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Lauren Hunady April 8, 2021

Developing the Legal-Capitalist-Patriarchy: Title VII Sex Jurisprudence, Socialist Feminism, and Vulnerability Theory

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An abstract of
a thesis submitted to the Faculty of Emory College of Arts and Sciences
of Emory University in partial fulfillment
of the requirements of the degree of
Bachelor of Arts with Honors

Department of Women's, Gender, and Sexuality Studies

2021

Abstract

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The first section of this paper is designed to provide an overview of contemporary sex jurisprudence under Title VII. With a particular focus on non-normative gender expression, I intend to extrapolate the major issue within sex jurisprudence as well as antidiscrimination law in general: immutability. The law itself requires a tangible, easily-located set of conditions in order to attribute rights to, but gender theorists have historically emphasized the discursive flexibility of both sex and gender – they are incompatible with existing antidiscrimination requirements. Through this inadequacy, I intend to expose the limitations of legal formal equality, the guiding system of antidiscrimination doctrine which seeks to 'level the playing field' of different identity-based groups. Since the law's attendance to immutability leaves many individuals outside of the reach of antidiscrimination protection, the antidiscrimination model must be reconsidered as a primary mode for achieving substantive social equality. The second section of this paper uses the limitations of antidiscrimination law and the history of Title VII gender nonconformity jurisprudence to expose the role of the state in capitalist and patriarchal domination; in this, I introduce the concept of legal-capitalist-patriarchy, building off the work of mid-century socialist feminists. Especially in the context of Title VII gender nonconformity jurisprudence, the state generally defers to the desires of the employer, ensuring they exist prior to those of the worker. This concerning relationship suggests the alliance of the law, in current structural organization, to both the capitalist class (through the primacy of employer interests) as well as patriarchal domination (through the suppression of non-normative gender expression). As such, socialist feminism provides important insight on the workings of capitalism and patriarchy, and the ideological backing that allows the state to put profit before people. Finally, I pose vulnerability theory as an avenue for conceptualizing legal and social organization, as well as broader social justice, that moves beyond the individual rights framework. By exploring the connections between Title VII jurisprudence, vulnerability theory, and anti-capitalist feminism, this paper intends to envision a future that cares for our material conditions and their importance to our ability to navigate the American landscape.

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Acknowledgements

I would like to thank, first and foremost, Professor Martha Fineman. I am immensely grateful that she decided to supervise a project working intimately with her theory; her guidance and comments have made this thesis process a wonderfully rewarding experience. It was nothing short of a dream to work with one of the leading feminist legal scholars of the contemporary age, and I am eternally grateful for her trust in me to use her paradigm for my research. I would like to thank the members of my committee as well: Dr. Stu Marvel, for her continuous guidance throughout my collegiate experience and always-helpful feminist-legal expertise; Dr. Katrina Karkazis, for her expertise on this area of research and reminders on the importance of language; and Dr. Dan Sinykin, for his interdepartmental perspective and instrumental writing comments. All of these faculty members have had considerable impact on both my thesis as well as my collegiate experience, and I am honored to have learned from them and worked with them. Finally, I would like to thank Colton Stokes, Christina Foard, Craig Osenberg, Ryan Hunady, Kyle Hunady, Maria Ferrando, Rachel Silver, and Lydia Abedeen for their support throughout this project.

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Title VII of the Civil Rights Act of 1964 articulates a prohibition against employment discrimination based on, among other protected categories, "sex." However, American courts have disagreed on how far "sex" can extend: does it stop at biology, can it extend to social constructions of gender, and could it potentially extend to gendered expectations of sexual orientation? Whether "sex" discrimination can apply to issues of gender and sexuality as social constructions, especially those that lie beyond typical gender binaries, has still been largely undetermined. However, the court decisions nonetheless rely upon an essentialist view of sex and gender by way of reducing gender to one deterministic locale. This project seeks to examine important Title VII litigation as it pertains to confronting a definition of sex discrimination. This project, first, attempts to reveal a legal model of traditional gender binarism present throughout employment discrimination cases such as *Price Waterhouse v. Hopkins* (1989)*, Ulane v. Eastern Airlines, Inc. (1985), Smith v. City of Salem* (2004)*, Austin v. Wal-Mart Stores, Inc.* (1998)**,** and others. Although there is some existing scholarship on Title VII and "sex" discrimination with ambiguity regarding transgender litigants, this project hopes to reveal a flawed system of gendered logic that establishes a legal model of gender binarism expectant of American citizens. This will ultimately produce a critique of the rights framework of formal equality law, in that the law is inadequately situated in dealing with complex issues of identity and stems such inadequacy from an improper legal subject. However, the site of employment law raises questions about the ability to gain antidiscrimination protections in a fundamentally hierarchical capitalist system; as such, this project secondly seeks to incorporate a socialist feminist intervention. Where other scholars have attempted to reconcile a legal pattern of sex and gender essentialism, they have yet to implicate the state in crafting these outdated definitions and models. Although recent trends have produced more progressive rulings on gender and sexuality

jurisprudence, the law's core reliance on immutability is incompatible with social constructionist understandings of gender. Through this, I employ a socialist feminist intervention to reveal a need to reform the structure and role of the law, and potentially the state, in which a substantively responsive government is required in order to address the material conditions of its constituents. Socialist feminism has its limitations as necessarily hindered by its reliance on identity categories, and thus I pose a new consideration for a holistic equity project: Martha Albertson Fineman's vulnerability theory. Overall, this project seeks to extrapolate the interconnectivity of law, capitalism, and patriarchy through a review of Title VII sex discrimination jurisprudence, ultimately calling for an amended approach to legal subjectivity and human condition akin to the vulnerability thesis.

The first section of this paper is designed to provide an overview of contemporary sex jurisprudence under Title VII. With a particular focus on gender expression and gender nonconformity, I intend to extrapolate the major issue within sex jurisprudence as well as antidiscrimination law in general: immutability. For transgender litigants, pursuing redress by accommodating immutability involves the adoption of certain pathologizing narratives about transgender experience. In court, in order to sustain protections against discrimination, transgender and gender nonconforming litigants must prove that their gender expression is a manifestation of some uncontrollable condition; this most often takes the form of gender dysphoria, the medical diagnosis that has come to replace Gender Identity Disorder. Indeed, as these medical diagnoses and respective treatments are often preserved for a select privileged few, it is not only an inaccurate measure of the transgender experience generally, but it also more broadly leaves many people outside of the bounds of protection of antidiscrimination law. The law itself requires a tangible, easily-located set of conditions in order to attribute rights to, but

gender theorists have historically emphasized the discursive flexibility of both sex and gender – they are virtually incompatible with current antidiscrimination regime. By examining this legal inadequacy, I intend to expose the limitations of legal formal equality, the guiding system of antidiscrimination doctrine which seeks to 'level the playing field' of different groups based on identity characteristics. Given that the law's attendance to immutability in the form of identity categories leaves many individuals outside of the reach of antidiscrimination protection, the antidiscrimination model must be reconsidered as a primary mode for achieving substantive social equality. Formal equality lacks the navigability to acknowledge and accommodate individuals with complex or multi-axis identities, such as transgender people of color, who specifically endure both complexities within an identity category (gender) as well as complexities based on a multi-axis categorization of gender and race. Formal equality thus remains an inadequate tool for furthering the social betterment of the most marginalized.

The second section of this paper builds on the limitations of antidiscrimination law in pursuing holistic social equality by exposing the role of the state, and the law, in capitalist and patriarchal domination. Insomuch as the state creates and maintains categories of difference through law and administrative systems, it simultaneously does little to address substantive and extra-categorial issues of systemic disadvantage. Issues of class, namely, have yet to have a substantive place in antidiscrimination law because the law is not posited to conceptualize of inter-categorial complexities and positionings, such as the difference between an upper-class LGBT+ person and a working-class LGBT+ person. Indeed, as the state refuses to provide social welfare programs and other systems that address and respond to human needs, their continuous adjudication of gender categorization can be considered little other than violent. Thus, I introduce the concept of legal-capitalist-patriarchy. Building off of the works of mid-century

socialist feminists, I seek to involve the law in this correlative system of oppression, wherein current legal frameworks operate in conjunction with capitalism and patriarchy to preserve the status quo. As such, the relationship between law, capitalist enterprise, and patriarchy may be conceptualized; whereby the law perpetuates both capitalism and patriarchy through, although not solely, the deference to and primacy of employer preference and the perpetuation of gender and sex essentialism respectively, both of these receiving systems continue to reinforce their defining legal statutes. The state operates by continuously building on itself from itself, and thus is implicated in the process of continuing class and gender inequality through the law. Especially in the context of Title VII jurisprudence, and employment law in general, the state generally defers to the desires of the employer, ensuring they exist prior to the needs of the worker. This concerning relationship suggests the alliance of the law, in current structural organization, to both the capitalist class (through the primacy of employer interests) as well as patriarchal domination (through the suppression of non-normative gender expression). As such, socialist feminism provides important insight on the workings of capitalism and patriarchy, and the ideological backing that allows the state to put profit before people. This is not to say that the law, or the state, cannot ever be useful in administering resources for life chances. Instead, it is to pose a critique of current organization. There are a variety of methods and ideologies that conceptualize an ideal society, but that is largely out of the bounds of this project. I hope to instead expose the inadequacies of current avenues of justice.

Finally, I pose vulnerability theory as an avenue for conceptualizing legal and social organization, as well as broader social justice, that moves beyond the individual rights framework. Posed by Martha Albertson Fineman, vulnerability theory examines the limitations of a liberal legal subject that admonishes a universal self-sufficiency through all points of life. It

implores legal restructuring to center a vulnerable legal subject, that which recognizes the universality of human dependency – dependency on others, as well as dependency on the state for the distribution of resources. As opposed to our current legal system, which creates and produces social categories to distribute rights to, we are in need of a governing system which recognizes our material needs and dependencies from the beginning. Instead of framing, for example, poverty as a problem of Black communities, it should be considered a fault of the state for not properly distributing resources to Black communities to minimize harm when and where it occurs, be it by changing social circumstances or physical ailment. This structural emphasis implores the state to recognize and respond to human need by way of resource-distribution, whether it be in access to healthcare or lowering income inequality. This emphasis combined with a distinctly humanistic vision of social and individual livelihood importantly expands other social movements that call for equity. A vulnerability project is one which recognizes our shared dependencies, our differing situations, and the ways that the *state* and its administration of institutions informs both.

Building on three major areas of scholarship – antidiscrimination doctrine, socialist feminism, and vulnerability theory – this paper intends to contribute a substantive vision of imminently attainable social equity. There has not been any existing literature that combines these three areas of scholarship, and in doing so, I intend to reveal the possibility of collaborative, coalitional work across identity lines to achieve more substantive social equity: material conditions, how they are produced, and patterns of material distribution should be common organizing ground for legal and social activists. While many leftists are rightfully skeptical of the ability of the state to administer the distribution of resources and governance equitably, vulnerability theory is able to expand on the existing structures of state oversight to

achieve a more community-minded society often espoused in leftist imaginaries. Indeed, a legal arena focused on vulnerability may provide the American constituency with the language, experience, and compassion necessary for such a compassion-driven, community-focused society without requiring the complete dismantle of familiar systems. Leftists should be open to methods of harm reduction rather than purely accelerationist methods of change.

In conjunction, the relationship this paper draws between antidiscrimination law, socialist feminism, and vulnerability theory is designed to recognize current inadequacies in legal attempts at equality, expose the necessity of extra-identity organizing, and conceptualize a way to actualize substantive equity. To explore the connections between Title VII jurisprudence, vulnerability theory, and anti-capitalist feminism is to examine the ways that our governing entities fail us. This paper is intended to provide insight into the possibilities of a future that cares for our material conditions and how they inform our ability to navigate the American landscape. A focus on the material, those very real, concrete determinants of life chances, will reveal the actual effects, not merely the intentions, of our governing bodies. Overall, this project hopes to reveal the interconnectedness between law, capitalism, and patriarchy so we may be able to better approach the inadequacies of resource maldistribution and promote an equitable and fulfilling life of the American people as a whole.

PART ONE: TITLE VII, ANTIDISCRIMINATION, AND THE PROBLEMS WITH FORMAL EQUALITY

I. Title VII and "Sex" Discrimination

Title VII of the Civil Rights Act of 1964 articulates that it is illegal for employers

> "to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment" and "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" due to, or "because of such individual's race, color, religion, sex, or national origin."[1]

There has been a large body of casework dealing with the extent to which 'sex' extends beyond mere biology in Title VII sex discrimination claims, discrimination against women because they are women, or against men because they are men. Even with this diverse body of rulings, there has not been a consistent recognition of sex's applicability: rulings across all court levels have only revealed the general consensus that sex is a complicated and elusive concept to trace, and Title VII unfortunately relies on the discursive stability of identity to track discrimination claims. The general attitude toward sex discrimination under Title VII is that it does to some extent incorporate other types of discrimination beyond those based on biological indicators or binary forms of sex expression, but this is by no means a unanimous holding. Through a review of recent case law, I extrapolate the logic of the courts in deciding on sex discrimination under Title

[1] "Title VII of the Civil Rights Act of 1964." *U.S. Equal Employment Opportunity Commission*. Retrieved December 11, 2020 (https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964).

VII – those gender discrimination claims that rely on immutable traits are more readily prosecutable because of the law's formulation around liberal identity and immutability. Claims that cannot be tied to a fundamental aspect of individual identity, however, are less likely to be awarded protection.

The stage for an expansive understanding of sex discrimination is set by *Price Waterhouse v. Hopkins* (1989), wherein the Supreme Court ruled that sex stereotyping is actionable under Title VII.[2] As the first case in the Supreme Court to declare that things other than biological bases to constitute sex discrimination claims, *Price Waterhouse* changed the general approach to sex discrimination extensively by expanding 'sex' to include 'gender.' *Price Waterhouse* detailed the case of Ann Hopkins, an accounting manager denied promotion to a partner position because of sexist stereotypes surrounding her workplace attitude, interpersonal behavior, and dress. Evaluations from existing partners discounted Hopkins when determining her eligibility for partnership; the majority-male partner evaluation body "reacted negatively to Hopkins' personality because she was a woman" by describing her as "'macho," or "'overcompensat[ing] for being a woman,'" objecting to her swearing "'because it's a lady using foul language,'" and suggesting that in order to improve her chances of being selected for partnership she "'walk… [and] talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[3] When Hopkins was passed over for the promotion to partner despite successful job performance, she sued her employer on account of sex discrimination. Price Waterhouse's legal team argued that sex *stereotyping* was beyond the limits

[2] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 1790-1: "In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender… An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."
[3] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), 1782.

of Title VII, but the Court declared that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"[4] The Court determined that *gender* being a motivating factor of a hiring decision at the time the decision was made was unlawful under Title VII; indeed, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[5] The Court ruled that a plaintiff who can prove that gender played a motivating part in a hiring decision may state a claim under Title VII; sex stereotyping was an actionable offense. It was a critical expansion of sex discrimination doctrine.

Since this decision, *Price Waterhouse* has been cited consistently as reasoning to extend "sex" to encompass gender expression and sexual orientation. The Supreme Court's country-wide jurisdiction ensured that any future Title VII cases must allow for the expansion of "sex" to include those instances that extend beyond biological sex, including the expectations of gendered behavior associated with a particular sex; when Price Waterhouse did emerge as binding legal precedent, it opened the potential for this expansion, and the potential for correcting several years of Title VII jurisprudence that preceded it.[6] Of these cases open to correction, the few

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[4] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) at 1791, citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 at 70 n. 13

[5] *Ibid* at 1791.

