GENDER IDENTITY DEBUTS IN WISCONSIN STATUTES: WHAT IT MEANS FOR PROTECTING TRANSGENDER WISCONSINITES

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The Wisconsin Legislature recently enacted what appears to be the first ever law in Wisconsin's history referencing the concept of gender identity, Wis. Stat. § 440.45. In particular, this law prohibits discrimination[2] on the basis of gender identity in the limited context of

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2. Currently, the Wisconsin state legislature is debating a bill addressing the use of restrooms, dressing rooms and related facilities in public schools. See S.B. 582 (Wis. 2015); Assemb. B. 469 (Wis. 2015). Particularly, these pieces of proposed legislation are seeking to address whether transgender students are able to use such spaces assigned to their self-identified gender or whether they must instead use a space that is set aside specially for them or spaces assigned to their birth-assigned gender. This issue is deeply important both transgender students, many of which are speaking out about the emotional ramifications of these bills, and of the wider community. Jesse Opoein, *Wisconsin Transgender 'Bathroom Bill' Draws Emotional Public Hearing*, THE CAPITAL TIMES (Nov. 20, 2015), http://host.madison.com/ct/news/local/govt-and-politics/wisconsin-transgender-bathroom-bill-draws-emotional-public-hearing/article_beae92ea-c07b-5b01-ab5b-67b5e5f81c0f.html. Although this issue is certainly important, this article focuses more directly on nondiscrimination policies

transportation network companies (think Uber or Lyft). This article explains the legislative context (or more accurately, the lack thereof) of this new law, follow-up legislative efforts confronting the issue of gender identity and uses its passage as an opportunity to take stock of the potential for increasing anti-discrimination protections for transgender Wisconsinites, both through the courthouse and the statehouse.

Ultimately, the best method of ensuring continued progress for transgender individuals in Wisconsin will come through more comprehensive legislative efforts because § 440.45 may undermine the ability to implement similar protections through judicial interpretation of existing non-discrimination laws.[3]

INTRODUCTION

"Gender identity" refers to one's inner sense of being male, female or something different altogether.[4] For most individuals, this concept is taken for granted because the outwardly apparent sex they are assigned at birth matches the development of that inner sense of who they are as they grow into adults.[5] For a transgender person,[6] however, this distinction is vital, as their gender identity is "nonconforming" to their birth-assigned sex; they are born male or female, but understand themselves to be something different.[7] This distinguishes these individuals from the rest of society in a

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that more generally deal with prohibiting using certain protected classes for making a distinction between individuals with respect to a variety of regulated activities such as "transportation network" services provided by companies like Uber or Lyft.

3. This article will leave for another day the question of whether or which forms of nondiscrimination policies should allow for reservations religious-based objections or where the presence of transgenderism could be a "bona fide" basis for distinguishing between individuals in certain regulatable areas (as some argue would be the case in dealing with restrooms and changing rooms, *see supra* note 1). Further, this article generally accepts as given that protecting the rights of transgender individuals would be politically and socially beneficial to the state of Wisconsin and beyond.

4. Franklin Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713 n.1 (2005). An important background concept for this article will be the characterization of the traditional conception of gender/sex as either male or female as the "binary" conception. Moreover, care should be taken not to attempt to neatly divide gender identity from one's biological features. A growing body of research is inquiring into the role of biology, beyond "psychosocial" influences, in determining gender identity, asking "how," not "whether" biology plays a role. M. Dru Levasseaur, *Gender Identity Defines Sex: Updating the Law to Reflect Modern Medical Science is Key to Transgender Rights*, 39 VT. L. REV. 943, 980-982 (2015).

5. This matching of gender identity and birth-assigned sex defines the "cissexual" or "cissexual." Norsworthy v. Beard, 87 F.Supp.3d 1104, 1120 n.9 (N.D. Cal. 2015).

