THE PRICE OF PRICE WATERHOUSE: HOW TITLE VII REDUCES THE LIVES OF LGBT AMERICANS TO SEX AND GENDER STEREOTYPES

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"Being oppressed means the absence of choices."
– bell hooks, Feminist Theory: From Margin to Center

I. INTRODUCTION

In 2017, a gay man can be called a "cocksucker" by his fellow employees and the system of justice will close its doors to him, offering no legal remedy.

James Pittman faced vehement harassment and discrimination at his job in Missouri at Cook Paper Recycling Corporation.[1] Pittman's fellow employees taunted him by calling him a "cocksucker," asking if he had

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1. Mark Joseph Stern, *Gay Man Tormented at Work Then Fired for Being Gay Has No Legal Recourse, Court Rules*, SLATE.COM (Oct. 30, 2015, 11:48 AM), http://www.slate.com/blogs/outward/2015/10/30/anti_gay_harassment_missouri_man_cannot_sue_for_sexual_orientation_discrimination.html.

AIDS, and mocking his relationship with his boyfriend.[2] Then, the company fired him because of his sexual orientation.[3] Pittman filed suit in state court, alleging employment discrimination.[4] The Missouri District Court and the Western District Missouri Court of Appeals both ruled in favor of Cook Paper, dismissing Pittman's claims because Missouri law does not include sexual orientation as a protected status in employment claims.[5] Federal law does not protect against sexual orientation discrimination in the workplace either.[6]

Title VII of the Civil Rights Act of 1964 ("Title VII") prevents employment discrimination on the basis of race, color, religion, sex, or national origin.[7] Title VII was enacted in the midst of the Civil Rights Movement to eliminate discriminatory employment practices that disadvantage members of minorities.[8] Further, the Americans with Disabilities Act[9] and the Age Discrimination in Employment Act[10] provide federal protections for other groups. Yet, Congress has not passed federal legislation to curb employment discrimination for the Lesbian, Gay, Bisexual, Transgender ("LGBT") community.[11] Congress has introduced The Employment Non-Discrimination Act ("ENDA") into every session since 1994, beside the 109th Congress, and has failed to enact it each time.[12]

Despite ENDA's failure, courts still attempted to provide some protections to the LGBT community through Title VII.[13] However, courts are limited to

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2. *Id.*

3. *Id.*

4. *Id.*

5. Zack Ford, *Gay Man Was Harassed at Work for Being a "Cocksucker," Court Says It Won't Do a Thing About It*, THINKPROGRESS.ORG (Oct. 30, 2015 8:00 AM), http://thinkprogress.org/lgbt/2015/10/30/3717515/missouri-discrimination-ruling/.

6. Stern, *supra* note 1.

7. 42 U.S.C. § 2000e-2 (2012).

8. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

9. *See generally*, 42 U.S.C. § 12101 (2012).

10. *See generally*, 29 U.S.C. §§ 621(a), 623(a) (2012).

11. *See The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2007-2008*, HUMAN RIGHTS CAMPAIGN, 2 (2009), http://www.hrc.org/files/assets/resources/HRC_Foundation_State_of_the_Workplace_2007-2008.pdf.

12. Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass This Law*, CTR. FOR AM. PROGRESS (July 19, 2011), https://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act/.

13. *See* Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 869 (9th Cir. 2001) (holding that the defendant violated Title VII due to sex discrimination, not sexual orientation discrimination, because a man had feminine mannerisms).

the language of Title VII and state law, which usually mirrors the language of Title VII. Since sexual orientation is not expressly included among Title VII's other protected classes, courts have tried to fit a square peg in a round hole by likening sexual orientation to sex or sex stereotypes.[14] Other courts simply argued that Congress did not include sexual orientation discrimination, so there is no recourse for such harassment.[15] In *DeSantis v. Pacific Telephone & Telegraph Co.*, the court plainly stated that the "prohibition of sex discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality."[16] One court even called relief from sexual orientation discrimination "wholly inappropriate" under Title VII's language.[17]

Most courts, however, use the standard set forth in *Price Waterhouse v. Hopkins* ("*Price Waterhouse*") of "sex stereotyping" to protect victims of sexual orientation discrimination in the workplace.[18] *Price Waterhouse* held that it is a violation of Title VII to deny an employment benefit to an employee based on traditional stereotypes associated with his or her sex.[19] However, as decided in *Vickers v. Fairfield Medical Center*, the *Price Waterhouse* standard only covers appearances or behaviors that are gender non-conforming.[20] Curbing discrimination based on gender non-conforming behavior does not provide all members of the LGBT community protection; in fact, it only provides protections for those members of the LGBT community who express gender in a way that does not comport with societal norms.[21]

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14. *See id.* at 874.

15. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 765 (6th Cir. 2006) (finding that the plaintiff had no recourse because sexual orientation is not included in Title VII's protected classifications); *see also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.").

16. DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979).

17. *See* Schroeder v. Hamilton Sch. Dist., 282 F.3d 946, 951 (7th Cir. 2002) (holding that a homosexual male teacher did not state an appropriate harassment claim because he was not treated any differently than his heterosexual colleagues, even though he was called "faggot" at work).

18. *See, e.g.*, Prowel v. Wise Bus. Forms, Inc., 579 F.2d 285, 291 (3d Cir. 2009) (finding that a gay man's "effeminacy and lack of conformity" to gender stereotypes was enough to survive a motion for summary judgment under Title VII).

19. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 248-49 (1989).

20. *See Vickers*, 453 F.3d at 766 (Lawson, J., dissenting).

21. *See* Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities,*

I argue that the Supreme Court's holding in *Price Waterhouse*, while successful in the context of gender and sex discrimination, when applied to sexual orientation discrimination provides an unworkable and unrealistic standard that reduces the lives of LGBT members to binary, gendered conformities. In doing so, the judiciary severely misunderstands the lives and identities of members of the LGBT community and the harassment many face in the workplace. *Price Waterhouse* paints in broad strokes, blurring the multi-faceted genders, behaviors, and lives of the LGBT community by wrongfully assuming that all sexual orientation harassment is rooted in gender non-conformity. I argue that sexual orientation harassment, although sometimes rooted in gender, cannot be conflated entirely with sex harassment under Title VII. In doing so, courts reduce gayness to a series of behaviors and appearances, instead of a deeply-rooted identity in need of federal protection.

In Part II, I explore various federal cases that conflate sexual orientation discrimination with sex discrimination. Although a rare few of these courts may allow a gay plaintiff to prevail in a claim of sex discrimination,[22] many do so through the *Price Waterhouse* standard of sex stereotyping, and not because the harassment was directed toward sexual orientation.

In Part III, I argue that it is improper to view sexual orientation discrimination through the lens of sex or gender discrimination. Doing so ultimately blurs the lines between sex and sexual orientation to the detriment of the LGBT community. Although it may be true that gender and sexual orientation discrimination are intertwined, conflating the two essentially erases the struggles and identities of LGBT lives and, in its wake, reinforces stereotypes. Conflating sexual orientation discrimination to gender or sex discrimination reduces gayness to a series of appearances and behaviors, protecting perceived sexual orientation instead of gayness itself. Further, the *Price Waterhouse* standard privileges some members of the LGBT community over others; members of the LGBT community that are gender non-conforming are privileged, while members of the LGBT community who may be gender conforming are left unprotected, even though they may suffer from sexual orientation discrimination. Further, I argue that the *Price Waterhouse* standard privileges transgender individuals who conform to the gender binary over lesbian, gay, and bisexual ("LGB") individuals who do conform.

In Part IV, I discuss possible alternatives to the *Price Waterhouse* framework that will allow all members of the LGBT community to be

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and Employment Discrimination, 43 U. MICH. J.L. REFORM 713, 715 (2010).

22. *See, e.g.*, *Prowel*, 579 F.3d at 291.

protected from workplace discrimination, particularly LGB individuals. For the LGBT community to achieve such protection, the legislature must pass ENDA or amend the Civil Rights Act of 1964. However, courts may look at sex discrimination differently than they have under the *Price Waterhouse* decision in order to provide protection to all, not only some, members of the LGBT community.

II. *PRICE WATERHOUSE* AND THE SEXUAL ORIENTATION DISCRIMINATION CONUNDRUM

In *Price Waterhouse*, the Court held that Title VII protects employees who may not display traditional appearances and behaviors of gender.[23] In *Price Waterhouse*, Ann Hopkins was denied a promotion after receiving positive reviews.[24] The partners of Price Waterhouse described Hopkins as having "strong character, independence, and integrity," and being an "outstanding professional."[25] However, partners at Price Waterhouse denied Hopkins' promotion because of her abrasiveness and masculine behavior.[26] Some partners said that Hopkins should learn to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[27] Although Hopkins displayed "masculine" characteristics, there is no evidence that she was bisexual or a lesbian.

The Court held that Price Waterhouse's discriminatory actions were of a mixed motive; in other words, Hopkins was denied a promotion because of legitimate and illegitimate discriminatory reasons.[28] The discriminatory reasons were based on sex stereotypes, which is impermissible sex discrimination under Title VII.[29]

Courts have taken this sex stereotyping approach and applied it to cases alleging sexual orientation discrimination, wrongfully assuming that members of the LGBT community inherently display deviant physical or behavioral characteristics that are gender non-conforming. Although many members of the LGBT community, especially transgender people, may display gender non-conforming behavior that may pass the *Price Waterhouse* standard, many do not.