[6] It should be noted that *Price Waterhouse* certainly did not preclude any and all decisions that ruled against transgender people in employment. Melina Constantine Bell, *Gender Essentialism and American Law: Why and How to Sever the Connection*, 23 DUKE JOURNAL OF GENDER LAW & POLICY 163–221 (2016), 187: Many subsequent decisions in federal district courts "distinguished the cases before them from *Price Waterhouse* on the basis that Hopkins was not a transsexual person but an anatomical female. Thus, a transsexual person could not be protected under Title VII as being discriminated against because of their anatomical sex; it was their status as transsexual that was the basis of their discrimination, rather than their sex, and, on these courts' view, discrimination against transsexual identity is not included in the plain meaning of 'sex' in Title VII." However, the overall trajectory has lent itself to alignment with *Price Waterhouse*; *Price Waterhouse* provided the potential for redress, but it was not necessarily occurring in vast numbers until the early 21st century.

transgender sex discrimination claims that emerged before federal courts prior to 1989 demonstrated a commitment to this rudimentary, oversimplified conception of "sex" to include solely biological (see: cisgendered) sex discrimination. Five years prior to the *Price Waterhouse* decision, the Seventh Circuit ruled that Title VII does not apply to 'transsexuals'[7] in *Ulane v. Eastern Airlines, Inc.* Karen Ulane sued her employer alleging discrimination based on her being both female and 'transsexual,' but the court denied this claim, since 'transsexual' is not a protected class under Title VII and there was limited evidence to prove discrimination based on Ulane's femaleness. The Seventh Circuit's ruling emphasized Ulane's medical transition process, which included hormonal therapy, sex reassignment surgery, and the eventual amendment of her gender markers on her birth certificate. Still, the court notes – and importantly – she was not a biological female, for she did not have child-bearing capabilities and her chromosomes "are unaffected by the hormones and surgery."[8] Indeed, the belittling, pathologizing language of the Court's dismissal underscored the larger cultural opinions of not only the 'horrors' of being transgender, but also the fact that it is a choice, and an allegedly abominable one at that:

> "Ulane is entitled to any personal belief about her sexual identity she desires. After the surgery, hormones, appearance changes, and a new Illinois birth certificate and FAA pilot's certificate, it may be that society, as the trial judge found, considers Ulane to be female. But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case… It is clear from the evidence that if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[9]

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[7] I place this term in quotation marks to denounce that I do not endorse the use of this largely outdated term. However, to avoid jeopardizing mistranslations of the language of caselaw that uses this term, I will include it, albeit in quotation marks, to mark the term of the literature.
[8] *Ulane v. Eastern Airlines, Inc.,* 742 F.2d 1081 (1984), at 1083.
[9] *Ibid*, 1087.

Despite 'appearing' female, Ulane, according to the court, is not a true, *immutable* female by way of her intrinsic biological, chromosomal makeup; the court notes, condescendingly, that Ulane is 'entitled to any personal belief about her sexual identity,' but is still not a female. It should be noted that the disregard of Ulane's case was not solely a problem of the legal conditions of gender jurisprudence; it was partly furthered by the pervasive and historical belief that transgender people "have not been viewed as worthy of protection, or in some cases even as human."[10] Paisley Currah offers *Ulane* as one of the cases that exemplifies the practice of belittling and abstracting transgender litigants because they "cannot be classified as either male or female."[11] *Ulane* was disagreed with by later courts in other jurisdictions,[12] many of which employed the judicial logic prescribed by *Price Waterhouse.* Indeed, *Price Waterhouse* was a crucial moment for establishing precedent of targeting sex-stereotype motivations, which has been critical to arguing on behalf of gender nonconforming plaintiffs.

II. Immutability and the Pathology Strategy

Despite *Price Waterhouse*'s critical intervention in sex discrimination claims, courts have nonetheless relied on medical definitions of gender nonconformity to establish immutability, and therefore an intrinsic claim to protected behavior. The emphasis on immutability is related to a core facet of early American legal doctrine. Although not explicit in Title VII, 'immutability' is a concept borrowed from 14th Amendment equal protection jurisprudence, wherein a characteristic

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[10] Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 WM. & MARY J. OF WOMEN & L. 37–66 (2000). at 40.
[11] *Id.* at 41.
[12] See generally, *Schroer v. Billington,* 424 F.Supp.2d 203 (2006); *Hively v. Ivy Tech Community College of Indiana,* 853 F.3d 339 (2017)*; Smith v. City of Salem, Ohio,* 378 F.3d 566 (2004)*; Barnes v. City of Cincinnati,* 401 F.3d 729 (2005).

is unchangeable, or is unreasonable to expect to change: for the purposes of the court, immutability relates to "'those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.'"[13]

American law has formulated an unofficial scale of immutability based on jurisprudential guidelines for certain identity groups; those characteristics that are deemed the most immutable, unchangeable, and/or inflexible are given the strictest of protections, while those characteristics that are deemed changeable and flexible are given weaker protections.[14] Race would be the prime example of the highly immutable.[15] In the growing jurisdiction of sexual orientation as a protected class, it has been deemed somewhere between somewhat-flexible and flexible, considering its inconsistent interpretations as requiring either intermediate scrutiny or rational basis scrutiny in the Courts.[16] Especially as cultural narratives surrounding sexual orientation emphasize being "born this way," the invocation of immutability has provided many courts (including the Supreme Court in the case of *Obergefell*[17]) with the legal footing to increase judicial scrutiny. Sex is also somewhere in the middle of this immutability scale; *intermediate*

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[13] Jessica A. Clarke, *Against Immutability*, 25 THE YALE LAW JOURNAL 2–102 (2015), at 5.

[14] A brief overview of the standards of scrutiny can be found in HOLNING LAU, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2018), at 19: "In contrast [to most global jurisdictions], the United States has created multiple tiers of judicial review for equal protection cases. For example, race discrimination is subject to 'strict scrutiny,' sex discrimination is subject to 'intermediate scrutiny,' and most other forms of discrimination are subject to deferential 'rational basis review'" (Internal citation omitted).

[15] For example, see *Regents of the University of California v. Bakke,* 438 U.S. 265 (1978), in which strict scrutiny was applied to an admissions policy that specifically regarded race as an admissions factor. See also *Washington v. Davis*, 426 U.S. 119, where Title VII claims of disparate impact were brought on the case of race.

[16] Burton F. Peebles, *Blurred Lines: Sexual Orientation and Gender Nonconformity in Title VII*, 64 EMORY LAW JOURNAL 911–954 (2015)., at 921: "…[C]ritics of statutory expansion have challenged the viability of including sexual orientation as a protected class due to its fluid nature, definitional obstacles, and similar evidentiary questions of establishing a claim."

[17] *Obergefell v. Hodges,* 576 U.S. 644 (2014) at 661: "Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable." It should also be noted that this immutability language is used concurrently with de-politicized "Love is Love" language so as to naturalize both homosexuality as well as the legitimacy of the state institutionalization of marriage. See Ben Trott, *Introduction: Queer Theory After "Marriage Equality"*, 115 SOUTH ATLANTIC QUARTERLY 400–404 (2016).

scrutiny was developed and implemented for use in sex discrimination cases.[18] The particular characteristics of race, nationality, religion, and alienage generally demand the highest level of judicial scrutiny when they are invoked in equal protection or Title VII cases – their immutable status demands that any reasoning for their invocation be legitimate and done so in the most efficient, least discriminatory way possible. Since these characteristics are largely unable to, or unreasonable to expect to be, changed, they target core facets of not only an individual's identity, but in many cases also their embodiment.[19] Antidiscrimination procedures address and the politics attached the certain forms of embodiment indicative of the class certain protected identities occupy.

Gender, however, is an interesting case. Gender identity, the relational and differing expressions and personal associations of gender, has not secured footing in this framework due to its malleable nature. Especially in recent years, where larger cultural awareness has granted some understanding of gender as a moveable, flexible form of identification, adopting this conception without modifying the law as it stands would effectively loosen the judiciary's grip on prosecuting gender and sex discrimination; Title VII requires a "stable and workable definition of gender."[20] But maintaining an immutability-based conception of gender also

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[18] *Craig v. Boren,* 429 U.S. 190 (1976). From Leslie Friedman Goldstein, *Gender and "More Rigid Scrutiny"*, *in* THE CONSTITUTIONAL RIGHTS OF WOMEN: CASES IN LAW AND SOCIAL CHANGE (New ed. 1989) at 165: "In the case of *Craig v. Boren,* in December 1976, a majority of the Supreme Court for the first time announced openly that gender-based discriminations were quasisuspect. The Court finally laid its doctrinal cards on the table with a frank announcement that to comport with the constitutional requirement of equal protection, 'classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'"

[19] Not all immutable, or highly unchangeable characteristics, are bodily. Indeed, the Supreme Court has broadened this conception of 'immutability' to encompass conditions beyond one's control for this reason. See Clarke, *supra* note 13 at 16: citing *City of Cleburne v. Cleburne Living Center*, which struck down a Texas ordinance that denied "a permit for the operation of 'a group home for the mentally retarded'… [since, quoting John Hart Ely,] 'Surely one has to feel sorry for a person disabled by something he or she can't do anything about…'" The Court determined that the individuals were not part of a suspect class, but nonetheless discriminated against based on uncontrollable characteristics.

[20] KIMBERLY YURACKO, GENDER NONCONFORMITY AND THE LAW (2016), at 145.

neglects the many people who are not so neatly sorted into male or female categories, whether in their biology, such as intersex individuals or post-operative transgender individuals, or by their presentation, such as individuals who reject only some expressions associated with their gender, or pre-operative or non-operative transgender individuals. To be sure, recent transgender jurisprudence has not alleviated this reliance on an immutability concept, despite the transgressive potential for arguments that center the possibility of non-binary identity. Instead, this recent jurisprudence takes the same form as their antiquated counterparts, albeit in a different direction: instead of arguing that biological indicators are constitutive of a particular gender identity, contemporary transgender advocates argue about the deep-seated nature of gender identity, and when applicable, a medicalized form of gender divergence.[21] It is no longer that gender is rooted in the immutable body, but instead rooted in the immutable psyche. This at first appears benign, but

> "[w]hile the [psyche] discourse is an improvement in that it recognizes the person as belonging to the gender to which they are transitioning or have transitioned, it is still deficient in that it continues to essentialize gender. Rather than locating a person's gendered core identity in a body, the soul/psyche discourse locates it in a soul or mind. Yet that approach still posits a gendered core identity that is fixed, from which gendered behavior supposedly emanates."[22]

The transition from bodily to mental immutability continues to essentialize the gender experience to one unchangeable locale. Instead of being able to protect gender expression as a practice,

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[21] Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 1–31 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006). at 18: In contemporary legal strategy for transgender anti-discrimination cases, "[t]he relation between sex and gender is reversed: biological sex characteristics are cast as aspects of genders, and largely mutable ones at that. It is gender identity and often even expressions of gender identity, however, that are described as unchangeable, set from an early age."

[22] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 191 (internal citations omitted).

contemporary gender nonconformity jurisprudence now requires the presence of established patterns of thinking and behavior to prove the existence of a "gendered core identity."[23] By arguing for protections based on a pathologized condition of gender diversity, transgender plaintiffs are fortunately able to gain access to important gender-affirming resources and protection, but it comes at a cost: the reassertion of the pathology of transgender identity continues to front the conception that gender identity diversity is a medical, mental abnormality, as opposed to one of the many ways to embody and relate to one's physical condition.

Central to Ulane's legal team's argument for her protection, and for many of the similar plaintiffs that followed, is the medical basis for Ulane's behavior, particularly the importance of gender-affirming surgery and her medical diagnosis of Gender Identity Disorder.[24] Twenty years after the ruling on *Price Waterhouse*, the Sixth Circuit rules, contrarily to *Ulane*, that a transgender woman's claims of discrimination do in fact satisfy requirements of sex discrimination under Title VII; in *Smith v. City of Salem, Ohio,* Jimmie Smith sues her former employer after a wrongful termination motivated by Jimmie revealing her transgender status, particularly that she suffers from Gender Identity Disorder and would be assuming more female expression while at work in accordance with her treatment plan.[25] Relying on *Price Waterhouse,* the court declares that instead of solely anatomical sex, Title VII also encompasses discrimination "based on a failure to conform to stereotypical gender norms," and since Smith's employer fired her because of expectations to perform masculinity, the court concluded that Smith was within the confines of sex discrimination protections.[26] Smith had similarly

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[23] *Ibid*.
[24] Gender Identity Disorder is the predecessor to "gender dysphoria." See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (4th ed. 1994) at 532. "Gender dysphoria" was replaced with publication of the DSM-V. See Gender Dysphoria, *in* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (2013), https://doi.org/10.1176/appi.books.9780890425596.dsm14.
[25] *Smith v. City of Salem, Ohio*, 378 F.3d 566 (2004), 568-9.
[26] *Id* at 573.

articulated that in accordance with treatment guidelines for Gender Identity Disorder, she would eventually undergo gender affirming surgery, or in the words of the Sixth Circuit, "complete physical transformation from male to female."[27] Between *Ulane* and *Smith,* a fundamental judicial, at the very least cultural, logic changed. Despite similar circumstances – a transgender woman, diagnosed with a medical condition related to gender identity, is fired from her job – these circuit courts reached opposite conclusions. This is in part due to *Price Waterhouse*'s expansion of sex discrimination's outer limits, but also the changing understanding of sex and gender, including the changing cultural determinants of legal sex – gender-affirming genital surgeries satisfied the law's need for stagnant, unchanging gender association under *Smith,* but for Karen Ulane, it was not enough to change, as the court saw, her "true" gender as dictated through chromosomes.[28] Indeed, *Smith*'s success was tied to the unchangeable condition of her 'female psyche' in accordance with updated information about the experience of gender difference, whereas *Ulane* was considered a medicalized anomaly. Nonetheless, both plaintiffs were argued to be moving 'neatly' between two identifiable binaries of male and female and accommodating their entire physical embodiment to meet the needs of these mutually exclusive poles.[29] In the eyes of the courts, this is an extremely attractive conception of gender

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[27] Id, 568. I will also note that I disagree with the framing of gender affirming surgeries as moving an individual from mutually exclusive axes of male and female.

[28] The determinants for 'sex' have been culturally contingent. While *Ulane* considered child-carrying capacity and chromosomes to be indicative of femaleness, future cases like *Smith* have determined that the presence of female genitals satisfy this requirement. See also, Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 104: "But what feature is definitive of a person's sex? Chromosomes? Hormone profile? Genitals? Personal preference for or comfort with an identity based on one sex rather than the other? Add to this that there is no such thing as 'brain sex' (brains are not innately sexually differentiated), and that in a significant percentage of cases genitals are ambiguous."

[29] I use the term 'neatly' to accentuate the normative binarism associated with medical transgender treatment, wherein gender transgression is generally not permitted. In order to substantiate the requirements for 'passing' as an individual's gender identity, transgender and gender nonconforming people in seek of medical intervention as a means to access important resources (such as documentational sex changes) are constricted by the highly normative nature of gender. See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15–37 (2003), from 26-28: "…[T]he most overt requirement for GID diagnosis is the ability to inhabit and perform the new gender category 'successfully'… [T]he favored indication of such 'success' seems to be the intelligibility of one's

transgression: it is able to be located within the body and substantiated by medical discourse. Perhaps most importantly, the 'complete' transition of several gender indicators to embody an 'opposite' sex is, for the courts, evidence of an immutable condition of gender dysphoria. What medicine provided between *Ulane* and *Smith* is a new way to understand gender immutability, particularly how gender transgression may be medicalized, and therefore within the jurisdiction of antidiscrimination status protections. Now litigants who are able to adorn the medical institution's conception of gender dysphoria may claim status as individuals with a mental condition outside of one's control. Though different in substance, *Ulane* and *Smith* demonstrate the changing approaches to gender immutability as, instead of merely located in the body, but also, if not solely, located in the mind. More contemporary rulings, like *Bostock v. Clayton County,* continue this pattern. The litigants were all fired from their respective employers on account of either their homosexuality or transgender identity. Notably, the decision articulated that "[f]or an employer discriminate against employees for *being homosexual or transgender*, the employer must intentionally discriminate against individual men and women in part because of sex."[30] In *Bostock,* not only does the majority opinion reassert that sexual orientation and gender identity are inextricably tied up in sex, but it also emphasized the 'status' of *being* homosexual or transgender.[31] For the Supreme Court, sexual orientation and gender identity are a critical

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new gender in the eyes of non-trans people. Because the ability to be perceived by non-trans people as a non-trans person is valorized, normative expressions of gender within a singular category are mandated." Spade references Judith Halberstam's work that studies the ways in which trans men seek to differentiate themselves from butch lesbians, wherein the trans men's adoption of a "preppy, clean-cut look" diverges from the "'punky' hair cuts, black leather jackets, and other trappings associated with butch lesbians." This reveals "the requirement that gender transgressive people be even more 'normal' than 'normal people' when it comes to gender presentation, thereby discouraging gender disruptive behavior… When the gatekeepers [like medical professionals] employ dichotomous gender standards, they foreclose such norm-resistant possibilities."