6. This article mostly uses the term "transgender," but "gender nonconforming," and "gender transgressive" are used interchangeably to refer to broad and diverse continuum of people whose personal experiences do not correspond to the identity or experiences typically associated with the sex assigned to that person at birth. *See* Romeo, *supra* note 3, at 713 n.1.

7. *Id.*

way that has led to severe and consequential discrimination.[8] Historically, the law has not recognized this important distinction between gender as expressed by one's outward biology and gender as the internal sense of identity.[9] This has compounded the social hazards facing the transgender community by closing the courthouse doors to claimants seeking legal redress of discrimination in areas of public life.[10]

It is in this larger context that the words "gender identity" make their unheralded debut in the Wisconsin Statutes through the vehicle of a law regulating the fast-growing market of smartphone-coordinated ridesharing, Wis. Stat. § 440.45. Perhaps momentously, this statute bans discrimination by companies in this industry from discriminating on the basis of several protected traits, including gender identity. This article will explore the implications of this statutory protection for the interpretation of less complete enumerations of protected classes.

At its heart, Wis. Stat. § 440.45 creates a risk of a judicial interpretation of legislative intent that precludes reading existing protections against gender-based discrimination to include more nuanced understandings incorporating gender expression and gender identity as distinct from traditional notions of gender-as-biological-sex. Further, remedies from non-state level actors or the Governor's Office will only create a partial legal solution to this risk. With this in mind, this article concludes with the hope that the Wisconsin Legislature will address the matter, regardless of judicial interpretation, by comprehensively instructing that statutory protections of gender should be read to defend the legal rights of transgendered persons.

II. BACKGROUND

A. Social Challenges Facing Transgender Individuals

Transgender and other gender non-conforming individuals face a variety of social and legal challenges as reflected in the difficulties of their own personal experiences as measured in a variety of ways.

Economically and in the world of employment, transgender individuals disproportionately suffer disadvantages compared to the general populace, including dealing with a higher rate of poverty and facing twice the national rate of unemployment (four times higher for transgender people of color).[11] This, in turn, exposes unemployed transgender persons to a wide variety of "debilitating negative

8. *See* discussion *infra* Part II.A.

9. *See* discussion *infra* Parts III.B.1. and III.B.2.

10. *See* discussion *infra* Parts II.A. and II.B.

11. Levasseaur, *supra* note 3 at 949 (citing the "largest survey to date of transgender-identified people," *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 8 (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf).

outcomes."[12] Of those who are employed, 90% reported experiencing "harassment, mistreatment, or discrimination" while at work.[13]

Socially, more than half of gender non-conforming persons received verbal harassment or disrespect in places of public accommodations including hotels, restaurants, buses, airports and government agencies.[14] Tragically, this surely contributes to the disproportion of attempted suicide among transgender persons (41% as compared to 1.6% of the general populace).[15] Similarly, large numbers of transgender persons indicated they had lost their job due to bias (55%), were bullied or harassed in school (51%), and were the victim of physical (61%) or sexual assault (64%).[16] In the first-ever national survey examining care refusals and other health care barriers confronting LGBT people and those living with HIV, "transgender and gender-nonconforming respondents reported the highest rates of experiencing" care refusals (~27%), harsh language (~ 21%), and physical abuse (~8%).[17]

Connected with all these hardships is the presence of transphobia, the fear and the accompanying animosity towards gender nonconforming, a rampant problem with a deep impact on the social health of transgendered individuals as a whole.[18] Although their gender identity plays a central role in the formation of these social and economic obstacles, transgender individuals are largely unable to obtain relief for discrimination based on that identity from institutional sources like the courts.

B. Legal Hardships Facing Transgender Persons

In most jurisdictions, the social hardships documented above are compounded by the inability of gender nonconforming persons to be able to count on courts to redress discrimination or enforce their legal rights.

