federal Court system.³⁶ To understand the pathologizing of gender states that fall

29. 742 F.2d 1081 (7th Cir. 1984).

30. *Id.* at 1085–86. The conflation of sexual identity and orientation is not a new concept, and it is to the *Ulane* trial court’s credit that it acknowledges a difference between sex and sexual identity and even attempts to find a line to draw between the two. *Id.*

31. *Id.* at 1087. It is notable that the language used by the Seventh Circuit here segregates transgender individuals from “biological males” and “biological females,” regardless of biological or medical history. I do not argue that biology or medicine should be accounted for in determining gender status, but by making this distinction the court potentially creates a standard where transgender individuals cannot ever receive protection under Title VII under any set of circumstances.

32. The Seventh Circuit’s holding in *Ulane* uses the term “transsexual” rather than “transgender.” The holding defines transsexual as a person discontented with their biological sex but does not make medical treatment a condition for the term, which is a description that aligns more closely with the modern term “transgender.” The Seventh Circuit does make psychological diagnosis a condition, but this psychological diagnosis is no longer a medical standard. See Eli Coleman et al., *Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People*, *Version 7*, 13 INT’L J. TRANSGENDERISM, 165, 167 (2011). The term as used here is therefore archaic, and not strictly appropriate for differentiation. *Ulane*, 742 F.2d at 1083, n.3.

33. Turner, *supra* note 25, at 580. See also *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (holding that a person who wishes to begin gender transition does not receive protection under Title VII).

34. Turner, *supra* note 25, at 569. For example, sentences such as “Ulane is entitled to any personal belief about her sexual identity she desires” and “[Ulane is] a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.” *Ulane*, 742 F.2d at 1087.

35. Turner, *supra* note 25, at 569.

36. Not all jurists in such circuits support the pathologization and othering of transgender persons, of course, nor does this paper suggest that they do. However, when a higher court uses pathologizing language, that court builds that stigma directly into the law; jurists at lower levels of court, who may see more cases involving transpeople than those at appellate levels, are bound to rule under pathologizing language used by the higher courts.

outside of the delineations of natural law, it is educational to turn to Judge Richard Posner's definition of "transsexual" in *Maggert v. Hanks*³⁷:

Gender dysphoria—the condition in which a person believes that he is imprisoned in a body of the wrong sex, that though biologically a male (the more common form of the condition) he is “really” a female—is a serious psychiatric disorder, as we know because the people afflicted by it will go to great lengths to cure it if they can afford the cure. The cure for the male transsexual consists not of psychiatric treatment designed to make the patient content with his biological sexual identity—that doesn't work—but of estrogen therapy designed to create the secondary sexual characteristics of a woman followed by the surgical removal of the genitals and the construction of a vagina-substitute out of penile tissue. . . . Someone eager to undergo this mutilation is plainly suffering from a profound psychiatric disorder.³⁸

Posner, one of the most highly regarded jurists of our age, did not simply refer to the medical definition at the time; he took particular care to imply that transgender persons were inauthentic sexual impersonators as well as clinically and socially insane. By using “believes,” Posner suggests inauthenticity of the transgender person's gender identity. Quotation marks denoting sarcasm placed around the word “really” with regards to gender identity go further: Posner suggests that not only is the person's gender identity not authentic, but it could never truly be authentic. The suggestion that a person would willingly undergo “mutilation” to relieve anguish is portrayed as indicative of insanity. In almost all circumstances, one does not typically refer to surgery that assuages otherwise inescapable anguish as “mutilation,” nor does one typically pathologize those who undergo such surgery. This use of language to declaim gender non-conforming individuals as deranged or abnormal is consistent with the pattern of natural law jurisprudence as it developed through the 1960s as observed by Eskridge. The legal use of stigma and pathologization results in a reduction of the regime-threatening behavior.³⁹

37. *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997). *Maggert* was, at its core, a case about the quality and specificity of treatment that a transgender woman housed in a men's prison was entitled to receive under the Eighth Amendment.

38. *Id.* at 671.

39. Eskridge, *supra* note 3, at 1339–40.

B. The Supreme Court Adopts Gender Construction Theory

The Supreme Court did not rule on the contest between constructive and plain meaning values of gender and sex until *Price Waterhouse v. Hopkins*.⁴⁰ Hopkins, a woman and senior manager at Price Waterhouse, was passed over for partnership despite her excellent job performance on the basis that her behavior, manner of dress, and physical appearance were overly masculine.⁴¹ Hopkins was the only woman candidate proposed for partnership that year, and she was subsequently deferred. The gender-centric statements of the other partners show a clear use of gender stereotyping in the rationalization of her deferral.

One partner described her as “macho”; another suggested that she “overcompensated for being a woman”; a third advised her to take “a course at charm school.” Several partners criticized her use of profanity; in response, one partner suggested that those partners objected to her swearing only “because it’s a lady using foul language.” Another supporter explained that Hopkins “ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr [sic] to an authoritative, formidable, but much more appealing lady ptr [sic] candidate.” But it was the man who, as Judge Gesell found, bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold who delivered the *coup de grace*: in order to improve her chances for partnership, Thomas Beyer advised, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”⁴²

The Court found that her deferral and the reasons given for that deferral were unacceptable sex discrimination under Title VII. The Court reasoned that prohibitions against sex discrimination included prohibitions against discrimination against those who did not conform to sexual norms and stereotypes.⁴³ The Court wrote, “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype

40. 490 U.S. 228 (1989).

41. *Id.* at 235.