For example, in *Prowel v. Wise Business Forms, Inc.*, the Third Circuit

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23. *See Price Waterhouse*, 490 U.S. at 258.
24. *Id*. at 233.
25. *Id.* at 234
26. *See id.* at 235.
27. *Id.*
28. *Id*. at 258.
29. *Id*.

held that discrimination against a gay man who was effeminate and displayed female-like characteristics, was actionable under Title VII.[30] Prowel spoke in a high voice, walked femininely, and supposedly sat "the way a woman would sit."[31] Prowel suffered verbal harassment from his fellow employees, who called him "faggot" and accused him of having AIDS.[32] Unlike Hopkins, however, Prowel was known to be a homosexual and was harassed because of his sexual orientation, not his gender.[33] However, because Prowel displayed feminine traits, instead of traditional, gender-conforming male traits, the Third Circuit held that the employer allowed discrimination based on sex under Title VII through the use of the *Price Waterhouse* precedent.

In allowing Prowel's suit to go forward as a violation of sex discrimination under Title VII, the Third Circuit delegitimized sexual orientation discrimination as secondary to gender or sex stereotypes. This is partly because Congress has forced courts to do so.[34] The court stated that "the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw,"[35] implying that sexual orientation and sex stereotypes are inextricably intertwined. As Brian Soucek states, "In Prowel's case, so-called sexuality discrimination [is] reduced entirely to harassment based on gender nonconformity."[36]

However, many of the actions or behaviors that Prowel exhibited cannot be directly linked to typically "feminine" behavior. Prowel's own testimony was that employees made fun of him for wearing nice men's clothes, keeping a clean car, and pressing buttons on a piece of equipment with "pizzazz" to the point where coworkers threatened to shoot "all the fags."[37] Surely wearing nice men's clothing, keeping a car clean, and pressing buttons with "pizzazz" are not stereotypical behaviors of a female. Instead, these are stereotypical behaviors of male gayness. The stereotypical behavior that Prowel was criticized for was not because of his sex or gender, but because of his sexual orientation. Prowel should have won his case for the struggles

30. *See* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291 (3rd Cir. 2009).

31. *Id.* at 287.

32. *Id*. at 287-88.

33. *See id.* at 287.

34. *See id.* at 290 ("Despite acknowledging that harassment based on sexual orientation has no place in a just society, we explained that Congress chose not to include sexual orientation harassment in Title VII.") (citing Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 265 (3d Cir. 2001)).

35. *Id.* at 291.

36. Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV 715, 735 (2014).

37. *See Prowel*, 579 F.3d at 287.

he endured because of his sexual orientation, not because of his sex.

A court may argue that Prowel's behavior is, in fact, rooted in gender discrimination or sex stereotypes because Prowel did not act within the typical masculine role. In other words, some may argue that the behavior exhibited by a plaintiff bringing a sexual orientation discrimination claim does not need to mirror the opposite gender's stereotypical behavior in order for the claim to stand. However, in *Anderson v. Napolitano*, the gay plaintiff, Anderson, was denied a Title VII claim based on sex discrimination, even though the harassment was due, in large part, to stereotypical "gay" behavior.[38] Anderson's fellow employees harassed him by talking to him in a flamboyant voice with a lisp, a trait typically associated with a stereotypical version of a gay man.[39] The District Court reasoned that lisping is not a gender-conforming trait of women, but a stereotype of a gay man.[40] The District Court dismissed Anderson's Title VII claim for employment discrimination because of sex, or sex stereotypes, because those stereotypical traits did not conform to how a woman would act.[41]

Thus, under Title VII, a gay man is not faulted for being gay, but for not being gay enough. Under Title VII, through the lens of *Price Waterhouse*, the gay man who exhibits stereotypical behaviors or characteristics is the one who wins the prize, not the gay man who is harassed purely because of his gayness, as evidenced in *Anderson*. In essence, under *Price Waterhouse*, in order to prevail on a Title VII claim, a gay man must project himself effeminately and a lesbian must act masculine.[42] As seen in *Anderson*, this test is unworkable and often undermines the intricacies of LGBT life because it protects gay stereotypes and not gay people.

The protection of gay stereotypes, instead of gay people, is evident in *Vickers v. Fairfield Medical Center*.[43] In *Vickers*, the plaintiff befriended a

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38. *See* Anderson v. Napolitano, No. 09-60744-CIV, 2010 U.S. Dist. LEXIS 10422, at *19 (S.D. Fla. Feb. 8, 2010).

39. *See id.* at *4.

40. *See id*. at *17.

41. *See id*. at *19.