In the context of statutorily forbidden sex-based discrimination, a number courts have reasoned that transgendered individuals did not receive protection of such laws. These courts reached this conclusion by reasoning that discrimination on the basis of conforming one's outward appearance to their gender identity is legally distinct from discriminating

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12. Unemployed transgendered people face twice the rate of homelessness, 85% higher rates of incarceration, greater incidence of negative health outcomes (e.g., double the rate of HIV infection, nearly double the rate of misusing drugs or alcohol) and are nearly twice as likely to participate in "underground economies" such as sex work or selling drugs. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 949-50 (citing Lambda Legal, When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living With HIV 10-11 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf).

18. *Id.* at 951.

on the basis of the internally identified gender or the transitioned-from gender.[19] In various state law contexts such as marriage and custody, courts have applied a narrow understanding of "male" and "female" to find against transitioned transgendered litigants.[20]

For the most part, legislative efforts to provide relief for transgender persons are in nascent stages as the issue has only begun to receive wide public exposure in recent years. It is in this vacuum that courts have most frequently failed to consider existing protections of "gender" and "sex," as will be explored in greater depth in Section III.

C. Wisconsin Statute § 440.45

Seemingly unrelated to the rest of this backdrop, the Wisconsin Legislature enacted chapter 440, subchapter IV in order to regulate "transportation network companies."[21] Transportation network services are defined as businesses that use a "digital network to connect passengers to participating drivers" for transportation services in exchange for compensation.[22] Essentially, this bill was intended to respond to concerns raised by the growing use of rideshare services provided by companies such as Uber and Lyft.[23] Specifically, the new law focuses on consumer protection, safety and privacy concerns by imposing limitations including a zero tolerance policy for drug or alcohol use by drivers.[24] These laws also address the impact of the newer companies' operations on pre-existing taxi markets by forbidding Uber and Lyft drivers from picking up passengers hailing cabs from the street (as opposed to using an app).[25]

The focus of this article is on legal implications of another provision, Wis. Stat. § 440.45, which prohibits transportation network drivers from discriminating against which passengers they will pick up. The idea of this

19. *Id.* at 973 (citing Holloway v. Arthur Andersen & Co., 566 F. 2d 659 (9th Cir. 1977); Ulane v. Eastern Airlines, Inc., 742 F. 2d 1081 (7th Cir. 1984). *See*, section III.B.2.

20. Levasseaur, *supra* note 3 at 967-972. In the context of marriage, however, statutes prohibiting same-sex marriage by means of limiting the institution to being between a male and female were invalidated by Obergefell v. Hodges, 135 S. Ct. 2584.

21. 2015 Wis. Act 16; *see also* WIS. STAT. §§ 440.40-440.495 (2015). All references to the Wisconsin Statutes will be from the 2013-2014 legislative biennium as updated by 2015 and 2016 acts unless otherwise noted.

22. WIS. STAT. § 440.40(6) (2015).

23. Mary Spicuzza, *Scott Walker signs into law Uber, Lyft oversight bill*, JOURNAL SENTINEL (May 2, 2015), http://www.jsonline.com/news/wisconsin/scott-walker-signs-uber-lyft-oversight-bill-b99492857z1-302302811.html. Lyft and Uber provide free mobile apps that coordinate passengers in certain urban areas with drivers in real time, charging fares according to demand. *See* About Us, UBER, https://www.uber.com/about (last visited Nov. 7, 2015); LYFT, https://www.lyft.com (last visited Nov. 7, 2015).

24. Jason Stein, *State legislation sets standards for rideshare firms like Uber, Lyft*, JOURNAL SENTINEL (Mar. 30, 2015), http://www.jsonline.com/news/statepolitics/state-legislation-sets-standards-for-rideshare-firms-like-uber-lyft-b99471674z1-298020341.html; Wis. Stat. § 440.44 (2015).