42. *Id.*

43. *Id.* at 251.

associated with their group”⁴⁴ While *Price Waterhouse* did not specifically extend to transgender employees, it laid the groundwork for the understanding that gender stereotyping is itself sex stereotyping, and in doing so began to align the Court’s understanding of the gender-sex relationship with the social constructionist theory.

By disclaiming the socially normative belief that a biological configuration necessitates a specifically gendered behavior, the Court acknowledged that gender and sex are not inextricably linked, and, in fact, need not coincide in normative fashion at all for the purposes of sex discrimination in employment. This indicates a constructionist, rather than natural law, theory of gender, though the court did not go so far as to indicate a similarly constructionist notion of sex. Following *Price Waterhouse*, federal court decisions have split over the role that gender stereotyping plays in employment discrimination cases involving transgender plaintiffs.

The Eleventh Circuit specifically extended *Price Waterhouse* to apply to transgender individuals in *Glenn v. Brumby*,⁴⁵ on the basis that the *Price Waterhouse* rationale extended to all individuals discriminated against because of their nonconformance with gender stereotypes.⁴⁶ Because “[t]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior”⁴⁷ there is “a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms. Accordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it is described as being on the basis of sex or gender.”⁴⁸ The Sixth and First Circuits have also followed suit, in *Smith v. City of Salem*⁴⁹ and *Rosa v. Park West Bank & Trust Co.*,⁵⁰ respectively.

44. *Id.*

45. 663 F.3d 1312 (11th Cir. 2011). *Glenn v. Brumby* concerned the case of an editor fired by the Georgia Assembly’s Office of Legislative Council when she announced that she planned to begin transition and present as a woman at the office. *Id.* According to her supervisor, Brumby, Glenn was terminated because “Glenn’s intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn’s coworkers uncomfortable.” *Id.* at 1314.

46. *Id.* at 1316.

47. Turner, *supra* note 25, at 563.

48. *Glenn*, 663 F.3d at 1316–17.

49. 378 F.3d 566 (6th Cir. 2004). In *Smith*, the Sixth Circuit held that a firefighter who was fired for undergoing gender transition and presenting as female was impermissibly discriminated against on the basis of her nonconformance with masculine gender norms. *Id.* at 570–72.

50. 214 F.3d 213 (1st Cir. 2000). *Rosa* differs somewhat from *Smith* in that *Rosa* concerned a bank whose employee refused a heterosexual male patron a loan when said patron wore a dress and

On the other hand, the Western District of Missouri held in *Broadus v. State Farm Ins. Co.*⁵¹ that *Price Waterhouse* did not speak directly to the issue of discrimination against transgender employees, because Hopkins was not herself “a transsexual. Rather, she was a female employee at an accounting firm who was advised to ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry’”⁵² While the *Broadus* court did not specifically rule out the possibility that *Price Waterhouse* could apply to transgender employees, the court took the proactive natural law step of differentiating a transgender employee from a person whose gender and sex the court perceived to be authentic. As in *Ulane*, creating this differentiation suggests that the transgender person is somehow not truly a man or a woman. It sets the employee apart as “other,” and suggests suspicion, distrust, and inauthenticity. It hews directly to the natural law fallacy that a binary sex exists, and that to transgress gender boundaries in a certain way makes one ineligible for inclusion under either sex.

Similarly, the Eastern District of Louisiana in *Oiler v. Winn-Dixie La., Inc.*⁵³ held that *Price Waterhouse* did not apply in the case of the firing of Oiler, a transgender woman who presented as female only outside of work,⁵⁴ under the rationale that sexual orientation and gender identity do not fall under the plain meaning of sex,⁵⁵ which itself refers strictly to biological formation.⁵⁶ The *Oiler* court’s terminology is a bit more confused in this case: the court identifies Oiler as a “transgender” “heterosexual man” with “gender identity disorder” and “transvestic fetishism,” but the court specifies that he is specifically not a transsexual.⁵⁷ The utility of the court’s differentiation is questionable. There is no reason to distinguish between different variations on gender non-conformity if the end product of the ruling is that that no subclassification of transgender identity can receive protection under a theory of gender discrimination.

makeup when applying. The loan clerk instructed him to go home and change out of the feminine attire he was wearing. *Id.* at 214. *Rosa* concerned the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f, which refers to Title VII of the Civil Rights Act for definitions of discrimination, and though the First Circuit did not find sex discrimination based upon the facts of the case the court acknowledged that had the clerk refused Rosa a loan on the basis of his attire, such action would have been sex stereotyping and therefore impermissible discrimination. *Id.* at 215–16.

51. No. 98-4254-CV-C-SOW-ECF, 2000 U.S. Dist. LEXIS 19919, *11 (W.D. Mo. Oct. 11, 2000).

52. *Id.*

53. No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).

54. *Id.* at *32.

55. *Id.* at *19-21.

56. *Id.* at *20-23.

57. *Id.* at *4.

This description is heavily pathological, however, and indeed the court later states that Oiler “is a man . . . [who] publicly disguise[s] himself as a woman, wears women’s clothing . . . [and] pretends to be a woman”⁵⁸ As in *Ulane*, the court differentiates from *Price Waterhouse* on the basis of the fact that Hopkins (of *Price Waterhouse*) never “pretended to be a man”⁵⁹ As with *Ulane* and *Broadus*, the *Oiler* court’s language betrays the court’s fundamental distrust of a person it sees as deceptive, mentally ill, and guilty of transgressing the natural law boundaries between gender and sex.