[30] *Bostock v. Clayton County, Georgia*, 140 S.Ct. 1731 (2020), at 1743. Emphasis added.

[31] *Ibid* at 1741: "The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions."

component of immutable identity, but that which nonetheless circles two poles of male and female. Though *Bostock* comes close to the administration of antidiscrimination law outside of immutable identity,[32] even a decade and a half after *Smith* the legal sector is still unable to consider of gender discrimination outside of the gender binary rooted in immutability.[33]

The medical institution provides a critical backbone to existing transgender jurisprudence; medico-legal definitions of transgender identity relate gender identity to a matter of mental diagnosis, where it may be connected to an immutable condition of human embodiment. However, the medical diagnoses and treatments associated with gender-affirming care are often limited to a privileged few. Care is cost-prohibitive on its own,[34] and combined with the pervasive and systemic discrimination against gender-nonconforming people that produces proportionately high rates of homelessness, underemployment, and incarceration, the

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[32] Paisley Currah, *How a Conservative Legal Perspective Just Saved LGBT Rights*, BOSTON REVIEW (2020), http://bostonreview.net/gender-sexuality/paisley-currah-how-conservative-legal-perspective-just-saved-lgbt-rights (last visited Mar 23, 2021): Currah notes that Gorsuch's majority opinion actually distances the questions of identity from the litigants, and instead revolves around action: "Employers fire, single out, discriminate (against), penalize. Infants are 'identified as' male or female, presumably by doctors or hospital clerks. Individuals later 'identify as' male or female." However, Gorsuch is unable to escape the gender binary. Even Currah notes that "nonbinary is not mentioned in the majority opinion," and Gorsuch's language often returns to dichotomies of male and female, such as at 1742, "…the answer entirely depends on whether the model employee is a man or a woman," or "treat the class of men differently than the class of women." The majority reverts back to binary language throughout the opinion, especially by posing dichotomies of male and female with no other consideration for gender diversity. The transgender and homosexual individuals that are provided in the majority's examples nonetheless are sorted into either male or female.

[33] *Ibid.* Commentators like Currah believe that Gorsuch's conservative legal perspective actually preserved trans and gay rights. Currah is particularly attentive to how Gorsuch's majority decision in fact pays little attention to gender identity, and rather focuses on current sex identification: "…[N]otably absent is any discussion of, let alone reliance on, the psychiatric diagnosis of 'gender dysphoria' which often dominates the analysis in the lower courts' positive rulings. Or even of 'gender identity'—a term most trans people, educators, and advocates… have used as an explanatory rubric but which has proven somewhat difficult for the non-trans public to parse. Instead, it's just sex: the sex one was identified as at birth and the sex one identifies as now." While Currah rightfully points out the intricacies that differentiate *Bostock* from other cases, like how it avoids pathologizing gender diversity, Justice Gorsuch still reverts to conditions of 'being' alongside his action-driven narrative. It is still implied that gender and sexuality are innate components of personhood. There is liberatory potential in the majority opinion, but it is still tethered to *conditions* of identity.

[34] I.e. Dean Spade, *Compliance Is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, *in* TRANSGENDER RIGHTS 217–241 (Paisley Currah, Richard M. Juang, & Shannon Price Minter eds., 2006), at 228.

medical justification necessary to plead these cases are far away for many individuals.[35] Additionally, access to gender-affirming care is predicated on the ability for the individual to fully and unquestionable adopt all of the expectations of their preferred gender identity, which may or may not be an accurate expression for all gender non-conforming people.[36] Without the diagnosis, the culturally-prevailing accepted evidence of a 'gendered core identity,' gender nonconforming individuals are left out of the reach of legal protection.[37]

Excluded from traditional sex jurisprudential discrimination claim methods, transgender plaintiffs have consistently had difficulty navigating the law due to, among other things, legal invisibility.[38] This 'invisibility' in part stems from the inconsistencies about identifying what gender nonconformity is – put in other words, cases have not solidly been able to separate the *status* of transgender identity from the *behavior* of gender nonconforming expression. Because of the doctrinal emphasis on immutability, courts have a much more difficult time detailing issues of *expression* as a cognizable form of discrimination compared to discrimination on the basis of transgender *identity*. Because of the inconsistencies and fluidity of 'conduct,' there are

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[35] I.e., see generally NATIONAL CENTER FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* (2016), *supra* note 44. *Id* at 2: the report findings "reveal disturbing patterns of mistreatment and discrimination and startling disparities between transgender people in the survey and the U.S. population when it comes to the most basic elements of life, such as finding a job, having a place to live, accessing medical care, and enjoying the support of family and community. Survey respondents also experienced harassment and violence at alarmingly high rates. Several themes emerge from the thousands of data points presented in the full survey report[,]" those of which include "pervasive mistreatment and violence" (2), "severe economic hardship and instability" (3), "harmful effects on physical and mental health" (3), and "the compounding impact of other forms of discrimination" (4). See also Dean Spade, *Compliance Is Gendered in* TRANSGENDER RIGHTS 217–241 (2006), *supra* note 34, at 219.

[36] Spade, *supra* note 34 at 228: "…access to gender-related medical intervention is usually conditioned on successful performance of rigidly defined and harshly enforced understandings of binary gender…"

[37] See generally, Dean Spade, *Resisting Medicine, Re/modeling Gender* (2003), *supra* note 29.

[38] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 192: "Transgender people, whose personal and social identities are not built around their birth sex the way conventionally gendered people's are, are dehumanized by their inability to squeeze into the exclusive feminine or masculine gender grooves our society is constructed to maintain. They are regarded as falling outside the scope of legal protection owed to 'real' females and males: 'real' humans, who have a clearly discernible sex. The intricate details of their anatomies are discussed and assessed by courts in order to determine what sort of human they are, and whether they can be subsumed within a human category at all."

limited bases for protecting those things that can, theoretically, be easily changed. Gender expression was historically considered a form of changeable behavior for transgender litigants, though recent trends have been more favorable. However, courts continue to rest on the same arbitrary reliance on an idealized condition of gender binarism as necessitated by immutable characteristics. Reliance of medical definitions of gender nonconformity do two harmful things: they pathologize the conditions of gender nonconformity, so that they are consistently associated with mental deficiency or abnormality; and they reassert the importance of biological/brain 'congruency,' wherein, in the courts, only 'perfect' transgender plaintiffs are likely to gain protections – those plaintiffs who may 'neatly' transition from 'one gender' to 'the other.' *Schroer v. Billington,* in ruling for Diane Schroer's case of sex discrimination due to her transgender status, exemplifies this concern with 'complete' gender assimilation:

> "Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that "Diane" is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's [the employer's] stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex."[39]

Any transgressive or gender subversive potential is intercepted by the medical requirements that must substantiate a continuous pattern of gender nonconformity and evidence of a certain gendered "brain sex."[40] In order to be perceived as their desired gender, transgender litigants

[39] *Schroer v. Billington*, 424 F.Supp.2d 203 (2006), at 210-11.
[40] On the use of the term "brain sex," see generally Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6.

must fully and completely adopt the expectations of that gender as required by the treatment plans created for gender nonconformity. It is not so much about the immutable body, but the immutable brain.

The core doctrinal regulations regarding transgender care are the Diagnostical and Statistical Manual (DSM) and the Harry Benjamin Standards of Care. Up until the fifth edition of the DSM, Gender Identity Disorder was the primary diagnosis for transgender individuals. The American Psychological Associated recommended such a diagnosis when the following conditions were present:

> "1. Strong and persistent cross-gender identification, defined as the desire to be, or the insistence that one is, the other sex.
> 2. Persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.
> 3. Absence of a concurrent physical intersex condition.
> 4. Evidence of clinically significant distress or impairment in social, occupational, or other important areas of functioning."[41]

The most recent edition of the DSM, the DSM-V, replaced Gender Identity with "gender dysphoria," a change that was "meant to recognize that the clinical problem is not a person's gender identity, but the dysphoria experienced as a result of the incongruence[42] between the person's gender identity and the gender identity expected of a person who was assigned that person's sex at birth."[43] While the DSM-IV "emphasized the *dissonance* in gender identity that individuals with GD experience,... the DSM-V... emphasizes the *distress* experienced by

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[41] American Psychiatric Association, *The Diagnostic and Statistical Manual Of Mental Disorders* (4th Ed. 2000) at 581, cited in Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 179.
[42] On the use of this term, see generally Dan Schneider, *Decency, Evolved: The Eighth Amendment Right to Transition in Prison*, 2016 WISCONSIN LAW REVIEW 835–871 (2016).
[43] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 179.

individuals because of [this] incongruity."[44] The new diagnostic criteria associated with gender dysphoria includes a bodily-psyche incongruence as related to gender; "a strong desire to change primary or secondary sex characteristics, or to be, or be treated as, a different gender; and a firm belief that one feels and reacts in a way typical of another gender."[45] As a supplement, the Harry Benjamin Standards of Care establish a 3-prong treatment outline for people experiencing gender dysphoria: the first being the administration of hormone replacement therapy, the second a prescribed one-year period of living "in the social role of a person of the desired sex," and if neither of those provide relief, the Standards of Care recommend Sex Reassignment Surgery.[46]

As aforementioned, gender-affirming care is highly exclusive. It is both cost-prohibitive and not the intended expression of many gender nonconforming individuals. When courts and medical doctrine frame gender-affirming surgeries[47] as the "hallmark of transgender experience," they neglect the realities of access to such surgeries; not withstanding prejudice in the medical profession against gender nonconforming people, such treatments are both economically inaccessible and narratively essentializing.[48] Dean Spade articulates his experience with obtaining gender affirming treatment that required him to be able to adopt a specific narrative about gender nonconforming experience. To obtain these treatments, there must be a lifetime of gender nonconformity and a deep desire to be the 'other' sex, but for Spade, he sought a

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[44] Yini Zhang, *Transcending the Corporeal Prison: Eighth Amendment Jurisprudence, the Evolving Standard of Decency, and Sex Reassignment Surgery After Kosilek v. Spencer*, 34 LAW & INEQUALITY: JOURNAL OF THEORY AND PRACTICE 247–284 (2016) at 255. Author's emphasis.
[45] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 179.
[46] *Id* at 168, citing Harry Benjamin Interna Tional Gender Dysphoria Association, Standards of Care For Gender Identity Disorders (6th ed. 2001).
[47] I use this term as a replacement for "Sex Reassignment Surgery," which I believe is limited in its conception of sex and self-identification. "Gender affirming" is intended to separate the individual from the sex-assignment narrative, and instead more broadly focus on the personal identification process, rather than an external assignment of sex.
[48] DEAN SPADE, NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW (Revised & Expanded ed. 2015), at 80.

mastectomy and no genital surgeries. Writing about his experience in consultation meetings to receive this treatment, Spade recalls the doctor asking him to describe when he 'knew he was different'; Spade responds with an answer highlighting his socioeconomic status, non-Christianity, and early feminist stance. The doctor's

> "expression tells me [Spade] this isn't what he wanted to hear, but why should I engage a narrative in which my gender performance has been my most important difference in my life? It hasn't, and I can't separate it from class, race, and parentage variables through which it was mediated. Does this mean I'm not real enough for surgery?... I don't want to participate in an idea that only some people have to struggle to learn gender norms in childhood. So now, faced with these questions, how do I decide whether to look back on my life through the tranny childhood lens, tell the stories about being a boy for Halloween, about not playing with dolls? *What are the costs of participation in this selective recitation? What are the costs of not participating?*"[49]

Indeed, Spade rightfully poses the questions about the costs associated with participating or not participating in this essentializing narrative: namely, it is the simultaneous individual access to resources and the active systemic "renaturalization" of an immutable and ubiquitous gender binary, or the contrary, not receiving important resources and not contributing to this essentializing view of gender.[50] Contributing to this narrative by claiming and demonstrating pervasive pain and suffering[51] because of one's gender identity is more likely to award certain institutional assets. In order to substantiate the "the cultural" (and legal) "requirement that body

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[49] Dean Spade, *Resisting Medicine, Re/modeling Gender* (2003), *supra* note 29, at 19-20. Emphasis added.
[50] On the use of "renaturalization," see Paisley Currah, *Defending Genders: Sex and Gender Non-Conformity in the Civil Rights Strategies of Sexual Minorities*, 48 HASTINGS L.J. 1363–1385 (1997) at 1373.
[51] Especially regarding the narrative that presupposes a 'troubled childhood' will produce gender nonconformity, scholars like Dean Spade have been skeptical of the relationship between emphasizing pain and suffering and demonstrating gender transgression. See Dean Spade, *Resisting Medicine, Re/modeling Gender* (2003), *supra* note 29, at 20-21.

sex match psyche gender," transgender people seeking accommodations craft a narrative to prove pervasive pain and discomfort through their existing gender incongruency.[52] As Spade's experience demonstrates, "law has a powerful role in dichotomizing sex, and requires every person to be assigned one of two sexes in order to access essential social goods."[53] Understanding the complex nature of the medical model of transgender identity reveals both why medical conceptions of sex and gender are continued as well as how the law perpetuates their existence.

Not only is a gender-related diagnosis able to provide access to certain modes of legal protection, but it is also directly related to the ability for gender nonconforming people to access other important resources, such as the ability to modify identity markers on government documents. Even marriage, especially before the legalization of same-sex marriage, requires identification documents articulating the sexes of the parties involved.[54] So too do drivers' licenses, passports, birth certificates, and other governmental documents each require a sex marker, many of which require evidence of a gender dysphoria diagnosis and/or gender affirming treatment in order to change; "gender reclassification policies… so frequently include surgical requirements," which exclude those who do not pursue surgical intervention "both because it is prohibitively expensive and because many people do not want or need it."[55] Indeed, access to these sorts of institutional resources can impact the very safety and life trajectory of gender nonconformers; inconsistencies in documentation often lead to violence from police, for

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[52] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 193.
[53] Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 191.
[54] See Melina Constantine Bell, *Gender Essentialism and American Law* (2016), *supra* note 6, at 185, referring to *In re Estate of Gardiner.*
[55] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 79-80. It should also be noted that among the wide variety of administrative agencies, each within either state or federal jurisdiction, the requirements for gender-affirming documentation are vastly different. There are often instances of one's documentation having different gender markers. I.e. *ibid* at 79.

example, who are often already suspicious of gender nonconforming individuals.[56] Existing 'quality of life' ordinances continue to be selectively utilized to police the public presence of gender nonconforming individuals.[57] As a method of survival, the ability to obtain proper administrative documents proving their expressed gender identity proves to be necessitated by the ability to have one's gender nonconformity justified or addressed through medical intervention. These medical definitions provide legal footing to declare the immutable status required for class-based discrimination claims. Those with the ability to claim a *status* of gender dysphoria are therefore able to access protections, since they are considered individuals belonging to a class determined by immutable characteristics. It is not that the law is expanding

[56] Regarding the connection between documentation inconsistencies and violence, see DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 80: "People whose identity documents do not match their self-understanding or appearance also face heightened vulnerability in interactions with police and other public officials… [T]he barriers created by administrative miscategorization are increasing, especially for people whose immigration status and or/race subjects them to intensified surveillance." Regarding pervasive violence in the transgender community, NATIONAL CENTER FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey: Executive Summary* (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf, at 12: "Respondents experienced high levels of mistreatment and harassment by police. In the past year, of respondents who interacted with police or law enforcement officers who thought or knew they were transgender, more than half (58%) experienced some form of mistreatment. This included being verbally harassed, repeatedly referred to as the wrong gender, physically assaulted, or sexually assaulted, including being forced by officers to engage in sexual activity to avoid arrest… In the past year, of those who interacted with law enforcement officers who thought or knew they were transgender, one-third (33%) of Black transgender women and 30% of multiracial women said that an officer assumed they were sex workers." Regarding police suspicion of transgender people, especially transwomen of color, AMNESTY INTERNATIONAL, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* (2005), at 3-4: "AI's [Amnesty International's] findings suggest that police tend to target individuals who do not conform to gender stereotypes that govern 'appropriate' masculine and feminine behavior. Race plays an important factor in determining the likelihood of an LGBT person being targeted for police abuse, indicating that such abuses likely stem from racism as well as homophobia and transphobia… Transgender individuals in particular report being profiled as suspicious or as criminals while going about everyday business such as shopping for groceries, waiting for the bus, or walking their dog."