25. WIS. STAT. § 440.445(4) (2015)

law is familiar; it is analogous to an anti-discrimination statute that restricts the selectivity of "common motor carriers" (including taxis)[26] in declining to serve certain passengers based on a protected series of classes.[27] The newer law, governing drivers for companies like Uber and Lyft, builds on this concept by adding "gender identity" to its list of protected classifications- becoming the first invocation of the concept in all of the Wisconsin Statutes.[28]

In one sense, this could be seen as a profoundly important first step for transgender Wisconsinites in prospectively achieving legislative protections where new areas of regulation similarly raise a need for an anti-discrimination provision. Section 440.45 is a tangible, legal signal of recognition of the existence of transgender individuals and the very real threats of discrimination they currently face. However, as this article will explore, this recognition could have downsides for gender non-conforming Wisconsin residents. Firstly, § 440.45's existence could have a limiting effect on the application of other anti-discrimination provisions to protect a more nuanced understanding of "gender identity." Further, that limiting effect may underscore the need to understand existing protections against "gender-" and "sex-based" discrimination already enshrined in the Statutes.

These possibilities of a limiting effect raise the need for more decisive action to be taken by the Wisconsin Legislature to address the legal and social challenges facing transgender individuals in the state in a more comprehensive manner, or at least in a way that is more deliberately focused on rapidly changing social discourse and understanding of what gender and gender identity mean.

III. ANALYSIS

A. Content and Context of Section 440.45: The Statutes' Inconsistent Protection of Vulnerable Classes Against Discrimination

Wisconsin Statute § 440.45(1), passed and signed into law in 2015, requires that licensed transportation companies institute policies "of nondiscrimination on the basis of trip origin or destination, race, color, national origin, religious belief or affiliation, sex, disability, age, sexual orientation, or gender identity with respect to passengers and prospective passengers and notify all of its participating drivers of the

26. WIS. STAT. § 194.01(1) (2014).

27. WIS. STAT. § 194.025 (2014).

28. As of February 13, 2016, a search for the term "gender identity" in all of the Wisconsin statutes only yields WIS. STAT. § 440.45. Other related terms such as "transgender" do not appear. *See Updated 2013-14 Wisconsin Statutes and Annotations*, WISCONSIN STATE LEGISLATURE, https://docs.legis.wisconsin.gov/statutes/prefaces/toc (last visited Feb. 13, 2016). These results were reproduced when running the same searches on Westlaw Next and Lexis Advance.

nondiscrimination policy."[29] Further, sub. (2) prohibits participating drivers from discriminating on the basis of listed classifications, also including gender identity.[30]

Documents articulating the passage of 2015 Wis. Act 16,[31] the legislation behind § 440.45, do not address the inaugural use of gender identity beyond a cursory level. The nondiscrimination statute appears in the language of Senate Bill 106 as introduced[32] and was added in current form to Assembly Bill 143 through Assembly Substitute Amendment 1.[33] The Wisconsin Legislative Council's Act Memo simply states what § 440.45(1)-(2) says: Drivers and transportation network companies can't discriminate on the basis of, among other things, gender identity.[34] Similarly, reported lobbying efforts focused on other issues relating to the legislation.[35]

In contrast, Wisconsin's "motor carrier" (i.e., taxis) statute only prohibits discrimination by act or omission "on the basis of race, creed, sex or national origin."[36] This less explicitly inclusive language was enacted in the 1981 Act's chapter 347 (Senate bill 150). Thus, the Wisconsin Legislature's first statutory reference to gender identity appears almost unconsciously done, and is accompanied by an unadorned and ambiguous legislative history. This, coupled with the gaps in current Wisconsin jurisprudence regarding gender and sex, creates a risk that those more encompassing terms will actually be read narrowly to the detriment of transgendered citizens.