C. *Macy v. Holder* and the Constructionist Theory of Sex

In May of 2012, the EEOC handed down a landmark decision in *Macy v. Holder*.⁶⁰ Mia Macy, a veteran and former police detective,⁶¹ applied for a job with the Bureau of Alcohol, Tobacco, and Firearms at the Walnut Creek crime lab.⁶² This application occurred before her transition from male to female, while Macy was still presenting as a man. Her unique expertise in ballistics qualified her for the job. Macy’s experience included “[certification] as a National Integrated Ballistics Information Network . . . operator and a BrassTrax ballistics investigator.”⁶³ While on the phone with the Director of the Walnut Creek lab, Macy was told she would have the job pending a successful background investigation. A few months later, with the background check underway, Macy informed the contractor responsible for filling her position that she was undergoing gender transition.⁶⁴ Five days after informing her contractor of the transition, the job offer was withdrawn.⁶⁵ Two different and separate pretexts were given for the withdrawal of the position, neither of which was concordant with Macy’s understanding of her position in the application process.⁶⁶

58. *Id.* at *28.

59. *Id.* at *29.

60. EEOC Decision No. 0120120821, 2012 EEOPUB LEXIS 1181 (Apr. 20, 2012).

61. Jesse McKinley, *Ruling Extends Sex-Discrimination Protection to Transgender Woman Denied Federal Job*, N.Y. TIMES, Apr. 24, 2012, at A14, available at <http://www.nytimes.com/2012/04/25/us/sex-discrimination-protection-extended-to-transgender-woman.html>.

62. *Macy*, 2012 EEOPUB LEXIS 1181, at *2.

63. *Id.*

64. *Id.* at *4.

65. *Id.*

66. *Id.* at *4-5. The initial alleged pretextual claim, made by the hiring director, was that budget considerations had eliminated the position in question. The subsequent alleged pretextual claim, made by the Agency EEOC counselor, was that the position was not itself cut but that another individual had been farther along in the background investigation. *Id.*

When she filed an EEOC complaint against the ATF, Macy did so on both the basis of sex discrimination and the basis of gender identity discrimination.⁶⁷ The ATF asserted that Macy's discrimination claim based upon gender identity, rather than the claim based upon physical sex, was not subject to an EEOC evaluation under Title VII.⁶⁸ This assertion was based upon previous Department of Justice policy, which treated only sex discrimination, and not gender discrimination, as a viable Title VII EEOC claim.⁶⁹ After review, the EEOC held "that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC's federal sector EEO complaints process."⁷⁰ *Macy* marked the first time that Title VII had been applied to gender discrimination in the case of transgender individuals on a federal level.

Since *Price Waterhouse* did not itself address the issue of transgender individuals, the *Macy* decision was necessary in order to begin transformation of the legal perception of gender transition from a pathological aberrance⁷¹ to a development of identity, not unlike a change of religion.⁷² Since *Macy* will govern the EEOC's investigation and enforcement of transgender-related sex discrimination claims, extant patterns of natural law discrimination and binary sex/gender theory will be made harder to implement, with one essential holdout remaining—the Bona Fide Occupational Qualification.

67. *Id.* at *6.

68. *Id.* at *7-8.

69. DEPT. OF JUST., EQUAL EMPLOYMENT OPPORTUNITY PROGRAM (2003), available at <http://www.justice.gov/jmd/hr/hrorder/chpt4-1.htm> (DOJ Human Resources policy on sex discrimination as Title VII claims).

70. *Macy*, 2012 EEO PUB LEXIS 1181, at *13.

71. See *Ulane v. Eastern Airlines*, 742 F.2d 1081 (1984); *Broadus v. State Farm Ins. Co.*, No. 98-4254-CV-C-SOW-ECF, 2000 U.S. Dist. LEXIS 19919, at *11 (W.D. Mo. Oct. 11, 2000); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *4-6 (E.D. La. Sept. 16, 2002).

72. *Macy*, 2012 EEO PUB LEXIS 1181, at *33. The notion of discrimination "during" transition is also particularly important here, because gender transition does not always have a conveniently defined medical endpoint. Many transgender individuals do not pursue medical intervention, or only choose to pursue certain medical treatments. Any treatments, medical or otherwise, are now tailored to specific patients. *Coleman et al.*, *supra* note 32, at 170-71. As a result of medical needs, however, economic considerations, availability of insurance coverage, and access to knowledgeable medical professionals can all prolong a transition period. See *Tracie White, Transition Point: The Unmet Medical Needs of Transgender People*, 29 STANFORD MED. 32, 37 (2012), available at http://stanmed.stanford.edu/2012spring/documents/medmag_2012spring.pdf.

III. CONSTRUCTED SEX AND THE BONA FIDE OCCUPATIONAL QUALIFICATION

Social constructionism gives a definition of gender and sex that is unified and elegant, founded entirely in identity rather than limited by biology. Defining sex and gender based on strict natural law bifurcates the law, makes it harder for individual courts to understand and to implement, and disenfranchises many individuals entirely. Biology itself is indeterminate with regard to anatomy, genetics, and outward physical characteristics. Thus, any determination made based strictly upon biology is essentially arbitrary. What, then, is the function of a Bona Fide Occupational Qualification (or “BFOQ”) based upon sex in a constructionist system?

A. *The BFOQ as Applied to Normative Gender and Sex*

BFOQs themselves are essentially exemptions within Title VII, structured so that they may allow discrimination within limited situations in such instances as the discrimination itself is necessary for performance of the job in question:

Notwithstanding any other provision of this subchapter . . . it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of [their] religion, sex or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise⁷³

These BFOQs must not only be necessary to perform the duties of the job, but the burden is on the employer to show why the necessity of discrimination outweighs the harm caused by discrimination. Typically, it is not enough to satisfy this standard that employing a person of a particular race, age, sex, or religion would, for example, simply alienate clients or coworkers. The presumption is against the legality of any given BFOQ.⁷⁴ What, then, would a BFOQ based upon a natural law assumption of binary biology, rather than gender, look like?