[57] AMNESTY INTERNATIONAL, *Stonewalled* (2005), *supra*, at 4: "AI's research has revealed that law enforcement officers profile LGBT individuals, in particular gender variant individuals and LGBT individuals of color, as criminal in a number of different contexts, and selectively enforce laws relating to 'morals regulations,' bars and social gatherings, demonstrations and 'quality of life.'" See DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 24-5. See also Richael Faithful, *Breaking Gender: In Search of Transformative Gender Law*, 18 THE AMERICAN UNIVERSITY JOURNAL OF GENDER, SOCIAL POLICY, & THE LAW 455–469 (2010), at 462: "Ancillary criminalization describes "public safety" laws and how their unfair enforcement negatively affects gender variant people… they are disproportionately harmed, even targeted, in the enforcement of such laws."

to protect all diverse forms of gender experience, but rather that it is accommodating those who neatly move from one pole to another.

As we have discussed, claims that behaviors, such as gender transgression, can be tied to an unchangeable characteristic that is out of the control of the individual have proved compelling in contemporary transgender jurisprudence. As an expression of an immutable condition, the gender transgression of those who are backed by medical diagnoses of transgender identity is perceived quite differently than the gender transgression of an individual who does not have such institutional support. Consider *Jespersen v. Harrah's Operating Co.,* which detailed the suit of a cisgender woman who objected to the requirement that women wear makeup on the job. [58] The Ninth Circuit held in *Jespersen* that a gender-based requirement that all women wear makeup was not sex discrimination. The plaintiff argued that she felt uncomfortable wearing makeup and that it impacted her job performance; Jespersen and her legal team also argued that the makeup requirement conflicted with her personal identity – drawing a connection between identity and behavior was a choice move to attempt to invoke the immutability concept. However, given that Jespersen was the only woman openly affected by the grooming policy, there was no evidence that it constituted sex stereotyping of women as a class. So too was Jespersen's dislike of makeup unable to be connected with a core facet of her identity. Indeed, the makeup requirement was not an 'unequal burden,' for men were held to similar, albeit different, standards of grooming. Jespersen lost the case. The difference between a case like *Jespersen* and that of *Smith v. City of Salem* can be summarized with a concern with immutability: while Smith's gender transgression was linked to an immutable condition of transgender identity, Jespersen's was not able to be related to a similar condition of gender nonconformity. Smith won her case, while

[58] *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104 (2006).

Jespersen did not. Jespersen is the type of plaintiff Kimberly Yuracko refers to as a "garden-variety gender bender," who are individuals that "object to some but not all of the conventions associated with their biological sex.[59] As a cisgender woman who did not seek to alter all conditions of her gender to accommodate an embodiment holistically of 'the other sex,' Jespersen could not be considered under a protected class, despite her claims that the makeup requirement was in objection to her personal identity. An 'incomplete' adoption or rejection of gender roles proves difficult for courts to consider, especially if they cannot be related to a core facet of personhood.

This relative difficulty in gaining legal recognition stems from the perceived difference between status and conduct: status as a condition of particular (and often politicized) human embodiment, and conduct as a malleable, preference-based behavior. Where those individuals compelled to adopt or reject all respective gender expectations are supported by more 'reliable' understandings of gender nonconformity, garden variety gender-benders are instead more often perceived as being able to adopt and reject roles as they please – for these people, since it is not so urgent for them to reject all of a certain set of gender roles due to a mental condition, it is therefore not an intrinsic, immutable characteristic for them to reject them.

Indeed, transgender plaintiffs who are supported by the medical institution through diagnosis are more likely to sustain immutability arguments, as they have the institutional backing that may justify the biological – thus immutable – conception of gender diversity. Those who do not 'neatly' or "successfully" transfer from 'one' biological sex or gender to the 'other,' whether by not undergoing cost-prohibitive gender-affirming surgeries or simply preferring to exist 'between' the binaries, are not granted the same ease of protection.[60] This separates the

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[59] KIMBERLY YURACKO, GENDER NONCONFORMITY AND THE LAW (2016), at 6.
[60] *Ibid.*

class of "garden-variety gender-benders" from those who articulate an innate condition of gender nonconformity. Those behaviors viewed as 'preference,' not easily tied to a matter of personhood, are not given the same urgency to protect in Title VII jurisprudence, since the 'balancing act' of employer desires and employee expression must be weighed; if it is understood as easily changed, the employer's interests win out.

Grooming cases are excellent examples of the importance of immutability to gender expression jurisprudence. Generally, gender-based grooming discrimination claims by the employee are difficult to win, since they involve "concepts apparently less anchored to identity categories, such as gender expression."[61] To be sure, the N.D. Indiana district court ruled in *Austin v. Wal-Mart Stores, Inc.* that a grooming policy that required all men to keep their hair shorter than their shoulders was not constitutive of sex discrimination. The court emphasized that "hair length is not an immutable characteristic, for it may be changed at will."[62] Indeed, the policy in question did not impact any "fundamental right of Austin's."[63] Much like *Jespersen, Austin* dealt with the competing legal concepts of preference and identity. Because Wal-Mart's policy to require men to keep their hair shorter than their shoulders was not an "[obstacle] to the employment of one sex that cannot be overcome," it was not considered constitutive of discrimination.[64] Indeed, the *Austin* court referred to *Baker v. California Land Title Co.'s* reasoning that Title VII was created in order to ensure that employees were considered on their merits and capabilities, not "on account of regulations by employers of dress or cosmetic or grooming practices which employer might think his particular business required."[65]

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[61] Paisley Currah, *Gender Pluralisms under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS (2006), *supra* note 21, at 13.
[62] *Austin v. Wal-Mart Stores, Inc.,* 20 F.Supp.2d 1254 (1998), at 1257.
[63] *Ibid.*
[64] *Id* at 1256.
[65] *Id* at 1257.

Alongside the general issues of separating immutability from preference, immutability poses problems for many gender theorists, who are largely skeptical to secure gender into one cohesive definition, intrinsic and immutable, just as the law desires. Indeed, gender is a continuous practice and development that is influenced by institutions and social relations as well as personal identification. It is fluid. However, the law is unable to accommodate this more dynamic understanding of gender; it requires something tangible and easily identified. It is this divergence – between the experience of gender and the necessities of jurisprudential reach – that underlines the antiquated logic of gender binarism that so pervasively impacts American gender and sex jurisprudence. Concern with the ability to accommodate an immutable gender binary permeates years of gender discrimination jurisprudence. Questions are often raised about the extent to which immutability can protect individuals, as well as to what extent requirements of immutability over-simplify complex forms of human embodiment. Indeed, even if the more flexible conception of gender expression is not necessarily a medical condition, a racial category, or a nationality, what lines are drawn between these categories – and more importantly, why and how? From this question stems an inadequacy of the law's capacity to acknowledge, recognize, and protect gender diverse individuals, given that the law requires strict, immovable identity groupings to accord rights *to.*

III. The Problems With Formal Equality: Identity-Based Legal Protections

Criticisms of immutability provide insight into one of the many limitations of antidiscrimination law, wherein not only are there nomenclature inconsistencies within the doctrine, but also a substantial population who are out of reach of these legal protections due to

their inability to claim status as part of a protected identity group. To better understand this condition, an overview of formal equality is required.

As the guiding practice of antidiscrimination law, formal equality is the philosophical and legal practice that seeks to 'level the playing field' for all individuals by targeting one socio-political identity at a time. In this way, the law is formulated on a "but for" basis: if everything about a discriminated individual were the same 'but for' this one politicized characteristic, be it race, gender, sexuality, nationality, or other identities, the person theoretically would not have been discriminated against. As protected classes are added to or amended in existing anti-discrimination law, one central legal subject can be thought to be at the center of these identity specifications:

> "Legal treatment of difference tends to take for granted an assumed point of comparison: women are compared to the unstated norm of men, 'minority' races to whites, handicapped persons to the able-bodied, and 'minority' religions to 'majorities.' Such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world."[66]

Indeed, by demarcating certain identity categories for protection, the law implies the non-discriminatory, that which does not require the protection of identity-based discrimination protections. The "unmarked" category from which all other instances of discrimination stem is summarized by many feminist scholars as a white, straight, cisgender, Christian, middle-to-upper class, educated, property-owning, able-bodied, adult, autonomous male.[67] This method of

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[66] Martha Minow, *Foreword: Justice Engendered*, 101 HARVARD LAW REVIEW 10–95 (1987), https://www.jstor.org/stable/1341224., at 13 (internal citations omitted).

[67] Kylan Mattias de Vries, *Transgender people of color at the center: Conceptualizing a new intersectional model*, 15 ETHNICITIES 3–27 (2015), at page 5, regarding the use of "marked" and "unmarked," and how "unmarked" identities create the basis for protections of their "unmarked" counterparts. See also Martha Albertson Fineman,

allocating protections is not only highly limited, but also largely inefficient at tackling substantive inequalities. Antidiscrimination claims cannot be made for more than one protected class at a time, and they are not formative or long-standing solutions to systemic inequity since anti-discrimination law is largely focused on a "perpetrator/victim dyad, imagining that the fundamental scene is that of a perpetrator who irrationally hates people on the basis of their race [or other protected characteristic]."[68] This is considered a "corrective" dynamic, wherein antidiscrimination law is employed after the discrimination occurred in order to punish a perpetrator.[69] More optimistic legal scholars look to the "distributive" components of anti-discrimination law, which encourage proactive prevention of discrimination.[70] Nonetheless, antidiscrimination law cannot be enacted unless discrimination has occurred, rendering it largely to this retroactive, reparative operation. Any 'encouragement' for employers to not discriminate is little more than a suggestion. Under the current antidiscrimination system, there is no legal basis for discrimination that has not occurred – only the threat of being found guilty may implore an employer to actively avoid discrimination policies. But this is still not enough, as both cases involving disparate treatment – which requires a pervasive prejudicial feeling that has impacted a person of a protected class – and disparate impact – facially neutral policy that produces inequities along protected class lines – are subject to Title VII intervention. Therefore, this 'distributive,' preventative power of antidiscrimination policy cannot be guaranteed, since discrimination can still occur with facially neutral, not-overtly-discriminatory policy.

Beyond Identities: The Limits of an Antidiscrimination Approach to Equality, 92 BOSTON UNIVERSITY LAW REVIEW 1713–1770 (2012), at 1752-3 on the addition of "autonomous" to this defining set of characteristics.

[68] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 42.

[69] Julie Chi-hye Suk, *ARTICLE: ANTIDISCRIMINATION LAW IN THE ADMINISTRATIVE STATE,* 2006 U. Ill. L. Rev. 405, (2006), *available at* https://advance-lexis-com.proxy.library.emory.edu/api/document?collection=analytical-materials&id=urn:contentItem:4JCT-1HM0-00CW-503C-00000-00&context=151683, at 405-06.

[70] *Id* at 407.

Critical legal scholars, especially feminist legal scholars and critical race theorists, have argued that antidiscrimination law has been historically inadequate in addressing complex understandings of intersectional identity; the law lacks an ability to navigate discrimination against individuals who occupy more than one socio-political identity category, and there has been limited success in changing the orientation of the law itself to promote a legal subject that encompasses a more robust understanding of complex identity. These theoretical developments have been critical to understanding how the law is involved in identity, and especially how the law neglects certain populations of individuals. The aforementioned invisible legal model – the heterosexual, cisgender, white, Christian, able-bodied, property-owning, middle-to-upper-class, educated, adult, autonomous male – is the ideal from which any antidiscrimination policy originates. However, there is no current understanding in the law to prosecute discrimination that impacts more than one of these matrices of identity. Kimberle Crenshaw was one of the first feminist scholars to identify this issue for Black women in the 20th century, wherein her analysis of *Degraffenreid v. General Motors* revealed the invisibility of Black women in antidiscrimination law as subjects who occupy multiple antidiscrimination classes. Indeed, in *Degraffenreid,* General Motors was able to avoid liability for firing troves of Black women by showing that they hired and promoted many white women and many Black men – therefore, they had not discriminated based on race *and* sex. As Crenshaw noted,

> "The court's refusal in *DeGraffenreid* to acknowledge that Black women encounter combined race and sex discrimination implies that the boundaries of sex and race discrimination doctrine are defined respectively by white women's and Black men's experiences… Where their experiences are distinct, Black women can expect

> little protection as long as approaches… which completely obscure problems of intersectionality prevail."[71]

Crenshaw's coinage of the term 'intersectionality' has provided foundational feminist theorizing that recognizes the multiplicity of identity and the manifestations of personhood along multiple axes of privilege and disadvantage. Crenshaw's work, among other authors', initiated important criticism on the limits of the law, and 'intersectionality' has continued to be a critical organizing method for social justice advocates and critical legal scholars. Intersectionality provided the language and metaphors to conceive of the reality of complex identity, and I do not undermine its importance to feminist theorizing. It is an important tool to grapple law as it is currently formulated, but antidiscrimination law as it currently stands does little to recognize or attempt to remedy more systemic, structural forms of inequity. Therefore, while conceptualizing intersectionality within antidiscrimination contexts is a useful tool for the time being, it is not the ends of our means.

A critique of identity-based legal reparations does not tackle the entire issue with formal equality. Indeed, the problems of antidiscrimination law often stem from the reliance on identity categories themselves; this is not to say that identity categories or not important or not useful tools in other contexts. To be sure, the language and movement-building potential of identity categories has provided groups across the United States with the community of shared experience to mobilize and demand better.[72] They provide the opportunity for coalitional

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[71] Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 THE UNIVERSITY OF CHICAGO LEGAL FORUM 139–167 (1989), at 142-3.

[72] Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, 23 TEMPLE POLITICAL & CIVIL RIGHTS LAW REVIEW 307–330 (2014) at 108 n.44: On the example of University of Pennsylvania LGBT+ organizing, "The amalgamation of interests and creation of alliances with people across differences reflected in 'Generation LGBTQIA' is also an effective political strategy. The students have varied individual sexual and gender identities,

organizing and serve as important resources for finding community.[73] However, the use of identity categories as proxies for the distribution of rights and protections, especially *after* harm has occurred, is an ineffective system for targeting inequality. Formal equality rests on the creation and reproduction of categories deemed deserving of certain legal protections; with an individual-based model of seeking protections, formal equality enables the state to avoid providing proactive, substantive equality through resources or institutional rearrangement. Scholars like Dean Spade have introduced strong critiques of the formal equality model, especially insomuch as it perpetuates a "victim/perpetrator dyad."[74] In addition to the inconsistencies of recognizing complex inter-categorial or intra-categorical identity formations, formal equality in fact does little to actually remedy the disparities of life conditions for marginalized groups: anti-discrimination and hate crime "reforms have not eliminated bias, exclusion, or marginalization… The persistence of wage gaps, illegal terminations, hostile work environments, hiring/firing disparities, and bias-motivated violence for groups whose struggles have supposedly been addressed by anti-discrimination and hate crime laws invites caution when assuming the effectiveness of these measures."[75] Fundamental and systemic forms of privilege and disadvantage continue to persist despite a relatively constant increase in anti-discrimination law, and thus we must conceptualize a more effective means of addressing inequity than formal equality.[76]

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but emphasize similarities rather than differences in order to reach others who share their interest in broader social justice questions that affect everyone."

[73] de Vries, *supra* note 67 at 15-17, regarding the importance of positionality.

[74] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 42.

[75] *Id* at 40.

[76] *Id* at 37: "If formal legal equality at best opens doors to dominant institutions for those who are already closest to inclusion (i.e., they would be included if it wasn't for this one characteristic), very few stand to benefit. Given the context of neoliberal politics, in which fewer and fewer people have the kind of racial and economic access necessary to obtain what has been cast as 'equal opportunity' in the United States, and where populations deemed disposable are abandoned to poverty and imprisoned only to be released to poverty and recaptured again, we face serious questions about how to formulate meaningful transformative demands and tactics."