29. WIS. STAT. § 440.45(1) (emphasis added).

30. WIS. STAT. § 440.45(2).

31. 2015 Wis. Act 16 was enacted out of 2015 Assembly Bill 143 after roughly concurrent development of 2015 Senate Bill 106. Both bills were introduced on March 31, 2015. *2015 Assembly Bill 143*, WISCONSIN STATE LEGISLATURE, http://docs.legis.wisconsin.gov/2015/proposals/ab143 (last visited Feb. 14, 2016); *2015 Senate Bill 106*, WISCONSIN STATE LEGISLATURE, http://docs.legis.wisconsin.gov/2015/proposals/sb106 (last visited Feb. 14, 2016).

32. This is inferable from the fact that this language appears identically in the enacted Assembly version without either of the only two Senate amendments to the bill making any reference to § 440.45. *Id.*

33. Assembly Substitute Amendment 1 to Assembly Bill 143, Wisconsin State Legislature, http://docs.legis.wisconsin.gov/2015/amendments/ab143/asa1_ab143 (last visited Feb. 14, 2016).

34. Legislative Council Act Memo for 2015 Wis. Act 16, 3, 5, http://docs.legis.wisconsin.gov/2015/related/lcactmemo/act016.pdf (last visited Feb. 14, 2016).

35. Gov't Accountability Bd. 143 Assemb. B., 2015-2016 Sess. (Wis. 2015).

36. WIS. STAT. § 194.025.

B. Possible Legal Outcomes Owing to Inconsistent Antidiscrimination Protection.

Several legal analysts and political actors have interpreted the protection of gender identity as prohibitions of sex-based or gender-based discrimination, while others have declined to do so.

i. Executive Order and Regulatory Interpretation

Executive action has been used on the federal level to prevent government agencies from discriminating on the basis of sexual orientation and gender identity.[37] Theoretically, similar measures could be employed for protecting gender identity on a state level. This approach has a major drawback: Executive action only touches areas of life where citizens interact directly with executive agencies or where otherwise authorized by legislative action. This leaves out interactions between private entities. As compared with legislative majorities, executives are also more easily replaced with a successor willing to order the repeal or replacement of protective regulatory policies; just one election can bring to power an executive with a different view of the issue.

ii. Judicial Interpretation

C. Constitutional Reasoning

An alternative source of protection against discrimination to the statutes lies in the federal and Wisconsin constitutions. However, as this section only briefly explores, this type of protection has not developed to the point of offering much help to transgender individuals seeking to avoid discrimination.

Federal constitutional protections against discrimination are usually limited in application to state actors, leaving out entirely the choices made by private actors such as employers.[38] The Wisconsin Supreme Court interprets the language of the Wisconsin Constitution's guarantee of "equality" and "inherent rights" as being parallel and equivalent to the 14th Amendment's protections of due process and equal protection in the U.S. Constitution.[39] For example, Wisconsin courts have acknowledged and applied "intermediate scrutiny" to laws classifying on the basis of "gender" under the auspices of those constitutional provisions.[40] Where the U.S.

37. *See Sexual Orientation and the Law* § 10:10.

38. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (citing Civil Rights Cases, 109 U.S. 3, 11 (1883)); U.S. Const. amend. XIV, § 1.

39. State ex. rel. Sonneborn v. Sylvester, 26 Wis. 2d 43, 49 (Wis. 1965); *see also* Wis. Const. art. I § 1 (Annotated Wis. Constitution through April 2015 Election); U.S. Const. amend. XIV, § 1.

40. State v. McCollum, 159 Wis. 2d 184, 202 (1990) (citing Craig v. Boren, 429 U.S. 190, 197 (1976)); Ferdon ex rel. Pertucelli v. Wis. Patients Comp. Fund, 284 Wis. 2d 573, 606, 607 (2005); Marshfield Clinic v. Discher, 105 Wis. 2d 506, 523 (1982).