42. It is important to note that courts have trapped themselves in the gender binary, which leaves little relief for bisexuals, as well as gay men and women who do act within their gender-specific roles. Bisexual plaintiffs would have to prove, like any gay plaintiff, that he or she is being discriminated against because of sex stereotyping. This claim, however, is unlikely to prevail because courts wrongfully assume that gender non-conformity is inherently attached to sexual practices. In a practical sense, a bisexual in the workplace would rarely be discriminated against because of his or her gender non-conformity, but because of his or her sexual preferences, leaving that person with no legal recourse.

43. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757 (6th Cir. 2006).

male homosexual employee and went on a vacation to Florida with another man.[44] He was then subjected to daily instances of discrimination from his fellow employees, who called him names, put chemicals in his food, and played him recordings of anti-gay conversations.[45] Vickers asserted a Title VII claim for sex discrimination based on the paradigms set forth in *Price Waterhouse*, but the Sixth Circuit denied his claim, stating that a favorable result for Vickers would "have the effect of de facto amending Title VII to encompass sexual orientation as a prohibited basis for discrimination."[46] The court further stated, "In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices."[47] The court knowingly stated that a sex-stereotyping claim under Title VII is only for those gays who behave, in a non-sexual way, like a stereotype.

Thus, like the court in *Vickers*, courts imply that they will only protect gay people who exhibit stereotypical behaviors or appearances of gayness.[48] A gay man is only protected from employment discrimination when he is a sissy, a fag, or an otherwise effeminate gay man. A lesbian will only have protection when she is a dyke. Courts will not protect other "presentations" of gayness, or perceived gayness, that may be gender conforming, or may not be stereotypical enough. The *Price Waterhouse* sex stereotyping structure, as courts have typically applied it, is simply not a broad enough standard to encompass all members of the LGBT community, especially LGB individuals.

III. REDUCING GAYNESS TO APPEARANCES AND BEHAVIORS REINFORCES STEREOTYPES AND FAILS TO PROTECT THE LGBT COMMUNITY

Through the Title VII lens of *Price Waterhouse*, members of the LGBT community can only recover from sexual orientation discrimination when they fit the description of a stereotypical gay man or lesbian.[49] Under this framework, the LGBT community is reduced to behaviors and appearances

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44. *See id.* at 759. It should also be noted that the plaintiff in *Vickers* never indicated his sexual preferences. However, for the sake of this analysis, the employer and his fellow employees treated him as if he is, in fact, a gay man, and discriminated against because of that belief.

45. *Id.*

46. *See id.* at 764.

47. *Id.*

48. *See id.*

49. *See id*.

and the individual struggles endured in the workplace are ignored. Indeed, courts have recognized this problem. In a 2005 case, the Second Circuit claimed that "one can fail to conform to gender stereotypes in two ways: (1) through behavior, or (2) through appearance."[50] However, this shallow distinction fails lesbian, gay, and bisexual individuals while privileging some members of the transgender community who conform to one gender. Ultimately, the *Price Waterhouse* framework forces members of the LGBT community to repress themselves, and act in a stereotypical way in order to gain protection under Title VII.

A. Title VII Protection for the LGB Community

The *Price Waterhouse* distinction between behavior and appearance fails to protect "normal" members of the LGB community—that is, LGB members who are gender conforming—yet protects stereotypical LGB individuals when they exhibit behaviors and appearances of the opposite gender. However, the *Price Waterhouse* standard for sex stereotyping effectuates and perpetuates LGB stereotypes and fails to protect all members of the LGB community collectively. It is an unworkable and nonsensical standard as applied to LGB individuals, as it only protects gay appearances and behaviors, and not homosexual sex acts, even though homosexual sex acts can be interpreted to be a violation of a traditional sex stereotypes. The *Price Waterhouse* standard also divides LGB individuals into "normal" and "stereotypical" categories, reducing the struggles and lives of LGB people to simply behavior and appearances. This distracts from the fact that members of the LGB community are discriminated against because of their sexual orientation, not because of their gender non-conformity, and undermines the purpose of Title VII.

First, the *Price Waterhouse* framework of sex stereotypes is an unworkable standard that is unnecessarily narrow. The *Price Waterhouse* standard only protects from sex stereotyping in the LGB community by behavior and appearance, but not through sexual acts, even though *sexual orientation*, not sex or gender, may be the cause of the discrimination.[51] However, courts ignore the fact that sexual acts with a member of the same sex could be construed as sex stereotyping itself under *Price Waterhouse*. Since heterosexual sex is a normative act, a homosexual act could be construed as violating a traditional sex stereotype. In other words,

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50. *See* Dawson v. Bumble & Bumble, 398 F.3d 211, 221 (2d Cir. 2005).