Instead, a legal system must proactively provide for and protect constituents instead of adopting a retroactive, remedial stance to attempt to discourage discrimination. Disadvantage must be tackled from its root. In many cases, this root is tied to material and institutional access. The following section will articulate the critiques of formal equality as a retroactive, reparative process. Socialist feminist criticism will center the importance of material conditions, and particularly how gender is related to certain resource attribution. As such, this section will not only conceptualize the limits of formal equality and the law's power to achieve substantive equality, but also question the effectiveness and legitimacy of the antidiscrimination project, including that of Title VII.

Part One of this paper has exposed the inadequacies of attempting to define gender nonconformity for legal jurisdiction, especially as such definitions require and rely on immutability. Immutability is an inappropriate standard for approaching discrimination cases, not only because it obscures the reality of gender nonconformity, but also in that it obscures, or at minimum overlooks, the disadvantage and privilege obtained outside of identity categories. Class, for example, is one of the most pertinent examples of an indication of resource access or lack but is unable to be conceived in an identity-based retroactive-redress antidiscrimination framework. Existing case law has shown that gender immutability is an inadequate way to accord rights and privileges to gender nonconforming people, but also to all people in general. The medicalization of transgender identity prevents subversive, transgressive, or non-binary expressions of gender from receiving protections in the workplace; the law's continued reliance on such a standard continues to entrench gender essentialism into our laws, our jobs, and our very lives. The state must be implicated in this project, and similarly implicated in its inability to

distribute resources to all people, especially wherein they fall outside of existing identity categories.

A more robust consideration of human need, expression, and centrality in the legal arena may be therefore better able to provide for gender nonconformers, as resources for resilience would be guaranteed before discrimination were to occur. The following Part produces and exposes the legal-capitalist-patriarchy through the expansion of socialist feminist thought to include the state and law in the role in perpetuating gendered class inequality. By extrapolating the distinctly feminist and anticapitalist critiques of Title VII gender jurisprudence, we may reveal the inner workings of a state concerned with patriarchal domination and capitalist enterprise. However, this is not the end of this story. Limitations in identity categories themselves leave this endeavor bound to the very structure it seeks to distance itself from. Instead, we must conceptualize a new way of framing the law's response to human need, that which goes beyond typical identity categorization. It is for this reason that vulnerability theory is posed as a potential avenue to expand on identity-based and anticapitalist organizing to implore the state to respond to human need – all of our human needs. Vulnerability theory and socialist feminism provide the tools to conceptualize a future that provides the proper materials for human survival and flourishment, with an important consideration of the state's role in the normative policing of gender conformity and obscuring equity disparities outside of identity categories. Where gender discrimination jurisprudence espouses immutability, it exposes the importance of a conjoined understanding of social and institutional positioning. State-adjudicated institutions work together and create certain conditions that impact how individuals maneuver the American landscape. As such, a structural approach to material need is necessary in order to conceptualize substantive equality inside and outside the employment context. When we recognize workers',

and humans', right to be perceived as they desire, to be considered as existing prior to the employer and not the contrary, we may prove the ultimate value in preserving life and community.

PART TWO: CONCEPTUALIZING RESPONSE TO MATERIAL NEED

I. The Problem with Rights

As the foundation for American legal doctrine, liberal theory asserts that the state should only intervene on individual freedom when absolutely necessary; the rest of human life should be the responsibility of the individual.[77] However, as the forerunning philosophy of American governance, liberalism is the constraint upon the state that prevents it from proactively providing for the constituency and preventing systemic disadvantage.[78] More substantive equality regimes that focus on population-level equity measures are more constitutive of equal life chances compared to the individualistic movement to redeem and award rights through antidiscrimination

[77] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983), at 33: According to liberal theorists, "the good society must protect the dignity of each individual and promote individual autonomy and self-fulfillment. Given these values, liberals have inferred that the good society should allow each individual the maximum freedom from interference by others. Unfortunately, however, liberals believe, interference from others and even attack from others is a permanent probability in the human condition… [T]he fundamental problem for the liberal theorist is therefore to devise social institutions that will protect each individual's right to a fair share of the available resources while simultaneously allowing him or her the maximum opportunity for autonomy and self-fulfillment."

[78] *Ibid*: Liberalism approaches the conflicting problem of state resource-distribution and nonintervention through "justifications and delimitations of the power of the state. For the state is the institution that liberals charge with protecting persons and property and, simultaneously, with guaranteeing the maximum freedom from interference to each individual." See also Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY LAW JOURNAL 251–276 (2010), at 258: "In recent years in America, the possibilities for a robust and expansive vision of equality seem to have eroded, worn away by the ascendency of a narrow and impoverished understanding of autonomy. In fact, autonomy from state regulation, control, or interference is posited as essential to the realization of individual liberty and freedom of action, even as that freedom has resulted in a diminishing of options and autonomy for many as our society has become more and more unequal."

laws and hate crime protections.[79] By premising protections on a formal equality regime, the anti-discrimination system maintains the primacy of an individualistic pursuit of remedy. Where there is a method for *individuals* to personally seek retroactive redress to harms already endured, the state is not obligated to provide proactive protections. Indeed, since both discrimination (per the "perpetrator/victim dyad"[80]) and resource deprivation (i.e. poverty) are both considered individual practices under this liberal standard, the state is able to continue to justify its nonintervention – according to this view, shortcomings of discrimination or resource accumulation are not the state's fault, and therefore not the state's responsibility.[81] Clearly, when viewed from a structural lens, the deficiencies associated with individual circumstances can be traced back to the state's inability to distribute resources or prevent discrimination. The legal subject by which laws are framed, therefore, demonstrates an unrealistic image of human existence that obscures – or completely ignores – the state's role in overseeing quality of life overall. A socialist feminist intervention is a useful component to revealing the inadequacies of rights projects in ensuring actual equity. Wherein many of our inequalities stem from a difference in material conditions, a socialist feminist analysis of a rights framework will show how intricately our wellbeing is related to our socioeconomic mobility.

The first task in this review is to examine the model of the expected citizen in American jurisprudence. Fineman's work is critical in exposing a particular liberal legal subjectivity that underlines American legal doctrine. Fineman expands the critiques of an identity-based subject articulated by feminist legal scholars and exposes the liberal legal subject as an idealized and

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[79] See generally, Dean Spade, *What's Wrong With Rights?*, *in* NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, & THE LIMITS OF LAW 38–49 (Revised & Expanded ed. 2015).
[80] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 42.
[81] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State* (2010), *supra* note 77, at 259: "Our privileging of autonomy demands a default position in which there is freedom from constraining rules and regulations. In such a system, success and failure can be understood solely as the result of individual actions and not involving a failure of governmental response."

especially antiquated view of human dependency, wherein the model subject is one who does not require assistance, especially from the state. As the "manifestation of public authority" and the counter to liberalism-driven self-interest, the state in this regard, "is not necessarily the nation-state but rather an organized and official set of linked institutions, legitimated by a claim to public authority, that hold coercive power, including the ability to make and enforce mandatory legal rules."[82] Fineman's synthesis of the liberal legal subject paints the following figure as the invisible model by which laws are centered:

> "Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference. He claims a right to autonomy to govern his own life while at the same time asserting his freedom from responding to the needs of others, who should be equally independent and self-sufficient… The liberal legal subject embodies an ideal of abstract equality or fundamental sameness where any differences among men are deemed to be legally or politically insignificant… [This subject] is a fully functioning adult in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts… The attainment of liberal economic roles, such as job creator, entrepreneur, taxpayer, and (of course) consumer, defines the aspirations and determines the values for this legal subject. The messy aspects of what it means to be human, particularly the physical realities of vulnerability and dependency, may be viewed as a problem, but they are strictly considered to be an individual, not a societal, problem."[83]

By premising law upon an autonomous and independent individual, the state may be justified in not providing substantive access to resources or institutions that increase life chances; when the

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[82] *Id,* at 6, n.14.
[83] Martha Albertson Fineman, *Beyond Equality and Discrimination*, 73 SMU LAW REVIEW FORUM 51–62 (2020), at 53-4.

expectation for American citizens is to be undoubtedly self-sufficient, shouldering all responsibility for life conditions and desiring liberty from state interference, formal equality's need for concrete models of personhood relegates any individuals who require assistance outside of the bounds of the law. They are exceptional, outside the norm. Additionally, in some ways, those dependent on the state are pathologized, relegated as an abnormal constituency that is unable to meet the expectations of equal opportunity as espoused by the American capitalist meritocracy.[84] In this way, "[t]he U.S. Constitution… embodies a restricted sense of state responsibility that is unrealistic for defining the appropriate legal relationships that exist between the modern state, the lives of individuals, and the operation of complex societal institutions."[85] The "restrained state of the liberal imagination" continues to deprive the population of important resources under the guise of liberty and freedom with emphasis on individual meritocracy.[86]

With the liberal legal subject in mind, formal equality regimes are limited in their capacity for substantive, holistic equality by pretending the expected behavior of the national population is that which does not require state assistance. By themselves, "[l]egal equality goals threaten to provide nothing more than adjustments to the window-dressing of neoliberal violence

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[84] Consider, for example, the derogatory myth of the "welfare queen" examined in Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 GLQ: A JOURNAL OF LESBIAN & GAY STUDIES 437–465 (1997). At 455-56: "The stigmatization and demonization of single mothers, teen mothers, and, primarily, poor women of color dependent on state assistance has had a long and suspicious presence in American 'intellectual' and political history. It was in 1965 that Daniel Patrick Moynihan released his 'study' entitled *The Negro Family: The Case for National Action*. In this report, which would eventually come to be known as the Moynihan Report, the author points to the 'pathologies' increasingly evident in so-called Negro families… [those of which] as being generated by the increasing number of single-female-headed households, the increasing number of 'illegitimate' births and, of course, increasing welfare dependency… Adolph L. Reed, in "The 'Underclass' as Myth and Symbol: The Poverty of Discourse About Poverty," discusses the gendered and racist nature of much of this literature, in which poor, often black and Latina women are portrayed as unable to control their sexual impulses and eventual reproductive decisions, unable to raise their children with the right moral fiber, unable to find 'gainful' employment to support themselves and their 'illegitimate children,' and of course unable to manage 'effectively' the minimal assistance provided by the state."

[85] Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality* (2012), *supra* note 67, at 1719.

[86] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 54.

that ultimately disserve and further marginalize… populations."[87] Though not exclusive to any "vulnerable population" as social theorists often posit, those people that do require state assistance are considered outliers at best in an otherwise functional system of self-sufficient individuals. However, we are deeply connected, be it to each other and our governing structures. Expecting all individuals to be able to navigate the neoliberal capitalist landscape unscathed and without need for governmental assistance is in fact neglecting the very realities of not only the human condition, but also the unsustainability of capitalism in pursuits of holistic equity. Liberal philosophy gained hold with the rise of capitalism;[88] as such, it is linked with the meritocratic 'equal opportunity' organization of American society. The ability for people to maneuver through the American landscape is often predicated on success in compounding institutions, including education, employment, and healthcare, while also sustaining access to important forms of human, social, and financial capital. The state, therefore, in its inability to properly distribute resources and institutional access, is implicated in the inequality of its citizens.

The liberal philosophy is notoriously ahistorical, and does not account for societal and individual contexts; Alison Jaggar notes that liberal emphasis on normative dualism, "the view that what is especially valuable about human beings is their 'mental' capacity for rationality,' is derived from a vision of political solipsism, "the assumption that human individuals are essentially self-sufficient entities."[89] However, this is not a realistic assumption, as humans rely on each other in order to share resources in order to produce enough offspring.[90] Indeed,

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[87] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 12.
[88] *Id* at 27.
[89] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983), at 40-41.
[90] *Ibid*: "As soon as one takes into account the facts of human biology, especially reproductive biology, it becomes obvious that individual self-sufficiency is impossible. Human infants… [require] a uniquely long period of dependence on adult care. This care could not be provided by a single adult; in order to raise enough children to continue the species, humans must live in social groups where individuals share resources with the young and the temporarily disabled."

"[h]uman interdependence is thus necessitated by human biology, and the assumption of individual self-sufficiency is plausible only if one ignores human biology."[91] This is apparent through the American legal system, wherein the invisible legal model is assumed as a constantly independent and self-sufficient adult. So too does it appear, albeit differently, in the case of legal identity protections: there is an imagined recipient of these legal remedies, that of which does not take into account specific circumstances including but not limited to an individual's class, geography, education, or any other result of differences in resources. It is a necessarily human thing to be dependent. It should be the central organizing principle of law and society.

What formal equality does not recognize is difference in material conditions. Instead, it lumps all difference under a series of identity categories and refuses to acknowledge the state's role in producing inequities typically associated with such categories.[92] Racial discrimination is not simply a matter of individual racists, but deep-rooted, systemic disadvantages as well; the history of redlining, white flight, and educational disparities provide a more realistic – and structural – view of the continued oppression of Black people. These are not simply problems of Blackness, but state allocation of resources – the state is responsible for population-level inequity. As such, a rejection of the liberal legal subject and a recognition of a legal model that represents human interconnectedness is more realistic and would warrant the adequate distribution of resources to mitigate harm. It is from this knowledge that socialist feminist views are helpful in extending the identity framework to include the differences in material conditions that Americans face.

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[91] *Id* at 41.

[92] See Martha Albertson Fineman, *Injury in the Unresponsive State: Writing the Vulnerable Subject into Neo-Liberal Legal Culture*, *in* INJURY AND INJUSTICE: THE CULTURAL POLITICS OF HARM AND REDRESS 50–75 (Anne Bloom, David M. Engel, & Michael McCann eds., 2018), DOI: 10.1017/9781108332934.003, at 61: "This fragmentation of humanity into discrete populations tends to locate differences within individuals, obscuring universal, and inherent vulnerability and the ways in which the meanings and consequences of variations are shaped within social structures."

II. Legal-Capitalist-Patriarchy: Expanding Socialist Feminism to Include the State

Socialist feminism largely emerged en masse in the late 1960's. After significant influence from the Civil Rights movement and the New Left, many women were dissatisfied with the male-centric organizing tactics of the aforementioned groups and opted to craft their own organizing centers and politics.[93] Emphasizing the interrelation of patriarchy and capitalism, early socialist feminists encompassed a very broad group of thinkers that are critical of capitalism's role in perpetuating patriarchy, and vice versa. Especially in the realm of workers' protections, socialist feminists have been critical of the law in adorning certain protectionist laws founded upon the need to protect 'the weaker sex' from the harms of capitalism – harms which should not be inflicted on any person, not just women.[94] Critical components of early socialist feminist analysis include sexual segregation of women from the productive workforce, the labor of domestic life, and reproductive labors. Although socialist feminism itself does not have the same societal significance today, it is certainly on the rise; [95] many early socialist feminists provided the foundations for combining class-consciousness with feminism that has informed contemporary authors and activists. As a forerunning author in the early socialist feminist movement, Zillah Eisenstein synthesizes radical feminist philosophy and Marxist theory in order to craft an understanding of capitalism and patriarchy as "theories of power" that are

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[93] *The Berkeley-Oakland Women's Union Statement*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 355–361 (Zillah R. Eisenstein ed., Kindle ed. 1979), at 356.

[94] CINZIA ARRUZZA, TITHI BHATTACHARYA & NANCY FRASER, FEMINISM FOR THE 99%: A MANIFESTO (2019) at 13: "Eschewing half-measures, the feminism we envision aims to tackle the capitalist roots of metastasizing barbarism… This feminism does not limit itself to 'women's issues' as they are traditionally defined. Standing for all who are exploited, dominated, and oppressed, it aims to become a source of hope for the whole of humanity. That is why we call it *a feminism for the 99 percent*" (emphasis added).

[95] The COVID-19 crisis has resulted in a surge in leftist thinking and a particular rise in socialist feminist philosophy. The absurdities associated with the U.S. government's neglect of the human constituency has led many women to seek out theories that explain their particularities as workers and as caretakers, such as the theories of socialist feminist Silvia Federici. See Jordan Kisner, *The Lockdown Showed How the Economy Explotis Women. She Already Knew.*, THE NEW YORK TIMES MAGAZINE (2021), https://www.nytimes.com/2021/02/17/magazine/waged-housework.html (last visited Mar 24, 2021).