Supreme Court declines to grant a right under a constitutional provision with roots in both the state and federal level, however, state courts can apply more powerful protections than that of federal courts by relying on state constitutional language.[41] However, the Wisconsin Supreme Court has an expressed preference for interpreting analogous provisions closely in line with federal precedent, in the context of "virtually identical provisions."[42]

Given the lack of clarity regarding the state of civil rights laws and sexual orientation and gender identity specifically, it is unclear how or whether the state supreme court would find a constitutional underpinning for strong protections of such groups. The U.S. Supreme Court has applied the 14th Amendment to invalidate laws imposing burdens generally along the lines of sexual orientation, but has done so without explicitly invoking a heightened form of scrutiny.[43] The high federal Court has not, however, addressed the concept of gender identity or the rights of transgender persons.[44] Perhaps this is not surprising given the Court has only recently begun to address constitutional issues of sexual orientation, a concept that is for many more familiar than gender identity.[45]

When looking at the reasoning underlying U.S. Supreme Court decisions such as *Romer v. Evans*, *Lawrence v. Texas* or *Obergefell v. Hodges*, each relying on 14th amendment principles to expand gay and lesbian rights, it is possible that discrimination on the basis of gender identity exists on borrowed time where state actors are concerned.[46] All these cases rely on or harken to a fundamental right of autonomy, a right to make deeply personal choices and retain a basic level of dignity in making

41. Cooper v. California, 386 U.S. 58, 62 (1967); State v. Knapp, 2005 WI 127, ¶¶ 57-59.

42. State v. Houghton, 2015 WI 79, ¶¶ 49-50. *Cf. supra* note 35. Although the constitutions in question are far from "virtually identical" regarding the 14th amendment's provisions, the combined meaning of the Wisconsin Supreme Court's holdings on these matters at a minimum suggests a reluctance to stray from federal pronouncements on what equal protection or implicit fundamental liberty interests either constitution actually protects.

43. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2585 (2015) (striking down marriage laws excluding same-sex couples); Lawrence v. Texas, 539 U.S. 558 (2003) (striking prohibitions of same-sex sexual conduct); Romer v. Evans, 517 U.S. 620 (1996) (striking a state constitutional amendment barring local governments from affording sexual orientation protected status).

44. "Gender identity" only appears twice in the U.S. reports, neither time as civil rights issue. *See* Smith v. Spisak, 558 U.S. 139, 154-55 (2010); Rowland v. Mad River School Dist., 470 U.S. 1009, 1015 n.9 (Brennan, J., dissenting) (tangentially referenced in opposition to denial of certiorari in case deemed an opportunity to clarify standards for employment decisions based solely on sexual orientation). "Transgender" does not appear in the U.S. reports at all.

45. *See Obergefell,* 135 S. Ct. at 2613-15 (2015).

46. State v. McCollum, 159 Wis. 2d. 184, 202 (1990) (citing Craig v. Boren, 429 U.S. 190, 197 (1976)); Ferdon ex rel. Pertucelli v. Wis. Patients Comp. Fund, 284 Wis. 2d. 573, 606, 607 (2005); Marshfield Clinic v. Discher, 105 Wis. 2d 506, 523 (1982).

them that is protected against state-law distinctions and infringements that demean those choices.[47] *Lawrence* concluded that the choice of engaging in same-sex sexual behavior as an expression of part of a homosexual's identity was included in that right to autonomy.[48]

It is not hard to imagine that where such a choice is protected as within the right, that the choice to outwardly present one's inward understanding of their gender cannot be left out of the right. It is far from guaranteed, however, that a follow-up decision extending the logic of *Lawrence* and like cases to transgender citizens will arise anytime soon, if at all.