51. *See* Price Waterhouse v. Hopkins, 490 U.S. 288, 239 (1989) (clarifying that although Congress passed Title VII to make sex, color, race, religion, and national origin impermissible factors for employment decisions, it did not purport to limit other factors employers may consider).

heterosexual sex acts are sex stereotypes in and of themselves. If an employee is discriminated against based on his or her homosexual sex acts, courts could interpret that discrimination as impermissible sex stereotyping. Under *Price Waterhouse*, courts *should* find that sex discrimination under Title VII encompasses homosexual sex acts because "real men should only sleep with women, not other men."[52]

However, courts have narrowed the *Price Waterhouse* standard to exclude discrimination based on the employee's perceived or actual homosexual activity, and instead include only the behavior and appearance of the employee. For example, an employee could be fired if he brings his same-sex partner to an office holiday party and holds his partner's hand or kisses him in front of his colleagues.[53] In the case of Robin Shahar, a lesbian attorney who held a same-sex commitment ceremony with her partner in Georgia, her employer rescinded her job offer after finding out about her homosexual relationship with another woman.[54] The court dismissed her employment discrimination claim, not because she did not exhibit any signs of gender non-conformity, but because she was in a relationship with another woman, which the court reasoned did not amount to impermissible sex stereotyping under *Price Waterhouse*.[55] Because claims like these involve homosexual activity, courts will not offer recourse under *Price Waterhouse*, even though it is a sex stereotype to be romantically or sexually involved with someone of the same sex.[56]

The analysis of sexual orientation employment discrimination should extend further to rightfully adhere to the anti-sex stereotyping standard set forth in *Price Waterhouse*. Allowing suits to go forward on behavior or appearance, but not on homosexual activity, is nonsensical and unnecessarily narrow. In essence, "*Price Waterhouse* also implies that the use of the stereotypes that men and women should be heterosexual violates Title VII"

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52. *See* Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (finding the Plaintiff's claim can stand because his coworkers found him to be effeminate, but not because he dated other men).

53. *See* I. Bennett Capers, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1182-83 (1991) (inventing this hypothetical situation to illustrate the narrowness of the *Price Waterhouse* framework).

54. Kenji Yoshino, *The Pressure to Cover*, N.Y. TIMES MAG. (Jan. 15, 2006), http://www.nytimes.com/2006/01/15/magazine/15gays.html?pagewanted=all&_r=1& [hereinafter Yoshino, *The Pressure to Cover*].

55. *See id.*

56. *See* Samuel A. Marcosson, *Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII*, 81 GEO. L.J. 1, 24-25 (1992).

under sex stereotyping.[57] The needless distinction between behavior, appearance, and homosexual activity undermines the entire purpose of Title VII, which is to protect individuals from workplace discrimination.[58]

Next, the *Price Waterhouse* framework effectuates otherness and homophobia by separating LGB members into "normal" and "stereotypical" groups.[59] The *Vickers* and *Prowel* cases present a bizarre distinction: in order to receive protection from employment discrimination, gays must first *become* the stereotype. In doing so, however, courts are sending a message to gays that they must become what is hated—the sissy, the fag, the dyke—to be legally protected.[60] I do not mean to blame members of the LGB community if individuals are gender non-conforming or act effeminate or masculine for seeking, and rightfully winning, judicial recourse. Instead, I argue that the *Price Waterhouse* framework forces the LGB community to stifle its individuality and to present itself in a stereotypical way to gain legal protection.

Price Waterhouse erases the intricacies of LGB lives and, instead, encourages stereotyping and assimilation into a stereotype. *Price Waterhouse* forces LGB individuals into a corner; LGB employees must choose to either become a stereotype and win a Title VII claim at the cost of experiencing harmful and dangerous harassment at work, or to act "straight," or gender conforming and possibly yield less discrimination. However, if there is discrimination based on that person's homosexual life or actions, her Title VII claim will fail. Essentially, the *Price Waterhouse* standard forces LGB people to flaunt a stereotyped version of their sexuality or not reveal anything about their lives that would indicate homosexuality.

However, the "flaunting homosexual will generally get less sympathy than the discreet one," in the workplace or in other public settings.[61] In a 2002 study about employment and parenting cases, individuals whose homosexuality was discreet, or kept completely private, kept their jobs and their children more often than those whose homosexuality was "notorious" or "flagrant."[62] The "flagrant" homosexual may be in need of more protections than the "discreet" one, but only at the cost of being a stereotype

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57. *Id.* at 24 n.96.

58. Capers, *supra* note 53, at 1184-85.

59. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 850 (2002) [hereinafter Yoshino, *Covering*].

60. *See* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291-92 (3d Cir. 2009).