"interrelated."[96] She considers socialist feminism to include the commitment "to understand the system of power deriving from capitalist patriarchy," which she defines as the "mutually reinforcing dialectical relationship between capitalist class structure and hierarchical sexual structuring."[97] 'Capitalist patriarchy' has since become a keystone of socialist feminist organizing and thought. I seek to extend this concept to include the state, and particularly the law. In the relationship between law, capitalism, and patriarchy, each component is largely self-replicating, although the law stands as a catalyst for the reactions that occur between the latter two. Where both law and patriarchy produce capitalism, capitalism too produces patriarchy, the latter of which influences the adjudication and development of American law. The three of them, correlated, are what I consider a theory of legal-capitalist-patriarchy. In the ways that the formulation of the law continues to oppress non-men and workers, socialist feminist interventions will provide important insights into the ways that the social roles of employer and employee are continuously developed and substantiated by legal doctrine. Indeed, the "goal of socialist feminism is to abolish the social relations that constitute humans not only as workers and capitalist but also as women and men."[98] Therefore, this exploration is prime material for the work of socialist feminist intervention. I offer cases challenging gender-based grooming expectations as a site of legal-capitalist-patriarchy, whereby the state's deference to employer grooming preference is placed before employee expression. The state is concerned with the ability for businesses to achieve profit at the expense of the human expression of those who work for the business.

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[96] Zillah R. Eisenstein, *Developing a Theory of Capitalist Patriarchy and Socialist Feminism*, *in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 5–40 (Zillah R. Eisenstein ed., Kindle ed. 1979), at 6.
[97] *Ibid* at 5.
[98] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983), at 132.

The first issue is to tackle whether law is incompatible with socialism, and whether a socialist critique of the law can do so without requiring its dissolution. In a Marxist view,[99] socialism is the period following the proletariat uprising that exists before the emergence of communism; as a steppingstone to communism, which is necessarily stateless, socialism perhaps includes the dissipation of the administrative state. In this definition, law is incompatible. The socialism I refer to is the broader conception of means of production ownership by workers, that which does not necessarily preclude the existence of the state. Indeed, some Marxist scholars indicate that Marx's call for the abolition of the state in fact refers to the class state, not the administrative state.[100] However, the law is often considered to be part of this class state, since it is a few elite bourgeois members that adjudicate the rights, privileges, or punishments to the many. There is a larger ambiguity involving the potentiality of the law in a socialist society, but these musings are beyond the scope of this paper; instead, I wish to indicate that even if the law may be incompatible with a communist or socialist society, the common ideals that may be implemented into the law may serve to enhance our current social organization that includes a law, or institutionalize and popularize communalistic ideals, wherein a proletariat uprising may be possible through the mass education of the workers as a class. This is a call for relatively imminent incorporation of these influential communalistic, empathetic practices of social

[99] Marxist feminist views are helpful, but not the core subject of the portion of this inquiry in that I am not producing a distinctly dialectical materialist stance. Still, many Marxist feminists provide important insight on the workings of social and institutional relationships of employer and employee. I intend to use these components in conjunction with larger socialist feminist workings to extrapolate the role of the law in the capitalist project and conceptualize a structural justice project centered on human need, not on the distribution of rights which may be invoked upon the instance of harm. Instead, placing human need first ensures that all citizens are provided for proactively. Though Marxist feminists are considered a subsidiary of socialist feminism, their requirement of state dissolution is purposefully not included within the realm of exploration of this project.

[100] MAX ADLER, THE MARXIST CONCEPTION OF THE STATE: A CONTRIBUTION TO THE DIFFERENTIATION OF THE SOCIOLOGICAL AND THE JURISTIC METHOD (Mark E. Blum ed., 2020), at 149: "Elimination of the state in Marx means something different than in [Hans] Kelsen['s work], because it is not 'the state itself' of which Marx speaks, but rather the class-based state, and in this sense it is also the capitalist state versus the proletarian class-state."

organizing, the abandonment of staunch liberal individualism, and ensuring the care for our communities is maintained. The thought of reforming law should not be precluded simply because it is not the revolution itself; many leftist groups are preoccupied with accelerationism, and this project should instead be considered a form of harm reduction. It is correct that this type of proposed society may reify the state, but as leftists it is important to consider the real benefits attained by harm reduction, especially for those individuals routinely neglected by social welfare. Remembering the state's progressive potential, at least in some forms, should be a guiding principle for the sake of reconceptualizing the law: "the challenge is to think beyond current ideological constraints and consider the possibility of an active state in nonauthoritarian terms."[101] We must imagine a state "whereby state involvement actually empowers a vulnerable subject by addressing existing inequalities of circumstances that result from undue privilege or institutional advantage."[102] Americans, and citizens of nations across the world, have yet to experience this type of state, the type that acknowledges and properly responds to systemic inequity, and therefore it is easy to think of the state itself as a wholly inept concept.[103] Instead, I implore leftist communities to engage with harm reduction, and consider the immediate benefits for communities around America when we may shape the law with the human condition in mind.

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[101] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State* (2010), *supra* note 77, at 274.
[102] *Ibid.*
[103] I consider it important to recognize and acknowledge the considerable work completed on social justice measures that occur outside of state jurisdiction, such as mutual aid. Considering the history of state violence, operating outside of state boundaries is a logical conclusion. Mutual aid strategies are, under current governance, important regimes of care. Especially during the COVID-19 crisis, mutual aid groups have grown substantially and have provided important resources for communities around the world. I only hope for a society that better provides for its constituents so that mutual aid is no longer necessary in the face of governmental neglect. See generally Dean Spade, *Solidarity Not Charity: Mutual Aid for Mobilization and Survival*, 38 SOCIAL TEXT 131–151 (2020); DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (eBook ed. 2020); NICK SRNICEK & ALEX WILLIAMS, INVENTING THE FUTURE: POSTCAPITALISM AND A WORLD WITHOUT WORK (Revised and updated ed. 2016); SOLNIT REBECCA, PANDEMIC SOLIDARITY (2020), http://www.jstor.org.proxy.library.emory.edu/stable/j.ctv12sdx5v.

Attention to material conditions, especially, are a useful step to implement in the role of the law as it currently exists in order to better the living conditions for all Americans.

One entry point for socialist feminist analysis is the legal prominence of the preferences of employers in gendered grooming cases. The law grants a troubling amount of deference to employers in outlining workplace policies, wherein the protection of the needs of the employer to operate a business is placed primary to the needs of the worker. Outside of the realm of liberal restrained state jurisdiction, equality measures attempt to facilitate a false equality between figures like the employer and employee, leaving the nuances of such a relationship to the dictations of the employer.[104] This deference indicates an alliance to capitalist hierarchies of power, which reproduce the employer/employee relationship of power and oppression. In using socialist feminism to examine Title VII sex jurisprudence, we may conceptualize the state's role in perpetuating inequality along both class and gendered lines. An obvious preference to the ability of an employer to limit the gender transgressive expression implicates both the concerns of profit-driven enterprise and patriarchal gender conformity. This analysis is not to imply that these are the only two forms of oppression that the state is responsible for in its current adjudication of the law; indeed, the American government has historically and continuously oppressed hundreds of groups domestically and internationally, and the law has been a tool to both develop and remedy these imposed relationships of dominance. However, combining identity and extra-identity modes of analysis – feminist and anti-capitalist – will hopefully reveal some of the major underpinnings of American institutional and social organization, and provide the opportunity to conceptualize a more responsive state.[105]

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[104] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 52.

[105] ARRUZZA, BHATTACHARYA, AND FRASER, *supra* note 94, at 8: "…[T]he new feminist wave has the potential to overcome the stubborn and divisive opposition between 'identity politics' and 'class politics.'" At 15: "…[F]eminism for the 99 percent seeks profound, far-reaching social transformation. That, in a nutshell, is why it

The worker's condition must be understood realistically: it is coercion. Workers do not exist in abstract; their relationship to employers and capitalists involves the 'choice' between work or death. Myths of choice are pervasive throughout the American meritocratic economy, but the choice between wage work and death is not a balanced or equal decision. In capitalist economies like that of the United States, the worker may either work, or they may not work – which will cause them to run out of food, be removed from insurance and risk going without medical treatment for serious illnesses, lose their housing, face the criminalization of poverty through police enforcement, potentially be jailed – but this is not an exclusive route. Ultimately, without work, the American laborer faces death. Workers must find a job in order to survive, but employers may choose among many potential employees desperate for work; there is a monopoly on filling certain positions that are in accordance with business image. Employers have the discretion to fire anyone insubordinate and hire more workers similarly desperate to survive.[106] This power relationship impacts the ability for workers to advocate for themselves generally, even outside the context of grooming codes. Taken-for-granted relationships of power like that between employer/employee are naturalized and offered as the only relationship that constitutes the completion of work. In a more robust and humanistic understanding of the relationship between person and work, we might be able to conceptualize the role of institutional

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cannot be a separatist movement… It is only by allying with such movements [that also fight for the 99 percent] that we gain the power and vision to dismantle the social relations and the institutions that oppress us."

[106] Especially given that most U.S. states operate under an 'at-will' framing of the employment relationship, the power dynamics of the employment relationship are constantly susceptible to change. This emphasizes the potential risk of losing employment and therefore losing the social benefits like wages and healthcare that are funneled through the employment system. See Jonathan W. Fineman, *A Vulnerability Approach to Private Ordering of Employment*, *in* VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK 13–33 (Jonathan W. Fineman & Martha Albertson Fineman eds., 2018) at 16: "The at-will rule provides that each party to an employment relationship of indefinite term is able to unilaterally terminate the employment without notice at any time for any reason… The ability of the employer to terminate the employment relationship at any time also means that it may unilaterally change the terms of the relationship for any reason without notice… [E]mployers are positioned by the at-will rule to effectively control all of the terms and conditions of employment."

organization in furthering this coercion. It is a largely anti-humanistic institution of forced labor that is founded on capitalism and maintained by the state.

I raise the question as to why employer preference is important, philosophically. Tackling employer relations at the root includes the consideration of why employers have preferences that must be balanced against that of employees. I call for considering the human before the worker akin to socialist feminist philosophy; why is it that the state allows businesses to control workers, when it is workers who are coerced into wage slavery? Employer and employees are social roles that are imbued with meaning, but the state has articulated through its alliances one to be necessarily more important than the other. Legally, grooming cases are significantly more likely to side with the employer, as requiring employees to adhere to certain – often gendered – codes of dress and grooming is considered reasonably within the lines of business operation.[107] Ultimately, the state is not as reserved as it appears; in other words, the state is certainly not minimized when ensuring equitable treatment, as Fineman articulates, for its inaction is a political and life-altering stance of its own. The state's distinctive role in protecting the imagery and operations of employers over the requests of the employees challenges this 'inevitability' by calling into question the 'natural' organization of these politico-legal arrangements. If the state were not to be involved in the protection of employer preference, what would the relationship between employer and employee look like? Though the state provides some important and necessary protections against employer abuse, the law's operational alliance with the employer raises skepticism about the natural conditions of the employer/employee dyad. This relationship is not so much natural as it is created and substantiated by the state: much like the institutional

[107] KIMBERLY YURACKO, GENDER NONCONFORMITY AND THE LAW (2016), at 148: "restraints on gender expression seem to be viewed as just another workplace constraint—to be added to the list of many other controls—that can be expected in the workplace."

relationships involved in the family or the corporation, the employment scheme may be considered as one of the many relationships of "identities [that] are legitimated in law. They are creatures of the state, in the sense that the state's legal mechanisms bring them into existence."[108]

As a matter of addressing inequities in material conditions among groups, Fineman poses the importance of certain social relationships and the meanings attached to certain social roles. The employer/employee relationship is one set of related identities that "reflect allocations of social power and privilege between occupants."[109] Fineman's conception of inevitable inequality provides some insight on the social roles of employee and employer as well as the nature of employer/employee relationships. Inevitable inequality refers to those relationships "where differing levels of power are appropriate," such as that between the parent and child.[110] Fineman also offers the relationship between employees and employers as an example. However, this inevitable inequality is only appropriate because Americans have no other options to conceive of the relationship between employer and employee. However, if we were to conceptualize an egalitarian workers' cooperative system, the employer/employee relationship would not need to be so hierarchically based. However, Fineman is correct in her synthesis of how the law approaches these situations of inevitable inequality:

> "When explicitly addressed, situations of inevitable inequality are typically handled in law and policy either by imposing a fabricated equivalence between the individuals or by declaring that an equality mandate does not apply because the individuals to be compared are positioned differently."[111]

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[108] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE JOURNAL OF LAW AND FEMINISM 1–23 (2008), at 6.
[109] *Ibid.*
[110] Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO LAW REVIEW 133–149 (2017), at 3.
[111] *Ibid.*

Employers and employees are treated differently on account of their respective positioning in this power/powerlessness relationship. A formal equality regime attempts to place these individuals on similar playing fields, but it is a limited endeavor given the respective social and legal positioning of each of these figures.[112] In the case of inevitable inequality between employee and employer, "state responsibility for ensuring equitable treatment for differently positioned individuals is minimized or obscured within the overriding framework of equality."[113] The employer acts as a mediator between the state and the worker as the distributor of social goods in the form of wages and employment benefits; as such, the employer's location informs the differences in power but also reifies the existing relationship between employer and state. According to this view, because the employer is the distributer of important resources, they are necessary to the organization of society: the workplace is one of a handful of institutions that "are designated as the prime mediating institutions to provide for the needs of individuals."[114] However, when the state attempts to prove legal equality between the employer and the employee, it neglects the intricacies of power involved in the transfer of life-determinant resources. This is not a naturally-occurring relationship that the state is called upon to rectify in times of unusual inequality; instead, the dynamics of the employer relationship are very much created and reified by the state's action – and inaction. The state relieves itself from providing resources by outsourcing it to employment.

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[112] Employers and employees are portrayed as two equals entering into a private contract of employment. See Jonathan W. Fineman, *A Vulnerability Approach to Private Ordering of Employment* (2018), supra note 106, at 17. This conception neglects the power differences associated with each position of the employment relationship. See *id*, at 19: "The law must recognize there are relevant and significant differences between the positions of an possibilities for employers and employees both in their ability to bargain with teach other and in their ability to successfully respond to such things as economic dislocations, market fluctuations or distortions, and disruption of 'business as usual.'"

[113] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 52-3.

[114] Martha Albertson Fineman, *Injury in the Unresponsive State,* in INJURY AND INJUSTICE, *supra* note 92, at 52.

Indeed, the state proves its active alliance with employers by generally deferring to their preferences when such preferences are challenged in court, like in Title VII cases such as *Jespersen* and *Austin.* This ideological and legal practice provides the path for a distinctly socialist feminist critique of the role of the state in creating material inequities, as well as maintaining alliances to the capitalist class by way of gender regulation. Especially in the context of employment discrimination, the state provides much lenience to employers in regulating expression. By their design, employment antidiscrimination ordinances protect against unlawful discrimination, but they do not prohibit any discrimination of any kind.[115] This means that discrimination is allowed, just not on the basis of immutable characteristics. The business is allowed to discriminate in accordance with its operations, and in many ways, in accordance with its intended appearance. Worker preference is placed behind employer preference – particularly how employers prefer their business to be run and how employers prefer their business be perceived.[116] Socialist feminism aids in this qualification by asserting that the primary role of the law, in these instances, may be more digestible were they able to protect the needs of the human individual who occupies the social role of employee. Indeed, socialist feminist review of women's unpaid domestic labor within the family system reveals the unequal burdens placed onto women amidst capitalist domination. Insomuch as the employment scheme is incompatible with the family, capitalism requires the family's existence to function. Capitalism oppresses all

[115] *Oncale v. Sundowner Offshore Services, Incorporated*, 523 U.S. 75 (1998) provided some important clarification about the limitations of Title VII jurisprudence. In deciding that same-sex sexual harassment was actionable under Title VII sex discrimination protections, the Supreme Court emphasized that this did not extend the reach of Title VII so much to prevent any and all discrimination. Indeed, the Court wrote, "Recognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual connotations" (75). They did not prohibit any and all sexuality from the workplace, "neither asexuality nor androgyny," but only "behavior so objectively offensive as to alter the conditions of the victim's employment" (81).

individuals, but socialist feminists are keen to the ways in which capitalism oppresses women based on their social role positioning as caretaker:

> "…[B]ecause capitalism produces and reproduces unemployment and insecurity in a context of universalized commodity production, where working-class consumption depends on the prior sale of labour power, the family form of the mode of reproduction emerges as an alternative source of economic survival for working-class people. Women's unpaid domestic labour stretches wages and salaries, thus enhancing the quality of life for the men whose earnings support them and ensuring their own and their children's well-being in the process. But this alternative has a price: economic and social inequality outside the home, and economic dependence and oppression within the home."[117]

The employment system is predicated on denying the reality of human interconnectedness and dependency as shown through its devaluation of the family. Were socialist feminist ideals to be implemented in the employment scheme (to the extent that current constructions of employment could still exist), it would seek to protect the human that exists prior to the employee; this includes matters of expression, and especially gender transgressive expressions. Employers that seek to maintain visual conditions of binary gender are drawing on transphobic and ultimately patriarchal definitions of appropriate gendered embodiment. The "economic and social inequality outside the home" is both an individual and a systemic problem, effecting both particular women and non-men as well as women and non-men as a whole. The key mode of survival includes the stretching of wages accrued from labor through marriage, and as such, capitalist domination requires a partnership of adults that often includes the gender segregation of women to roles such as caretaker. Overall, socialist feminist analysis better conceives of the

[117] MARTHA E. GIMENEZ, MARX, WOMEN, AND CAPITALIST SOCIAL REPRODUCTION: MARXIST FEMINIST ESSAYS (2019), at 13-14.

connection between Title VII gender expression and the state's role in furthering gender essentialism throughout American society than an either solely anti-capitalist analysis or a non-class-informed feminist analysis. Thus, it provides the ability to examine the state's role in furthering gender essentialism as a self-preserving necessity to employment.