73. 42 U.S.C. § 2000e-2(e) (1964).

74. Sharon M. McGowan, *The Bona Fide Body: Title VII's Last Bastion of Intentional Sex Discrimination*, 12 COLUM. J. GENDER & L. 77, 80 (2003).

The binary sex construction revolves around the presence or absence of biological anatomy—in this case, perhaps, testes or ovaries. To draw strictly from this definition, a BFOQ would apply to a job that in some way required testes or ovaries, but not necessarily any gendered traits or performances that accompany them. This is immediately apparent as an absurdity: the presence of a particular sex organ cannot be what any but a miniscule handful of employers want.⁷⁵ If we broaden the definition to include gender, but hold to the strict biology, we have an answer much closer to the modern conception. We believe that in order to perform these jobs, the employees must be men that look like men, act like men, sound like men, are attracted to women, and have a normative male anatomy. Women must meet the same standards respective to heterosexual normative-appearing women. And yet to append the anatomical requirement still seems somewhat absurd. After all, employers rarely check to make sure a potential employee’s anatomy fits the qualification, even in fields where BFOQs have been approved for use. Under this light, sex-based BFOQs seem much more like gender-normativity-based BFOQs. This reframing is consistent with a modern social constructionist understanding of sex: it is a social norm, not biology, that creates an outward representation of masculinity or femininity, and therefore it is that social norm that is desired by employers who permissibly qualify their employees by sex.⁷⁶ There is, of course, a belief that certain types of work are suited more towards a strictly masculine or feminine body. However, “[m]ost other physical differences between the sexes, such as strength, are imperfectly correlated with sex. Indeed, studies have shown more significant differences among members of the same sex than between men and women as groups.”⁷⁷ This gives the impression that BFOQs are generally quite broad, but in fact modern BFOQs regarding sex are fairly narrowly construed. Typically, they exist when a position requires actual or potential observation or intrusive contact with the body of another person.⁷⁸ Courts have consistently recognized such BFOQ exceptions in cases involving corrections officers, bathroom custodians, and medical attendants.⁷⁹

75. Some employers, of course, may desire specific primary and secondary sexual characteristics in their employees. Some examples that come to mind are performers, models, and sex workers. No stigmatization of such individuals is intended through this Note.

76. Turner, *supra* note 25, at 565.

77. *Id.* at 564 (citation omitted).

78. McGowan, *supra* note 74, at 78.

79. *Id.* at 78.

Courts have cited four essential factors to be considered in sex-based BFOQ determinations. First, the court must consider the likelihood of physical and sexual assault due to temptations that exist in environments of confinement. Second, the court considers whether that cross-sex observation harms the dignity of the individual observed. Third, courts should reinforce an environment of sexual modesty that cross-sex observation might endanger. Finally, courts assume that a single-sex environment is necessary to promote rehabilitation in environments that are intended to rehabilitate.⁸⁰

These restrictions in particular are indicative of not just gender stereotyping, but also of erasure of the experiences and risks of non-heteronormative individuals within such environments. First, it is questionable whether or not the risk of physical or sexual assault is actually greater in opposite-sex situations than in same-sex situations. Justice Thurgood Marshall stated in his dissent in *Dothard v. Rawlinson*⁸¹ that violent assault against a guard in a men's prison is no more likely to occur against female guards than male guards, because a violent inmate does not attack the guard-as-woman; the inmate attacks the guard-as-guard.⁸² Furthermore, the tactics that prison guards use to enforce security do not rely upon the individual physical strength of the guard, but instead rely on institutional power and the teamwork of units made up of multiple guards.⁸³

Second, if physical strength and risk are not issues necessitating a sex-based BFOQ, then there is the allegation of dignity. Specifically, it is generally alleged that there is a greater invasion of privacy when a man sees a woman nude, or vice versa, than when two members of the same sex see each other. It is ridiculous to assume that this assumption is based upon biology. The offense is not a product of the sex organs. It is likewise unreasonable to believe that an anatomically male doctor is intrinsically

80. *Id.* at 87.

81. 433 U.S. 321 (1977). *Dothard v. Rawlinson* concerned an Alabama prison's policy of restricting applicants for prison custodial work by height and weight, certain characteristics of which comprised the BFOQ in the case, rather than by strength or capability. *Id.* at 323–24. This policy had the effect of excluding from prison work more than forty percent of all possible women who applied, but less than one percent of all men. *Id.* at 329–30. However, the BFOQ was upheld in *Dothard* due to a concern on the part of the Court that women would face greater risks in the prison as prison staff than men would, that women would be less adequate than men in their response to these risks, and that an inadequate response to the danger would present a threat not just to the individual prison employee but to everyone in the prison, as well as to the general population outside. *Id.* at 335–36. Justice Stewart framed the risk as arising directly from the “womanhood” of the applicant. *Id.* at 336.

82. *Id.* at 346 (Marshall, J., dissenting).