Correspondingly, Wisconsin case law has not weighed in on these vague protections of civil rights for gays and lesbians, instead acknowledging the laws for their apparent muddying of the rational basis test,[49] and has not addressed the concept of gender identity in the sense of a substantive, constitutionally based right.[50]

Lower federal courts have more directly confronted related legal questions dealing with sexual orientation and gender identity. For example, the Ninth Circuit explicitly declared that classifications based on sexual orientation warrant heightened scrutiny as recently as 2014.[51] Other courts have declined to follow that precedent, though many such decisions were abrogated or overruled base on *Obergefell's* less doctrinally explicit grounds.[52] In the more geographically relevant Seventh Circuit, Judge Posner acknowledged the Ninth Circuit's position, but opted for a different analysis. Nonetheless, he applied what appeared to be stricter than rational basis to distinctions based on sexual orientation in the context of marriage.[53]

In the corrections context, several lower federal courts have examined the constitutionality of states' refusals to treat Gender Identity Disorder (GID)[54] of prison inmates under the 14th and 8th amendments.

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47. *Romer*, 517 U.S. at 632 (animus towards a group defined by sexual orientation prohibited by equal protection clause); *Lawrence*, 539 U.S. at 562, 573-74 ("Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct"); *Obergefell*, 135 S. Ct.at 2597-98 (stating that liberty protected by the due process clause includes "intimate choices that define personal identity and beliefs").

48. *Lawrence*, 539 U.S. at 562, 574.

49. *Pertucelli*, 284 Wis. 2d at 615 n.94.

50. Wisconsin cases referencing transgendered individuals or discussing gender identity do so only tangentially, usually referencing an involved party. *See e.g.*, Storms v. Action 314 Wis. 2d 510, 512-13 (2008); Madison v. Appeals Comm., 122 Wis. 2d 488 (1984); State v. Gustafson, 352 Wis. 2d 574 (2013).

51. SmithKline Beecham Corp. v. Abbot Lab., 740 F. 3d 471, 480-81 (9th Cir. 2014).

52. Deboer v. Snyder, 772 F.3d 388 (6th Cir. 2014), *overruled by Obergefell*, 135 S. Ct. 2071; *see also* Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 917 (E.D. La. 2014) abrogated by *Obergefell*, 135 S. Ct. 2071.

53. Baskin v. Bogan, 766 F.3d 648, 671 (7th Cir. 2014).

54. *See* Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120, 120-21 n.1

The Seventh Circuit, for example, invalidated a Wisconsin statute preventing prison medical staff from giving hormone treatment as deliberately indifferent to inmates' serious medical needs in violation of the Constitution's ban on cruel and unusual punishment.[55] Such cases, however, come from an easily distinguishable area of law and are not easily cast as victories against *discrimination* on the basis of gender identity.

These cases, however, are considered persuasive at best and do not receive the same presumption of coextensive interpretation of analogous constitutional provisions as the U.S. Supreme Court sometimes gets from the Wisconsin courts.[56]

In conclusion, limits such as the state-actor doctrine or the finite scope of other constitutional principles render federal courts unreliable and hard-to-predict sources of relief for gender identity protection.

D. Federal Statutory Interpretation

Several federal statutes protect against discrimination on the basis of sex. Title VII of the Civil Rights Act of 1964[57] in particular has figured prominently into case law development around whether a statutory protection against gender identity-based discrimination is implicit in statutes only referring to "gender" or "sex." Title VII prohibits employers from discriminating against employees and applicants on the basis of "sex" among other protected traits.[58]

In *Price Waterhouse v. Hopkins*, a four-Justice plurality of the U.S. Supreme Court indicated that sex-based discrimination prohibited by Title VII incorporated gender discrimination evinced by sex-based stereotypes.[59] In that case, a Title VII plaintiff was told to act more feminine to improve her chances at a promotion.[60] The Court held that the plaintiff had presented sufficient evidence to show that sexual

55. Fields v. Smith, 653 F. 3d 550 (7th Cir. 2011); Rosati v. Igbinoso, 791 F. 3d 1037 (9th Cir. 2015) (holding that a denial of sex-reassignment surgery constituted deliberate indifference to inmates' medical needs was a sufficient allegation to state a claim for relief); Kosilek v. Spencer, 774 F. 3d 63 (1st Cir. 2014) (upholding denial of sex-reassignment surgery in instant case but indicating blanket denial of treatment in all cases would be problematic).