We can now conceive of the relationship between law, capitalism, and patriarchy by way of Title VII. Two relevant problems emerge from the example of gender nonconformity discrimination jurisprudence. First, as previously discussed, gender nonconforming individuals are not taken seriously due to a reliance on legal immutability. Now we may examine the second problem: the philosophical primacy of employer preferences over employee expression. The state's role, therefore, in bolstering the legitimacy of employer preferences for workers is directly related to its overall role in perpetuating the harms of capitalism, and in the case of Title VII sex jurisprudence, patriarchal ideals as well.

Socialist feminists, like their predecessors, are keen to the myth of the public/private divide. For theorists like Jaggar, this divide is conceived as being created "to answer the characteristic liberal question of the legitimate extent of government authority… [T]he public realm is understood to comprise those aspects of life that are properly subject to government regulation; the private realm is those aspects which should be exempt from such regulation."[118] For socialist feminists specifically, the public/private divide is one of the points at which women's domination may be tracked, whereby the sexual division of reproductive and domestic productive labor is outside the purview of the law and the state since it is relegated to the family. The liberal economic scheme divides 'spheres' of the "public, 'economic' world of the market and the private, 'non-economic' sphere of the home."[119] Socialist feminism sought to fill the

[118] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983), at 144.
[119] *Ibid.*

gaps in analysis of typical Marxist thought, which does not conceive of women's domestic labor as contribution to capitalist production; this leaves women, but more specifically caretakers, outside of Marxist criticism. Where the home was previously conceived, for men, as a reprieve from labor, for women and caretakers, it is constant labor. Instead, socialist feminists recognize the labor involved in the keeping of the home as well as the sexual and reproductive labor involved in bearing and rearing children, a productive capacity of its own. It is thus related to the 'public' productive economy, blurring the distinction between private and public.[120] However, socialist feminists pointed out the normative nature of a separate-spheres conception of society, noting that it promoted a very specific but unrealistic view of reality.[121] Indeed, the liberal philosophy of keeping the state out of 'private realms' denies important protections to the domestic caretaker, who are oftentimes women. As one of the more private institutions, the domestic family hides inequalities from the state in the name of non-intervention.[122] However, since "individual and collective reliance on social relationships and institutions mandate that the state monitor these essential social arrangements and make adjustments when they are not operating equitably,"[123] there is no fully private institution.[124] At most, they are "quasi-

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[120] ARRUZZA, BHATTACHARYA, AND FRASER, *supra* note 94, at 8-9: "Disclosing the unity of 'workplace' and 'private life,' [the new wave of anticapitalist feminism] refuses to limit its struggles to those spaces. And by redefining what counts as 'work' and who counts as a 'worker,' it rejects capitalism's structural undervaluation of women's labor—both paid and unpaid."

[121] ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983) at 144: citing Joan Kelley, "Doubled Vision" at 222-3.

[122] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (2008), *supra* note 107, at 5: The state is considered "the quintessential public entity and the family [is] cast as essentially private in its relationship with both market and state."

[123] Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VALPARAISO UNIVERSITY LAW REVIEW 341–370 (2019), at 367.

[124] Martha Albertson Fineman, *Injury in the Unresponsive State,* in INJURY AND INJUSTICE, *supra* note 92, at 63: "In considering the structuring power of institutional arrangements, a vulnerability approach assumes an integrated vision of society, not one of autonomous individuals and separate spheres. There is no public/private divide and the identity categories of critical interest are the social identities prescribed by law, practice, and culture…", and 67: "…the state is always at least a residual actor when it comes to societal institutions. the state brings societal institutions into being through law and regulation, as well as defining the nature and consequences of the social relations and roles within them. It also works to protect or privilege certain entities and allocates power between and among constituents, stakeholders, and members of institutions."

private."[125] This premise combines the socialist feminist's concern with the subjugation of women in domestic situations, as undervalued workers and as sexual objects, with the vulnerability theory analysis of state obligation. The state is peripherally involved in informing the relationships and dynamics of the family, such as through juvenile law, policies on childcare, etc.; therefore, the state's reach is more inclusive than it may appear, and thus more directly implicated in the perpetuation of systemic inequality. This continues the challenge to mutually exclusive poles of public and private as they relate to the family.

I offer Kimberly Yuracko's work as a synthesis of what may be, following the aforementioned discussion, called a legal-capitalist-patriarchy. Yuracko's *Gender Nonconformity and the Law* approaches a considerable amount of case law and scholarly literature about the inconsistencies of sex discrimination jurisprudence. However, Yuracko does little to consider the role of the state in continuing the operation of both inconsistent and essentializing gender law *as well as* the alliance of the law to the capitalist ideal. Yuracko sympathizes with employers in constraining gender-based expression in the workplace, noting that complete "gender freedom… would… impose dramatic costs, and constraints, on both employers and society more generally."[126] According to Yuracko, "race and sex are not relevant to… whether one possesses the range of skills and attributes necessary for" most jobs, but

> "[s]uch is not the case with gender. Many jobs are distinctly gendered. That is, they demand a set of traits and attributes that are typically recognized as masculine or feminine. Prohibiting employers from requiring conduct that is traditionally gendered would force employers to restructure jobs so as to fit employees'

[125] *Ibid*. See also, Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 61.
[126] KIMBERLY YURACKO, GENDER NONCONFORMITY AND THE LAW (2016), at 146.

> preferred gender expression—such accommodations would be costly and, in some cases, impossible."[127]

Yuracko ultimately argues that certain characteristics are tied to certain gendered individuals. She implies, however, that there is little to no overlap of such characteristics across gender identifications. Yuracko offers the examples of "flight attendant, elementary school teacher, and paralegal" as jobs that are historically female dominated because such jobs have "traditionally feminine role demands."[128] She mistakenly subscribes to an immutability framework that insists on the existence of a distinctly feminine brain and a distinctly masculine brain. She reflects a league of feminist thinkers – and legal thinkers – that continue to subscribe to outdated notions of immutability, albeit in ways different from those previously tackled. And, perhaps more fundamentally, Yuracko does not incorporate necessary state and capitalist critique necessary for a substantive consideration of gendered and gender-nonconforming experience. Nonetheless, a distinctly anti-capitalist feminist overview of this passage is a helpful summary of what I come to describe as the legal-capitalist-patriarchy. Yuracko incorporates explicit discussion of topics peripherally related to capitalism and patriarchy, but it is her avoidance of the law that implicates a dangerous neutrality toward the state and its operations to fulfill patriarchal and capitalist interest. I use this passage to extrapolate and exemplify the interrelations between these three systems of domination and to conceptualize the extension of socialist feminist 'capitalist patriarchy' to include the current formulation of the law and state.

First and foremost, Yuracko assumes that certain jobs require a certain type of gendered socialization, or even more severely, a certain type of innate gender, to complete them.

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[127] *Ibid.*
[128] *Ibid.*

Particularly, she notes that certain gendered traits are required for certain job. However, it is both essentialist and deterministic to consider the traits themselves as gendered and requiring a specific type of gendered person to complete them. A more thorough understanding of gender expectations is necessary for exposing the fallacy of this argument: the requirements attributed to these certain occupations are gender neutral on their own, but through socialization and institutionalization of gendered behavior and expectation, gender is imposed onto these requirements. It is not an exclusively feminine trait to be nurturing; obviously, there are plenty of women who are not nurturing and motherly, and plenty of men that are. This type of argument furthers gender dimorphism that continues to provide the basis for the continued and pervasive differentiation of gender.

Second, and perhaps more importantly, while Yuracko's concern with 'cost' can be considered more broadly, it is key language to refer to the capitalist undertakings of an employer who must go through the actual labor of reclassifying such gendered jobs. Not to mention there is no indication of what costs would be incurred, or exactly how the reclassification of jobs might occur, but she does not offer any reason as to why such a project would be "impossible." Her disturbing sympathy towards preventing costs of the employer rather than the advocacy of workers' expression demonstrates a predictable alliance between law and capitalism, whereby the preservation of corporate costs come at the expense of worker livelihood. The prevention of cost is directly tied to the burden of workers – who, as discussed previously, are the ones coerced into an employment relationship due to an insufficient social welfare system that provides for the unemployed. Indeed, insofar as employment is the means by which individuals receive healthcare and wages, the protection of the employer rather than the employee means that this distributive power may be kept outside of the responsibility of the state. It means that the state

may remain uninvolved and unresponsive to fulfill liberal demands of freedom and autonomy, despite the restricted, coercive nature of employment in America.

These two critiques of this passage must be viewed in the context of employment discrimination law, the backdrop on which Yuracko's discussion occurs. As such, it is pertinent to view the role of the law in protecting employer costs that are associated with the preservation of expression associated with certain gender identities. Therefore, we may understand the law as being necessarily intertwined, in this instance, with furthering patriarchal and capitalist enterprise – to maintain the gender segregation of work is to protect the employer's profit, and to do so is to implicate the state in the role of perpetuating legal inequality. This is a prime instance of the legal-capitalist-patriarchy – those instances which not only reassert the primacy of the worker before the human as well as subjugate non-men, but those instances which also involve the legitimization and institutionalization facilitated by the state and its operating arm of the law.

III. Beyond Socialist Feminism: Vulnerability Theory

Socialist feminism expands on Marxist theory in important ways, particularly in their expansion of Marx's "labor" to include domestic and procreative labor. However, as a theory rooted in identity categories, it is limited in its applicability to the entire human condition. I offer Fineman's vulnerability theory as a qualifier; while it is more often than not women who occupy domestic and caretaking roles, their subjugation relates to their social identity as caretakers. She reorients the typical analysis of socialist feminists' concern with women's domestic life to encompass, rather, the larger institutional response to the particular social role of domestic caretaker. Vulnerability theory may provide us with the tools with employing an expansive approach to labor, but outside of an identity formulation. As mentioned previously, the

importance of social roles and identities is critical to a vulnerability analysis[129] – the social role of the caretaker must be interrogated in its relationship to other identities and institutions. We must be asking how the state neglects a certain social role that is gendered (which, due to several factors including a history of male domination on the basis of sexual reproductive roles[130]), instead of focusing on the condition of an essentialized, generalized image of who might be filling this role.

Caretaking roles are predominantly held by women, as explained by socialist feminists; but this doesn't mean that the mistreatment of caretakers by the state is a mistreatment of women because they are women. Instead, it implicates the state's neglect of people who occupy this caretaking role.[131] Men who occupy domestic caretaking roles experience many of the same forms of this expanded labor alienation, albeit without many of the sexual components argued by socialist feminists that constitute women's experience. It is the state's devaluation of caretaking – both as a state practice as well as an individual practice – that neglects the needs of caretakers. So too does socialist feminism face limits in its conception of 'womanhood' – Black women, for

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[129] Martha Albertson Fineman, *Injury in the Unresponsive State,* in INJURY AND INJUSTICE, *supra* note 92, at 67 n.126.

[130] MARTHA E. GIMENEZ, MARX, WOMEN, AND CAPITALIST SOCIAL REPRODUCTION: MARXIST FEMINIST ESSAYS (2019) at 61-2: "Sociologically, an early and influential explanation for sexual inequality was found in the interaction between sex differentiation and sex stratification… Firestone argues that sex class (male dominance) stems from men's and women's unequal biological roles in procreation… More recent theories about the origins of male dominance give, like Firestone, a determinant role to the family, to sexual and reproductive relations, and to the type of psychosexual development generated within the family." This is one of many theories for the origin of male dominance, but is by no means exhaustive; i.e. Chodrow's theory of male dominance being rooted in the social category of motherhood as assigned to women (*id* at 65). Mid-century feminist thought, especially that which derives from radical feminism, emphasize the biological differences between men and women (see generally, Alison M. Jaggar, *Radical Feminism and Human Nature*, *in* FEMINIST POLITCS AND HUMAN NATURE 83–122 (1983).). However, these biological differences must not be considered as determinative of gender. Instead, we must consider them as politically charged forms of embodiment that have served as the basis for oppression. Relating them to the conditions of maleness or femaleness, aside from typical problems associated with biological essentialism, continues to fuel the identity paradigm that prevents substantive equity work that improves the lives of all people of all genders.

[131] It is important to note, however, that the state is involved in the distribution of resources that effectively pushes more women to become domestic caretakers than men. Still, this implicates the state in the neglect of certain social roles.

example, have had a very different historical relationship with labor and work than the average white woman. Much like the limitations of identity-based formal equality, socialist feminism is constrained to the bounds of heuristic identity nomenclature. As a means to expand the liberatory potential of socialist feminist organizing by way of state intervention, vulnerability theory poses a powerful and necessary intervention. Fineman's vulnerability thesis ensures that all individuals are continually provided for in such a way that takes into account our particular differences as well as our universal similarities.

Indeed, Fineman's conception of the public/private divide expands on the important analysis accomplished by socialist feminists. Going beyond the socialist feminist critique of liberal abandonment in the name of individualism and freedom, Fineman's critique of these separate spheres implicates the state more explicitly in the production of inequality: in the name of freedom, "[e]conomic institutions (such as corporations) and commercial practices (like those governing wealth accumulation and distribution) are shielded by the black box of the free market as constructed in late-American capitalism."[132] While the market system appears public from the view of the family institution, and indeed appears in such a way from the view of a typical individual, it is 'private' when viewed in relation to the state.[133] The state's lack of intervention in market operations "facilitate[s] a skewed and unequal society."[134] The times when the state does intervene on market operations does so in order to save big businesses; as one of the many institutions that are vulnerable, the corporation has been repeatedly saved by state intervention,

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[132] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (2008), *supra* note 108, at 5.
[133] i.e. see *ibid*: "…[W]hile the market is cast as public vis-à-vis the family, it is private when paired with the state. Current conceptions of privacy place some things and institutions presumptively beyond state regulation and control."
[134] *Id* at 6.

including during the Great Recession as well as the ongoing COVID-19 pandemic.[135] Not only does this demonstrate the state's capacity to help individual constituents, it also demonstrates its alarming alliance with capitalist enterprise at the expense of the average working individual.

As a connective point, the public/private divide brings together the basis for inequities as analyzed through both vulnerability theory and socialist feminism. Thus, the political action of a social movement that is distinctly socialist and feminist may facilitate the legal imposition of a vulnerable legal subject, and vice versa. Together, these modes of thought and action reveal a distinctly legally-involved vision of capitalist patriarchy, whereby the state may be charged with the reproduction of both capitalism and patriarchy through its residual influence of employment relations, family structure, and gender policing. This legal-capitalist-patriarchy provides a mode of analysis crucial to identifying roots of social inequities as well as the tools necessary to find more suitable solutions for the betterment of society.