83. *Id.* at 343.

incapable of humiliating his male patient beyond the indignity of simply seeing the patient nude. The assumption being made, of course, is that all members of the offensive transaction are entirely normative as far as sex, gender, and sexual orientation are concerned. By changing any one of those aspects of the disadvantaged person's character, the door reopens for the additional indignity. A male doctor may be of the sex that meets the criteria for the BFOQ to treat male patients. However, if the patient identifies as female, or if the patient is attracted to persons of the same sex as the doctor, or if the doctor is attracted to persons of the patient's sex or identity, then the opportunity for indignity and harm have been restored and perhaps worsened. Further, because there is the mistaken assumption that the sex-based BFOQ will protect the patient, the patient can potentially be more vulnerable than if there were a minimum level of oversight or responsibility and no BFOQ. The natural-law-based dignity theory behind sex-based BFOQs falls short specifically because it is prescriptive of gender and sexuality in a way that does not prevent harm to dignity in practice.⁸⁴

I assert a more constructionist notion: that the offense is instead composed of two elements. The first element is that one individual must be in a position of power over the other in some way, or capable of otherwise legally restricting the other's action during the invasion of privacy that the job requires. The second element is that the person in power must make the disempowered person feel vulnerable in a way that exceeds the indignity of simply having one's privacy violated. The first element defines the relationships in which such a qualification must exist. For example, the relationships between an orderly and a nursing home resident, a doctor or nurse and a patient, a prison guard and an inmate, or a

84. Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?*, THE WILLIAMS INST. (Apr. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf>. This study asserts that about 3.5% of adults in the United States identify as lesbian or gay, and 0.3% identify as transgender, though eleven percent of surveyed individuals admit same sex attraction without self-identifying as lesbian, gay, or bisexual. *Id.* at 1. If it is the attraction that creates the harm to dignity—being observed by someone who finds the sex or gender of the observed sexually attractive, or whose sex or gender the observed finds attractive, then based upon these statistics the BFOQ fails in its prescription twenty percent of the time; eleven percent of the time, the BFOQ will fail because the observing official will be attracted to members of the sex or gender of the disadvantaged person; and a further eleven percent where the disadvantaged person will be attracted to members of the sex or gender of the observing official, with a statistical overlap of one to two percent when both observer and observed have an attraction to the other's gender, and that gender is normatively identical for both. In no BFOQ evaluation is it required such that the observer or the observed be specifically attracted to the other, all that is required is that a person of a sex or gender that is normatively found attractive by the other is involved in the interaction between the two individuals.

flight security officer and a passenger at their checkpoint all might suffice to satisfy the first requirement.

The second element helps frame the additional vulnerability beyond simply a privacy invasion. If, indeed, the offense to dignity is sufficient to require qualification, then it is not sufficient to assume that the presence of a particular gender expression or sex characteristic defeats the danger entirely because the danger is subjective on the part of the disadvantaged person.

There may be valid reason to apply qualifications to an observer, but to do it by sex is inaccurate and inappropriate. Since there is a presumption against any BFOQ, this inaccuracy weighs heavily against the institution of such a qualification. The natural law heritage of the qualification should not give it shelter or unearned legitimacy. Even in a world in which a textualist interpretation of sex prevails over a constructionist interpretation, BFOQs fail their prophylactic purpose.⁸⁵

B. Sex-based BFOQs and Transgender Employees

In light of the essentially contrived purpose of the sex-based BFOQ, it is instructive to examine its effect when applied to transgender individuals in normatively sex-sensitive situations. The first issue to address is the one that confounds textualism: namely, what does it mean to enforce a sex-based BFOQ where sex is socially constructed? When sex is defined as a “a man with normative male anatomy, or a woman with normative female anatomy” and transgender and intersex persons simply do not exist, a sex-based BFOQ is simple to execute, whether justified or not. An employer may look at the gender marker on an employee or potential employee’s identification documents and be satisfied that no unwanted sex organs or chromosomes are entering the workplace. This employer may still have to deal with contra-normative-gender behavior that renders the BFOQ meaningless. For example, contra-normative gender behavior might include a normatively-gendered guard’s willingness to victimize and

85. McGowan, *supra* note 74, at 97–98. This is not to say that there is no purpose adequately served by qualifying observer positions in prison and medical facilities, but only that it is an overreaching, inaccurate solution to the problem, and a solution that victimizes some while it protects others. The elimination of male employees from all prisons incarcerating women would likely reduce the rates of rape and sexual abuse in those prisons. This action would, however, not prevent any of the same-sex sexual misconduct of guards against prisoners in those facilities, nor would it create resolution of any other harms or indignities, available to any overseer regardless of sex, that prisoners endure. *Id.* at 124. Both of these problems might be better solved by more oversight of the system itself, rather than by less oversight executed by single-and-same-gender overseers. *Id.*

humiliate members of the same sex⁸⁶ or a male prison guard too slight and weak to enforce security in a men's prison. In such cases, the purpose of the BFOQ has been thwarted, but the letter of the law has been satisfied and nominal justice has been served. The world posited above, however, does not exist. Transgender and intersex employees require that we ask further questions of a BFOQ: are employers screening for an anatomical shape, a gender identity, or a gender performance that makes the job impracticable?

Consider El'Jai Devoureau, a transgender man who lost his position as a urine monitor for men at a Camden, New Jersey drug-testing center, Urban Treatment Associates.⁸⁷ The job involved watching men provide urine samples for later analysis. He was fired on his second day of work, when his employer heard that he had transitioned from female to male.⁸⁸ Devoureau has refused to submit or discuss his medical history.⁸⁹ Devoureau's state-issued identity documents indicate that he is male.⁹⁰ Urban Treatment Associates hired him as a male and never questioned his sex before his firing.⁹¹ It is reasonable to assume that during the hiring process Urban Treatment Associates never anticipated that any male patient would object to Devoureau's presence as a monitor, or at least they never anticipated that a patient would not make any sex-based objections to which other male monitors would not be subject. Devoureau was fired under the premise that masculinity is a BFOQ for the job of urinalysis monitor. The corollary to this premise is that despite all government-approved documentary evidence, Urban Treatment Associates did not consider Devoureau to be male.