61. *See* Yoshino, *Covering*, *supra* note 59.

62. KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 101 (2006) [hereinafter YOSHINO, THE HIDDEN ASSAULT].

of the "flagrant" and "flaunting" homosexual.[63] Some law scholars, like Brian Soucek, argue that the *Price Waterhouse* framework incentivizes gays to be extreme characterizations of gay stereotypes in order to receive Title VII protection.[64] However, Soucek ignores the risks taken by members of the LGBT community who must become stereotypes. LGB individuals who are gender non-conforming, or fit the more stereotypical version of a homosexual, are more likely to face discrimination and violence inside and outside of the employment context.[65] A "flagrant" homosexual may be covered by Title VII at some point in the future, but must endure occasionally violent and serious harassment to trigger Title VII protection. Assuming that LGB individuals will purposefully "flaunt" themselves, as Soucek suggests, ignores the reality that, in order to avoid discrimination and harassment in the first place, LGB people may "cover" themselves with heteronormative sex stereotypes.[66]

"Covering" is a term coined by Kenji Yoshino that is similar to "passing" when discussing race.[67] However, he distinguishes "covering" from "passing" by stating that passing pertains to the "visibility of a characteristic, while covering pertains to its obtrusiveness."[68] Covering is essentially pretending to be somebody else to protect oneself from discrimination or harassment, no matter how minute.[69] In essence, "covering" is hiding in the closet; to protect oneself from discrimination, an LGB person has to "closet" him or herself. Under *Price Waterhouse*, "covering" is more likely than an LGB person pretending to be a stereotype, which puts them at risk of discrimination, simply for Title VII protection. Thus, a LGB person is likely to "cover" to prevent the discrimination in the first place.[70]

Price Waterhouse creates this dilemma, leaving members of the LGB

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63. *See id.* at 93. Interestingly, the LGBT community is subject to the same issue in asylum cases. In order to seek asylum, a person must show that that she has a "well-founded fear of persecution." *See* 8 U.S.C. § 1158. Hence, like in Title VII claims, there is a greater likelihood that someone will achieve legal protection if she can exhibit physical behaviors and appearances that lead to a potential for discrimination. Thus, asylum-seekers need to be "gay enough" to prevail. *See also* Soucek, *supra* note 36, at 775 n.379.

64. Soucek, *supra* note 36, at 783.

65. *See* YOSHINO, THE HIDDEN ASSAULT, *supra* note 62.

66. *See* Soucek, *supra* note 36, at 783. *But see* Yoshino, *The Pressure to Cover*, *supra* note 54.

67. Yoshino, *The Pressure to Cover*, *supra* note 54.

68. *See id.*

69. *See id.* (providing an example of covering by stating Margaret Thatcher took voice lessons to make her voice lower so she would not be too "feminine").

70. *See id.*

community with two options: (1) heedlessly flaunt stereotypical ideas of gay "behavior" and "appearance" to achieve Title VII protection but risk dangerous harassment or discrimination, or (2) closet oneself and suppress one's LGB identity to avoid discrimination in the first place. Although *Price Waterhouse* offers protection to some people in the LGB community, it divides LGB identity and ultimately suppresses it.

B. Title VII Protection for Transgender People

Just as *Price Waterhouse* privileges a type of caricaturized gayness, it also privileges some transgender individuals over LGB people. A number of courts have indicated that transgender people have a Title VII claim because their identities are more closely tied to sex or gender stereotypes.[71] Recently, the D.C. Circuit ruled in favor of a transgender employee of the Library of Congress under the *Price Waterhouse* standard of impermissible sex stereotyping.[72] Although the court stated that the plaintiff's claim could have rested on discrimination based on transgender status, which is not protected under Title VII, the court indicated that the evidence for transgender discrimination looks very similar to evidence of impermissible sex stereotyping under *Price Waterhouse*.[73] Therefore, the *Price Waterhouse* standard makes Title VII protection easier for some members of the transgender community than it does for members of the LGB community. However, transgender people must still identify within the gender binary to receive Title VII protection.

On the other hand, Title VII claims do not offer sweeping or broad protections for transgender people either. Many courts separate evidence of discrimination based on transgender status from sex discrimination and find that Title VII does not protect transgender people.[74] Other courts limit the applicability of *Price Waterhouse* for transgender people.

However, the trend is for courts to protect transgender discrimination under Title VII through *Price Waterhouse* because transgender issues are so closely intertwined with gender and sex.[75] For example, in *Schwenk v.*

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71. *See* McGinley, *supra* note 21, at 750.

72. *See* Shroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

73. *See id.* at 308.