Socialist feminism and vulnerability theory are united by a focus on material conditions; the core investigation relates to the distribution of resources for human survival. Though socialist feminism takes more time to investigate how this distribution specifically impacts women, the attention to material circumstances is of vital importance to actualizing an extra-identity

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[135] Martha Albertson Fineman, *Injury in the Unresponsive State, in* INJURY AND INJUSTICE, *supra* note 92, at 69-70: During the Great Recession, "[t]he state responded to the increasingly vulnerable position of certain big businesses caused by the failing market during the recession, and the heightened risk of loss was met with loans to the auto industry and bailouts for the financial industry. At the same time, the exposed vulnerability of and heightened risks for individual mortgage holders created in the wake of the same crisis was largely ignored. their plight was assigned to the realm of individual responsibility, and pleas for governmental aid were deflected with cries of 'moral hazard.' In other words, the state played favorites, choosing to respond to vulnerable institutions over vulnerable individuals" (internal citations omitted). On the COVID-19 pandemic, numerous commentators have discussed the disparity in the awarding of stimulus funds to businesses while individuals are given next to nothing. See Peter Whoriskey, Douglas MacMillan & Jonathan O'Connell, *"Doomed to fail": Why a $4 trillion bailout couldn't save the American economy*, October 5, 2020, https://www.washingtonpost.com/graphics/2020/business/coronavirus-bailout-spending/; William J. Barber II & Liz Theoharis, *The Evil Tucked Into the $2 Trillion Coronavirus Stimulus Bill*, TIME, April 2, 2020, https://time.com/5814076/coronavirus-stimulus-bill-corporate-bailout/; Lee Fang, *Congress Stalls on Stimulus Checks for Families While Corporations Continue to Reap Millions from CARES Act*, THE INTERCEPT, December 4, 2020, https://theintercept.com/2020/12/04/covid-irs-corporation-tax-refunds/.

framework into an identity-based juridical system. Vulnerability theory may provide an avenue for socialist feminist organizing to gain footing within the law, and call for the state's active role in mitigating the harms – and inequality – necessitated by its emphasis on free market capitalism. With both of these concepts, we may be able to conceptualize a politico-legal response to human need that directly challenges the state's restrained position as deferring to the needs of capitalist growth. As a means to actualize socialist feminist ideals in legal discourse, Fineman's concept of 'resiliency' provides an avenue to implore legal intervention to mitigate harm. I will provide a brief overview of the remaining components of vulnerability theory to properly situate discussion of resiliency and resource accumulation for material conditions.

The previous discussions of Fineman's work have established the inadequacies of a liberal legal subject, that which espouses and expects undoubted and constant independency and self-sufficiency. As Fineman's work reveals, the liberal legal subject is an antiquated and fundamentally inaccurate model of the expected American person. Following this inadequacy, Fineman poses the replacement of the liberal subject of law with a "vulnerable subject," which "does what the one-dimensional liberal subject approach cannot: it embodies the fact that human reality encompasses a wide range of differing and interdependent abilities over the span of a lifetime."[136] All humans are vulnerable, and in varying degrees we are dependent on others. By framing the expected recipient of legal doctrine to be a dynamic and ultimately dependent person that engages with varying dependencies across an entire lifetime, the law would thus be obligated to provide the proactive means for substantive equality in that it recognizes the

[136] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (2008), *supra* note 108, at 12.

"collective or social injury that inevitably arises from a state unresponsive to the universal and constant human condition."[137]

The remaining components of vulnerability theory surround the types of vulnerability we experience. We are susceptible to changing circumstances, whether it be bodily, social, or institutional changes. Fineman identifies vulnerability as specifically stemming from both our *embodied* condition as well as our *embedded* condition. By "embodied," Fineman refers to the literal condition of embodying a physical form: the body is "inevitably and constantly susceptible to changes—both positive and negative, developmental, and episodic over the life course."[138] However, our embodiment is not "socially neutral"; variations within certain characteristics (what we may refer to as race, gender, etc.) have previously served and continue to serve as the basis for hierarchy, subordination, and oppression.[139] These historic forms of inequality remain important critical locations to improve our existing antidiscrimination policies, especially through measures that address past discrimination and improve the possibility of future resilience.[140] Due to our embodied condition, we as humans create networks of social relationships, especially networks of care, on which we are dependent in order to mitigate the risk of change to our bodily condition. This is what Fineman refers to as "embedded" vulnerability, the critical focus of a vulnerability analysis. We are all "differently situated within webs of economic and institutional relationships."[141] 'Social relationships' includes not only the interpersonal relationships we form, but also the many connections we make with institutions throughout society. The social connections we form with others and the relationships developed

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[137] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 54.
[138] *Id* at 55.
[139] Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality* (2012), *supra* note 67, at 1754.
[140] *Id* at 1755.
[141] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State* (2010), *supra* note 78, at 269.

with existing institutions are shaped by law, policy, and social norms. Those relationships are under constant change, and drastically impact the resources we may have for the future.

By this, we can conclude that we are dependent on the state and its organization and monitoring of institutions; though not always in the same amount or to the same degree, we are dependent on the state to adequately distribute resources and make resource-distributing institutions accessible. Vulnerability theory espouses the cumulative and generative nature of changes across a lifetime; changes in institutional organization can impact individuals in the long-term.[142] Being terminated from one's employment, for example, will have impacts within an individual's connection to other institutions, like healthcare in the form of insurance or lack thereof, or the necessity of social welfare. We depend on others across our varying stages of life, most evidently during infancy, old age, or in the occurrence of disability. However, we also interact with institutions in a similar way: dependency on education, welfare, or other state-sanctioned institutions may vary in degree throughout a lifetime, but we nonetheless depend on institutions throughout our lives to provide socially cognizable resources. Indeed, even our bodily vulnerability may impact our social and institutional relationships. Serious illness may involve an increase in dependency on healthcare institutions, or may potentially result in employment termination in at-will states; "Our bodily vulnerability is compounded by the possibility that should we succumb to illness or injury there may be accompanying harm to or disruption of existing employment, economic, or family relationships."[143] However, institutions are subject to vulnerability as well given their interdependence and linkages.[144] Institutions

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[142] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 55.
[143] Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State* (2010), *supra* note 78, at 268.
[144] Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition* (2008), *supra* note 108, at 12: "Of course, societal institutions are not foolproof shelters, even in the short term. Metaphorically, they too can be conceptualized as vulnerable. They may fail in the wake of market fluctuations, changing international policies, institutional and political compromises, or human prejudices."

themselves, "riddled with their own vulnerabilities,… cannot eradicate, and often operate to exacerbate our individual vulnerability";[145] as such, it is imperative for state intervention to ensure these institutions are operating with the vulnerable, dependent subject in mind, "placing him/her in social context."[146] As state-formed and "state-facilitated," these institutions must be monitored by the state to ensure their just and equitable operation, particularly as these institutions distribute important resources for the management of risk and harm.[147]

Though all individuals are vulnerable, wherein they are susceptible to harm or change, some people are better able to respond to such changes; put in other words, some groups have the ability to mitigate potential harms, while others are left exposed to the threats to human embodiment, like sickness, or those to social circumstances, like community or institutional rearrangements. We are constantly susceptible to changing circumstances. *Resiliency* is thus the tool for which individuals and societies may manage and respond to changing circumstances; it may reduce our susceptibility to misfortune. For Fineman, "[r]esilience is found in the material, cultural, social, existential resources that allow individuals to respond to their vulnerability (and dependencies). [It] is measured by an individual's ability to survive or recover from harm or setbacks that inevitably occur over the life course."[148] Resilience is generative, in that it allows an individual to pursue risks knowing they have the ability to recover from unanticipated failures. It is also accumulated in that it is collected throughout our lifetime with little control by the recipient. Finally, and perhaps most importantly, resilience is sequential, in that access to resources in one institution, such as education, will impact possibilities for resiliency in future

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[145] *Id* at 13.
[146] *Ibid*.
[147] *Ibid*. See also *id* page 2: "The fact that societal institutions play a significant role in maintaining and extending inequality is the very reason that we need a more active state, one that is responsive to that reality."
[148] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 57-8.

institutions, such as employment.[149] Oftentimes, an inability to gain resources for resiliency is considered individual shortcoming, but it should instead be framed as a stately and societal failure in adequately allocating resiliency-building resources. Some individuals, and indeed, some groups at large, have more consistent access to high quality resources that create resiliency, and therefore are better able to mitigate the changes or harm that necessarily occurs throughout life. Resiliency thus provides an alternative explanation to the systemic oppression of marginalized groups, incorporating helpful components of identity-based coalitions without the misplaced focus. Instead of being a problem attributed to the condition of being gender diverse, a person of color, a non-citizen, or another marginalized identity, a focus on resiliency-building resources allows us to consider the state's role perpetuating inequality. The state is concretely implicated in producing these inequities through maldistribution, and with the imposition of a vulnerable legal subject, obligated to more adequately provide for all individuals.

The ability to mitigate harm, according to vulnerability theory, is correlated to an ability to accumulate resources distributed by the state, including but not limited to education, employment, or healthcare. Differences in resiliency can be traced to disparities in resource access. Human, social, and financial capital made available to some groups over others produces continuing and pervasive inequities; successful navigation of the neoliberal American landscape is the assumed default but is actually a political result produced by the state's unequal distribution of resources. By framing the perpetrator of these material inequities as the state, and not an abstract, untraceable prejudiced individual, we may better conceptualize substantive response to material conditions: it is the state who is obligated to provide resources to prevent

[149] Martha Albertson Fineman, *Vulnerability, Resilience, and LGBT Youth*, (2014), *supra* note 72, at 114.

harm, and it is the state implicated in the production of population-level inequity.[150] Historically Black communities with poor education systems and underemployment is, ultimately, the state's doing. As such, it should be the state's responsibility to remedy the systemic inequity that privilege some groups over others. The vulnerable legal subject, as opposed to the liberal legal subject, would provide the legal footing to reconceptualize state response to material need. The vulnerable subject makes clear the "collective or social injury that inevitable arises from a state unresponsive to the universal and constant human condition of vulnerability and dependency."[151] The state is therefore charged with remedying the "disregard… [of] human vulnerability in creating its institutions and defining the social relationships that will govern society."[152]

By combining the concept of the vulnerable legal subject with the state's potential to mitigate harm to its constituents, resiliency becomes the core way to advocate for a more responsive state which advocates for our humanity – no longer an abstracted ideal of self-sufficiency and individualism, the vulnerable subject recognizes the realistic ways we require others to survive. Other scholars critical of the United States' role in the misallocation of resources to some groups over others have approached the same realm of vulnerability theory's analysis, but have come short in conceiving of vulnerability as a component of the human condition. By making explicit the fact that vulnerability is an inevitable component of human existence, the legal obligation to provide substantive resources for the constituency would be imperative. Dean Spade offers important insight into the maldistribution of resources that negatively impact transgender people of color: quoting Foucault, Spade reveals that power in the

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[150] Martha Albertson Fineman, *Beyond Equality and Discrimination* (2020), *supra* note 83, at 54: "When we place the vulnerable subject at the center of our theorizing, it becomes clear that there is a collective or social injury that inevitably arises from a state unresponsive to the universal and constant human condition of vulnerability and dependency."
[151] *Ibid.*
[152] *Id* 54-5.

form of population management, "which distributes life chances across populations,"[153] incorporates the employment of

> "'tactics rather than laws, and even of using laws themselves as tactics—to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.' This decentralized view of law… suggests that power is not primarily operating through prohibition or permission but rather through the arrangement and distribution of security and insecurity… [Population management] includes interventions that impact the population as a whole… Broad-based programs—in fact the very programs that constitute the nation itself—such as taxation,… social welfare programs…, criminal punishment systems,… and identity documentation programs… are technologies of this mode of power. These programs operate through purportedly neutral criteria aimed at distributing health and security and ensuring order. They operate in the name of promoting protecting, and enhancing the life of the national population and, by doing so, produce clear ideas about the characteristics of who the national population is and which 'societal others' should be characterized as 'drains' or 'threats' to that population."[154]

Spade is right to focus his analysis of population-level power distribution on structural impacts that affect one's ability to maneuver the American landscape. He is also correct in his analysis of the law's role as a key 'tactic' in the distribution of life chances, given the impacts of state-maintained institutions in creating inequality through supposedly neutral means. Similarly, Spade's implication of the state's role in perpetuating inequality and forming a certain national identity designed to exclude and remove certain populations is nuanced and necessary; how the state controls some populations and encourages others is directly related to the administration of

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[153] DEAN SPADE, NORMAL LIFE (2015), *supra* note 48, at 57.
[154] *Ibid.*

resources and institutions. Over-policing of Black communities, for example, that leads to a disproportionate presence of Black people in prison ensures that they, as societal 'others', are no longer members of general society.

However, the key difference between Spade's understanding of the distribution of "security and insecurity" and Fineman's vulnerability paradigm is that vulnerability theory espouses the cumulative and interrelated composition of resources to accrue resiliency. 'Security' itself is not something that is attained in its whole, but rather built over time with the resources to mitigate change and harm. It is not necessarily that there is the distribution of a condition of security, but rather the maldistribution of resources for resiliency to mitigate the constant threat of change and harm necessitated by our universal human vulnerability. This key difference may mean the difference between a continuously proactive state that recognizes the constant vulnerability of its constituents, and a state that stops providing for those for whom "security" has been achieved. Because vulnerability is ever-present, there is a constant risk of losing that "security," and this distribution of "security" is therefore not a suitable model to call for a more active state.

By expanding the political reach of socialist feminism and other movements similarly limited by identity categorizations, vulnerability theory provides an avenue to actualize the ideals of anti-capitalist organizing that simultaneously pays attention to our particularities, such as gender and embodiment, and our universalities. Although socialist feminism is an important organizational mass for the recognition of women's harms under capitalism, a more long-term substantive justice project must liberate all individuals from the constraints of compounding systems of domination. Socialist feminism is a useful analytical tool for the interlocking mechanisms of capitalism, patriarchy. With vulnerability theory, we may expose the law as being

involved in this relationship. Together, vulnerability theory and socialist feminism complement each other as a holistic project of social and legal justice. Conceptualizing a society built on communalism and interdependence is crucial to the inception of a society that provides the material needs for a fulfilling human life and society. Where the state has the jurisdiction and the ability to mitigate harm by way of resource distribution, it should thus be obligated to do so when incorporating a vulnerability analysis. Vulnerability therefore extends the reach of these movements to ensure a holistic and continuous pursuit of wellbeing.

CONCLUSION: THE STATE AND MATERIAL NEED

From Title VII to socialist feminism, this paper sought to make the connections between gender nonconformity in the workplace, vulnerability theory, and socialist feminism. As gender nonconformity and gender expression cases reveal, the formal equality mode of law is a limited and insufficient tool for tackling systemic and extra-identity harm. Gender is a fluid and flexible notion of socialization, identification, and behavior, while the law requires a static and innate method of classification – they are incompatible. As such, vulnerability theory provides the necessary tools for reimagining a extra-identity legal framework, that which abandons the antiquated liberal legal subject and adopts a vulnerable subject that is informed by our inevitable susceptibility to change and our varying degrees of dependency across a life course. With this subject in mind, we may conceive of a state obligation to provide the resources for resiliency, that which mitigates the impacts of change and harm throughout life. By way of resources, vulnerability theory joins the socialist feminist tradition; however, vulnerability theory importantly expands the applicability of socialist feminism by conceiving of the disadvantages

women face under late-stage capitalist not as necessarily women's disadvantage, but rather a cumulative institutional devaluation of social roles that the state, institutions, and culture push women into. Together, socialist feminism and vulnerability theory provide the tools to actualize political and legal change; they are complements of a larger social justice project.

The liberal grounding of American society is an inaccurate and ultimately harmful conception of human existence. A society that acknowledges and encourages human connection and dependency may better be able to accommodate the population as a whole. By ignoring the realities of human and institutional interdependence, American society continues to deprive individuals of important resources. Indeed, the harms of capitalism, including mass under- and unemployment, homelessness, lack of healthcare, are exacerbated by the meritocratic emphasis on self-sufficiency. Capitalism is undoubtedly linked to the liberal tradition, and as such, they must be abandoned as societal organizing concepts. Neither are sustainable or recognitive of human experience. Socialist feminism and vulnerability theory provide the language for demanding better from our governing bodies, for demanding we have the materials for our survival and flourishment; we deserve a society, a state, based on care, compassion, and community.