A case such as Devoureau's raises three issues that a court would have to untangle. First, who is capable of determining an employee's legal sex?

86. In fairness, it cannot seriously be argued that a willingness to humiliate and victimize members of one's own normative sexual group is somehow contra-gender behavior. The jurisprudence surrounding BFOQs and the offense to dignity theory, however, places same-sex observation on a pedestal, and assumes that no such same-gender violations exist, or, at least, that they do not exist in such a way as to outstrip the indignity of cross-sex observation.

87. *TLDEF Helps Transgender Man Achieve Settlement in Discrimination Suit*, TRANSGENDER LEGAL DEF. & EDUC. FUND, http://www.transgenderlegal.org/headline_show.php?id=429 (last visited June 26, 2014). Since the initial writing, Devoureau's suit has reached settlement.

88. *TLDEF Files Suit on Behalf of Transgender Man Fired from Male-Only Job*, TRANSGENDER LEGAL DEF. & EDUC. FUND, http://www.transgenderlegal.org/headline_show.php?id=346 (last visited June 26, 2014).

89. Richard Pérez-Peña, *A Lawsuit's Unusual Question: Who is a Man?*, N.Y. TIMES, Apr. 10, 2011, at A18, available at <http://www.nytimes.com/2011/04/11/nyregion/11sexchange.html>.

90. *Id.* Devoureau's Georgia-issued birth certificate, New Jersey driver's license, and Social Security registration all indicate that he is male. *Id.*

91. *Id.*

Does an employer's opinion on an employee's sex trump state documents? For an employer such as Urban Treatment Associates to prevail, the employer would have to convince a court that transgender employees inhabit a space outside of the natural law definitions of "male" and "female." This requires a jurisprudence founded on the principles of *Ulane*, rather than *Price Waterhouse*, *Smith*, or *Macy*, by limiting "male" and "female" to the so-called plain meaning of biology, and exiling the transgender plaintiff to the role of outsider in lieu of accepting a constructive and all-encompassing understanding of sex. Further, they would have to show that their suspicion of their employee in the face of government identity documents is sufficient to place the employee in this outsider category.⁹²

The second issue is a determination of the circumstances under which a rejection of the sex marker on government-issued ID is appropriate. An employer that adopts a sex-based BFOQ that relies upon a "plain meaning" definition of sex will be faced with a particular dilemma: namely, how does one know that one is hiring a so-called "impostor" under the natural law of sex such that one may terminate or prevent the employment? Devoureau was outed⁹³ by a rumor that he had undergone transition.⁹⁴ Not every employer will have such a rumor to assist it. A determination based on appearance will not suffice. Many men have effeminate features, and many women have masculine features, even outside of the transgender umbrella.

Nor will a determination based on mannerism suffice. Mannerisms are not only not determinative of biological sex, but it is illegal to discriminate in employment based upon contra-gender behavior or appearance under *Price Waterhouse*. This restriction means that an employer who singles out and takes adverse employment action against an employee based upon gendered mannerisms or appearance is exposing itself to legal action under Title VII, whether or not that employee has physically normative sexual organs. There is simply no legal way for an employer to reliably and

92. *Ulane v. Eastern Airlines*, 742 F.2d 1081 (1984), and *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002), would be particularly apt references to make for this purpose, since even outside of the legal reasoning used, the language employed is useful for framing transgender employees as "other than" male and female. Given the language used in *Maggert v. Hanks*, 131 F.3d 670 (7th Cir. 1997), to believe that a court would adopt this discriminatory language is no stretch.

93. In context, persons whose gender, gender identity, sex, or sexual orientation is not in line with heteronormative standards, but who nonetheless expresses themselves or pass as heteronormative, are "outed" when said gender, sex, or orientation is revealed to the world without their consent. Outing naturally subjects the person outed to increased scrutiny, suspicion, and danger.

94. See Pérez-Peña, *supra* note 89.

safely single out transgender employees under a BFOQ should the law permit employers to do so.⁹⁵

Finally, in order for a business to institute a natural law sex-based BFOQ, it would have to request proof of anatomical normativity from current and potential employees at birth and at present. The least intrusive way to prove anatomy is with medical records. Even then, though, this demand is extremely intrusive upon the privacy of one's employees. The medical records in question would also have to indicate physical anatomical shape, hormone levels, and chromosome count and status.⁹⁶ Finally, since part of the alleged purpose of these BFOQs is to protect both employees and clients from offenses to dignity, instituting such a requirement seems to be entirely counterproductive—even if that request for medical records is strictly legal.

The absurdity of Devoureau's termination becomes obvious. No analysis can vindicate the use of this BFOQ without drawing upon natural law and thereby tying assumed-gender behavior, such as the ability or inability to maintain a professional demeanor while supervising a drug-test urination, to the suspected biology of the observer. A constructionist understanding of sex makes this BFOQ entirely unnecessary. Under such an understanding, there is no question that Devoureau identifies as male, was identified by both the government and his employer as male, and as such is male for all practical purposes. He is perfectly well-equipped to supervise urine sampling and prevent urine substitutions and other illicit behavior. His gender and sex are no more questionable than those of any other employee hired as a man. Urban Treatment's clients would have no more suspicion or reason to complain of an offense to dignity committed by Devoureau than if any other male-identified person were supervising. Devoureau's gender expression is all that clients require, and he cannot be fired solely on the basis of that gender expression under the precedent set by *Price Waterhouse*.