74. *See*, *e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) ("[D]iscrimination against a transsexual because she is a transsexual is not 'discrimination based on sex.' Therefore, transsexuals are not a protected class under Title VII and [a plaintiff] cannot satisfy her prima facie burden on the basis of her status as a transsexual.").

75. *See*, *e.g.*, Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 528 (D. Conn. 2016) (denying the employer's motion for summary judgment where a transgendered

Hartford, a prison guard sexually assaulted a pre-operative male-to-female transgender inmate.[76] The court, in deciding whether or not Schwenk had a claim under the Gender Motivated Violence Act, relied on the Title VII definitions of sex and gender discrimination.[77] The court found that Title VII, through the lens of *Price Waterhouse*, protects transgender individuals because Schwenk, who was biologically a male, appeared and behaved femininely and her attacker was fully aware of Schwenk's plan to transition to female.[78]

Schwenk indicates that impermissible sex stereotyping under *Price Waterhouse* is sometimes more easily proven in cases of transgender discrimination than sexual orientation discrimination, as long as the plaintiff is transitioning from one binary gender to the other. In *Schwenk*, the court found sex-based discrimination under Title VII simply because the plaintiff was born with male genitalia, but presented as a female.[79] The court stated, "Thus, the evidence offered by Schwenk tends to show that [the prison guard's] actions were motivated, at least in part, by Schwenk's gender . . . by her assumption of a feminine rather than a typical masculine appearance or demeanor."[80] A biological male who dresses, talks, or acts like a female, whether transgender or not, is inherently gender non-conforming.[81] One court even expressly held that a transgender female-to-male person was not protected under sexual orientation discrimination, but instead was covered by gender discrimination based on *Price Waterhouse*.[82] In that case, the court held that "discrimination against a man because he was wearing a dress could constitute sex discrimination."[83] Although transgender identity is undoubtedly more than a "man in a dress," the court in *Enriquez v. West Jersey Health Systems* would seemingly grant Title VII protection for that "man in a dress."[84] A transgender person that is within the gender binary would fit into the *Enriquez* court's interpretation of *Price Waterhouse*.

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employee could not show that she was denied employment because of her transgender identity).

76. *See* Schwenk v. Hartford, 204 F.3d 1187, 1194 (9th Cir. 2000).

77. *Id.* at 1200-02 (showing that the language of the Gender Motivated Violence Act mirrors Title VII language).

78. *Id.* at 1202.

79. *See id.*

80. *Id.*

81. *See* Shroer v. Billington, 577 F. Supp. 2d 293, 335 (D.D.C. 2008).

82. *See* Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

83. *Id.* at 372 (citing Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213 (1st Cir. 2000)).

84. *See id.*

However, the *Price Waterhouse* standard does not protect all members of the transgender community. First, as discussed, only some circuits provide Title VII protection to transgender individuals.[85] Second, *Price Waterhouse* only protects those who exhibit appearances and behaviors of the opposite binary gender. Sometimes, a transgender plaintiff must do more than exhibit non-male or non-female appearances and behaviors. Instead, the transgender plaintiff must exhibit appearances and behaviors of the opposite binary gender, not something in between.[86]

Lastly, some courts have allowed employment discrimination when a transgender plaintiff exhibits behaviors or appearances of the opposite gender outside of work, but not during work. In *Oiler v. Winn-Dixie Louisiana, Inc.*, the court rejected the plaintiff's sex discrimination and sex stereotyping claims under *Price Waterhouse* because he was fired for dressing as a woman outside of work.[87] Because he never dressed as a woman at work, he could not prove he was terminated for impermissible sex stereotypes, despite direct evidence of his termination for dressing as a woman outside of the workplace.[88] The court's reasoning indicates an employer has the power to dictate how a transgender person acts inside and outside the workplace.[89]

For courts that do recognize transgender individuals under Title VII, however, the proof required is much easier for transgender plaintiffs than LGB plaintiffs simply because transgender discrimination is directly linked to sex stereotyping and gender discrimination. A plaintiff, who is biologically one sex, exhibits behaviors and appearances linked to the opposite gender, and is discriminated against, could inherently prove impermissible sex stereotyping under the *Price Waterhouse* standard.[90] LGB people do not have such proof available to them under current interpretation of *Price Waterhouse* because gayness, although intertwined with gender stereotypes, is not dispositive of a sex stereotype.

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85. *See*, *e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that "transsexuals" are not a protected class under Title VII).

86. *See Enriquez*, 777 A.2d at 372.

87. *See* Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 1741, at *37 (E.D. La. Sept. 16, 2002).

88. *See id.* at *30.

89. *See* McGinley, *supra* note 21, at 759.