95. This is assuming it would even be legal to single out individual employees for inquiry into medical records. The Americans with Disabilities Act specifically indicates that no employer may demand a medical examination of an individual entering employee unless it requires the same of all entering employees. 42 U.S.C. § 12112(d)(3)(A) (2009).

96. These three indicators are often requested when demanding or contesting "proof" of sex from transgender individuals. Even if one's gender marker, anatomical shape, and hormone indicators all indicate one sex, chromosomal markers may still be used to "prove" that a person is transgender. Rarely, however, are chromosomal markers requested of gender-normative non-trans individuals, nor ought they be requested of anyone.

C. Sex-Based BFOQs and the Transgender Observed

A sex-based BFOQ's natural law adherence not only causes damage to the employee and employer, but also to third parties who are in the care of or under observation by the employer and employee. The same norms that require that a strict anatomical line be drawn between male and female and that exclude those persons who do not fit within a sex-normative framework falter when it comes to categorization of the observed. Sex-based BFOQs exist almost strictly within cross-sex scenarios and prevent harm to the supposed weaker of the involved sexes, and prevent some measure of legally unacceptable indignity to both. As a result, the observed parties must be strictly segregated by sex, or the BFOQ cannot be instituted.

The problem, naturally, is that not all persons fall within those strictly defined sexes. When the observed are inmates of correctional institutions, there is no option to terminate employment or to simply walk away from the situation in which one is observed. Typically, such situations lead authorities to follow the natural law prescription with regards to original anatomy rather than apply constructionist principles to determine the safest option with the least harm to dignity—the purported end of natural law BFOQs.

1. Tanya Guzman-Martinez and The Incarceration Dilemma

In 2010, Tanya Guzman-Martinez filed suit against the Corrections Corporation of America as a result of its natural law norms.⁹⁷ Tanya had crossed the U.S.-Mexico border and applied for asylum in the United States due to her fear that her gender identity would subject her to danger in Mexico.⁹⁸ While Tanya's application was pending, she was detained in the Eloy Detention Center. Despite Tanya's identification as a woman, her expression of her gender identity, her appearance, and medical history, authorities detained Tanya in an all-male housing unit. While present in this unit, she was not only victimized by other inmates due to her appearance and gender identity, but also by at least one guard, who would force her to “watch him masturbate into a styrofoam cup and then

97. *Guzman-Martinez v. Corr. Corp. of Am.*, No. CV 11-02390-PHX-NVW, 2012 U.S. Dist. LEXIS 97356 (D. Ariz. July 13, 2012). Because the Detention Center adopted a normative model for sex that excluded transpersons, Guzman-Martinez was forced into the all-too-common position of being a transgender woman assigned to a male-only detention center.

98. *Id.* at *4.

[demand] that she ingest his ejaculated semen.”⁹⁹ The unit failed to house her with women, as she requested, and also failed to give her a confined cell, which she also requested.¹⁰⁰

The trial court found that as Tanya was “biologically male,”¹⁰¹ housing Tanya in a women’s facility would violate the constitutional rights of other prisoners and impermissibly burden the system.¹⁰² However, the court provided no indication as to how such an arrangement would “impermissibly burden” the system.¹⁰³ Similarly, the court did not explain how a single-occupancy cell in a women’s facility would cause unconstitutional punishment for Tanya as a woman. The court seemed to take as given that a single-occupancy cell in a facility where a woman prisoner’s gender makes her a target for sexual harassment and abuse both from other inmates and her overseers does not constitute unconstitutional punishment. As a matter of law, in contesting her prison conditions, the court found that Tanya failed to state a claim for relief because there are no legal standards yet established for the housing or treatment of transgender prisoners.¹⁰⁴ The key was that the court found her “biologically male,” but at the moment there is no reliable method of transforming every possible biological gender marker upon which the court could have relied.¹⁰⁵

A natural law jurisprudence is therefore capable of perpetuating correctional atrocities such as those suffered by Ms. Guzman-Martinez by relying on the concept of “biological distinction.” Biological distinction is such a nebulous and inaccurate quality that any court could interpret it to limit the rights of a transgender or intersex person, regardless of the person’s biology.¹⁰⁶

99. *Id.* at *8. This sexual abuse and battery were accompanied by other verbal harassment, slurs, and threats over an extended period of time. *Id.*

100. *Id.* at *7. Deprivation of single occupancy cells for inmates who are subject to specific violence is counter to the requirements of the American Correctional Association Standards. *Id.*

101. *Id.* at *25–26.

102. *Id.*

103. *Id.* at *26.

104. *Id.*

105. Nor should any person be required to transform every possible gender marker in such a fashion. In this case, the court does not clearly indicate which marker it uses to categorize Guzman-Martinez’s sex, but the court does refer to her as “biologically male.” *Id.* at *25-26. The court also notes Tanya’s preparation for gender confirmation surgery. *Id.* at *7. Because “male biology” used as an indicator, it seems unlikely Guzman-Martinez would have been able, as a woman, to avoid being treated as a man even had she already undergone further medical treatment.

106. As ludicrous as it may seem to suggest that prison officials would move goal posts to allow rather than prevent atrocities, at least one prison official has stated a preference for a DNA-based gender identification system for transgender prisoners. Sydney Tarzwell, *The Gender Lines Are Marked With Razor Wire: Addressing State Prison Policies and Practices for the Management of*

2. *Gender, Sex, and the Bona Fide Abuser*

Neither the abuse committed against Ms. Guzman-Martinez nor the court's inability or unwillingness to address this abuse is a novel occurrence. Transgender persons, particularly persons of color, are arrested and subjected to prison sentences disproportionately more often than non-transgender defendants are subjected to the same sentences.¹⁰⁷ Some municipalities include gender-nonconforming behavior among sex offenses, and not only disproportionately persecute transgender persons, but subject them to permanent sex offender status.¹⁰⁸ Within the corrective system, prison staff create a hyper-gendered environment that results in violence, sexual abuse, and rape of transgender prisoners by other detainees and by prison staff themselves at a higher frequency than the general prison population.¹⁰⁹ These disproportionate abuses occur in both men's and women's facilities.¹¹⁰ Therefore, the potential for abuse is likely not inherent to any particular gender or sex demographic.

The normative standards, however, inherent to that gender or sex demographic may determine the form the abuse takes. The cause of abuse therefore likely lies within the hyper-gendered nature of the environment. This hyper-gendered environment is the natural product of institutions employing a sex-based BFOQ. Because these BFOQs result in a gendered selection, rather than a strictly sex-based selection, the natural law gender standards that reinforce the BFOQ are amplified within the employee population. In a closed system, such as a prison, where the observed may not leave the environment created by the observers, I believe that such normative behavior is further reinforced. Transgressions against gender normative behavior may be persecuted more frequently and with less regard for the life or safety of the transgressor.¹¹¹ This closed cycle harms

Transgender Prisoners, 38 COLUM. HUM. RTS. L. REV. 167, 195 (2006). Such a system would ensure that transgender prisoners were misgendered and subjected to heightened rates of sexual abuse without the possibility of being assigned a facility appropriate to their sex. See Valerie Jenness et al., *Violence in California Correctional Facilities: An Empirical Examination of Sexual Assault* (2007), <http://www.wcl.american.edu/endsilence/documents/ViolenceinCaliforniaCorrectionalFacilities.pdf>.

107. Tarzwell, *supra* note 106, at 197.

108. *Id.* at 172.

109. *Id.* at 179–80. Transgender inmates are more than thirteen times more likely to be abused than is the general population. Jenness et al., *supra* note 106, at 42.

110. Tarzwell, *supra* note 106, at 177–80.

111. In addition, safety and medical treatment of transgender detainees is still a developing and contested jurisprudence. A textbook example of this jurisprudence occurs in *Maggert v. Hanks*, wherein Judge Posner held that adequate medical care for transgender persons in prison might incentivize transgender people to commit crimes in order to receive care. 131 F.3d 670, 672 (7th Cir.

the entire prison population, but results in a specific targeting of transgender persons, who by definition defy normative gender standards. The result is that the sex-based BFOQ which relies upon natural law creates situations almost identical to those that it is purported to prevent: namely, physical violence and offense to dignity arising out of conflicts of gender and sex.¹¹²

CONCLUSION

As much as one might like to believe otherwise, natural law principles still have a firm hold upon our judicial system. By adhering to these principles, which draw lines between sexes based upon antiquated moral alarmism, our judicial system stunts its ability to make itself accessible to persons of every gender, biology, and sex. By enforcing laws based on these principles, without adapting jurisprudence to allow for variations in sex, the judicial system restricts the way the world responds to transgender and intersex persons and limits their recourse when recourse is appropriate.

BFOQs reinforce such a system by ensuring that the workplaces where employees are most vulnerable are able to perpetuate illegal gender discrimination and create a foothold for antiquated jurisprudence. But as transpersons—who have historically been a hidden part of western society—come forward in increasing numbers, and awareness of transpersons increases to the point where jurists and legislators have to take note, the jurisprudence of natural law gets forced into a corner. Its adherents must choose either to hand down unjust verdicts, with language that betrays the antiquated motive of normative entrenchment, or to manipulate the language of statutes in order to preserve the strict meanings of “male” and “female.” These courses cannot hold, however. With a more

1997). Given the rampant abuse and particular risks that transgender individuals face in prison, even beyond the typical danger, it requires a tremendous stretch of logic to assume that transgender individuals in general, or even any non-transgender individuals, are so sociopathic and so overwhelmingly consumed by the incentive to receive particular expensive medical care that the benefit could be perceived to outweigh both the social conscience required to intentionally commit a felony subject to imprisonment and the very real danger of subjecting oneself to rape and risk of death in prison solely to receive that treatment.

112. At the time of writing, the incarceration of Chelsea Manning in military prison is also a contested issue. Chelsea, a transgender woman of particular prominence, is housed in a men’s military prison in contravention of federal prison standards. This violation is the result of military policy, which disallows transpeople from service in any capacity, and which therefore makes no accommodations for transpeople being held in military prisons. This systemic ban raises a much broader question, and one not within the scope or substance of this Note.

visible transgender presence, jurisprudence is shifting to account for the constructive nature of gender and the way that gender defines sex.

Sex-based BFOQs are a structural core of a natural law system, and they are structures that both actively endorse and further violence and oppression. An active approach to constructionist philosophy and jurisprudence will allow the deconstruction of this deeply entrenched system, and will provide justice not only for transpersons, but for individuals of every gender and sex who are harmed, othered, or marginalized by an acceptance of the harms that a strictly-sexed jurisprudence overlooks or endorses.

I urge modern jurists to adopt such an approach in their understanding of sex and gender going forward. This adopted view will allow everyone with even nominal access to the law the full benefit of its protection. It will also provide all persons with the opportunity to engage in productive and gainful employment safely and without fear of intrusion into and redefinition of their identities.