90. *See* Shroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

IV. TITLE VII AND LGBT RIGHTS IN THE FUTURE: SOLVING THE *PRICE WATERHOUSE* PROBLEM

All members of the LGBT community should be protected by Title VII law because doing so would further the legislative purpose of the law.[91] To protect the entire LGBT community, the easiest way to solve the unworkable and unevenly applied *Price Waterhouse* standard would be to enact ENDA into law. However, the language of ENDA, as proposed, may repeat the problems of *Price Waterhouse*. The ENDA bill, as proposed, would prevent discrimination based on "actual perceived sexual orientation or gender."[92] This language indicates that the employer must be aware of the plaintiff's sexual orientation or gender identity. Importantly, any ENDA bills that may eventually become law must indicate how a plaintiff proves a claim. Otherwise, courts may continue to use *Price Waterhouse* as the framework to indicate how an employer might know if someone is LGBT. If courts continue to use the *Price Waterhouse* framework after ENDA, the supposedly inclusive bill would provide no additional protections because proving gayness would simply revert back to proving impermissible sex stereotyping. For instance, plaintiffs like Vickers may fall through the *Price Waterhouse* cracks. He was not known to be gay, nor was he perceived to be gay through his appearances or behaviors, yet he faced terrible discrimination.[93] Where would he fit in ENDA?

ENDA, as well as courts, would need to set forth new standards that would ideally include both sex stereotyping and discrimination based on sexual orientation or gender identity.[94] Proving discrimination based on bisexuality might also be problematic. Some less sympathetic judges may decide someone engaging in acts of bisexuality could be "experimenting," and recovery under "true" sexual orientation could be precluded.[95] Furthermore, if ENDA is to be enacted, it must use specific language defining gender-identity and transgender. If not, less sympathetic courts may decide that a person is not truly transgender until they've had sex reassignment surgery.[96]

If ENDA is not enacted, however, courts could expand the meaning of

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91. *See* Capers, *supra* note 53, at 1187.

92. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4, 9 (2013).

93. *See* Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 759-60 (6th Cir. 2006),

94. For example, if a gay male plaintiff can establish that he was discriminated against for being a "sissy," he could prove a Title VII violation. The same plaintiff should also be able to establish a Title VII violation for sexual orientation discrimination if he can establish that he was harassed due to having a same-sex partner.

95. McGinley, *supra* note 21, at 771.

96. *Id.*

"discrimination based on sex" and impermissible sex stereotypes under *Price Waterhouse*. This would entail a simple re-reading of *Price Waterhouse* to recognize that having a sexual or romantic relationship with someone of the same sex inherently creates impermissible sex stereotyping. Although critics might consider it judicial activism, courts "should not be restrained when [their decision] is in furtherance of legislative intent."[97] However, this is a judicial pipe dream. Courts would undoubtedly be reluctant to reinterpret *Price Waterhouse* without a Supreme Court decision, which, in the current political climate, does not seem likely. However, even if *Price Waterhouse* was reinterpreted, it would not help the plaintiff in *Oiler*, who was fired for behavior outside of the workplace.[98] Further, reinterpreting a Title VII standard may shake the ground of well-established Civil Rights Act standards. If courts could add protected classes under Title VII or re-interpret a Supreme Court standard, like *Price Waterhouse*, there would be a greater likelihood that conservative legislators may take protections away from protected classes by amending Title VII.

V. CONCLUSION

Members of the LGBT community deserve Title VII protection for the countless instances of employment discrimination. However, under the current framework, certain members of the LGBT community are privileged over others, and the *Price Waterhouse* standard is applied unfairly and bizarrely. Also, *Price Waterhouse* forces members of the LGBT community to either risk harassment to receive Title VII protection, or closet themselves to avoid discrimination and harassment altogether. However, the future of LGBT Title VII rights seems bleak, as ENDA continually stops short of Congressional approval, and courts would be reluctant to reinterpret *Price Waterhouse*.[99] While members of Congress fight over LGBT rights, and members of the judiciary continually draw inexplicable lines between sex and sexual orientation discrimination, LGBT people go unprotected in the workplace. Even though it is unclear what the future of Title VII holds for

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97. Capers, *supra* note 53, at 1186.

98. *See* Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 1741, at * 11-14 (E.D. La. Sept. 16, 2002).

99. It should be noted that ENDA would not be the be-all-to-end-all of LGBT protections. For example, the version of ENDA presented to the 113th Congress contained religious exemption provisions such that major LGBT advocacy groups removed their support for the bill. *See* Jennifer Bendery, *Gay Rights Groups Pull Support of ENDA's Sweeping Religious Exemption*, HUFFINGTON POST (last updated Aug. 5, 2014), http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption_n_5568736.html.

the LGBT community, it is clear that the future of Title VII will either continue to reduce and fragment LGBT identity, or it will allow for a fuller realization of LGBT identity outside of behavior and appearance.