56. "[D]eterminations on federal questions by either the federal circuit courts of appeal or the federal district courts are not binding upon state courts." State v. Mechtel, 176 Wis. 2d 87, 94, 499 N.W.2d 662, 666 (1993). *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 838; Cooper v. California, 386 U.S. 58, 62 (1967); State v. Knapp, 2005 WI 127, ¶¶ 57-59.

57. 42 U.S.C. § 2000e (2009) et seq.

58. *Id.* at 2000e-2(a)(1).

59. Price Waterhouse v. Hopkins, 490 U.S. 228, 250-251 *rev'd on other grounds* by Burrage v. U.S., 134 S.Ct. 881, 889 n.4 (2014) (stating "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associate with their group").

60. *Price Waterhouse*, 490 U.S. at 235.

stereotyping played a part in evaluating her candidacy for the promotion which shifted the burden onto the employer to prove that a nondiscriminatory purpose was the true reason for not promoting her.[61]

There is disagreement among the courts as to whether federal statutory protections of sex-discrimination such as those in Title VII extend to transgender individuals and in what contexts. One side of this conflict views *Price Waterhouse* as illustrating how sex- and gender-based discrimination are inseparable as applied by statutory schemes like Title VII. To that end, at least one court has interpreted the two concurring opinions in *Price Waterhouse* as supporting that notion that sex-discrimination incorporates discriminatory application of gender-based norms, only writing separately mainly to discuss evidentiary issues.[62]

Several circuits have read *Price Waterhouse* to reject distinctions made in earlier federal circuit cases between gender identity-based discrimination and prohibited sex-based discrimination under the statute.[63] The Sixth Circuit in *Smith*, for example, held that a transgender plaintiff had sufficiently pleaded claims of sex stereotyping and gender discrimination[64] by alleging that his divulging of his being transgender to his supervisor ultimately lead to his being suspended from work.[65] The court's primary reasoning was as follows: If an employer's discrimination against a woman for acting masculinely is sex-discrimination, then it is also sex-discrimination when that employer discriminates against a man for behaving femininely.[66] Other circuits applied the logic of *Price Waterhouse* to other areas of federal law such as the Equal Credit Opportunity Act[67] and the Gender Motivated Violence Act.[68]

Other courts maintain that the *Price Waterhouse* theory of gender stereotyping still adheres to traditional notions of sex, emphasizing that there is thus a technical distinction between guarding against stereotypical gender norms as applied to men and women and protecting transgender individuals against discrimination based on their status as transgender.[69]

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61. *Id.* at 258, 261.

62. *See e.g.*, Smith v. Salem, 378 F.3d 566, 571-72 (6th Cir. 2004) (citing *Price Waterhouse*, 490 U.S. at 258-61 (White, J., concurring) and at 272-73 (O'Connor, J., concurring)).

63. *Smith*, 378 F.3d at 572-73; Schwenk v. Hartford, 205 F. 3d 1187, 1201 (9th Cir. 2000).

64. *Smith*, 378 F.3d at 572.

65. *Id.* at 568-69.

66. *Id.* at 574. *But see Levasseaur*, *supra* note 3, at 977-80.

67. Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213, 215-16 (1st Cir. 2000).

68. Schwenk, 204 F.3d at 1202 (stating that for the purposes of both Title VII and the Gender Motivated Violence Act, "the terms 'sex' and 'gender' have become interchangeable").

69. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007) (stating agreement with "the vast majority of federal courts to have addressed this issue" in concluding that discriminating on a person's "status as a transsexual is not discrimination because of sex").

Insofar as this distinction has merit, the panoply of pre-*Price Waterhouse* decisions denying Title VII protections to transgender individuals.[70] Even if true, this could, in effect, be a distinction without a difference: Such decisions do not preclude transgender Title VII plaintiffs from making claims on the basis of not conforming to sex stereotypes.[71]

In sum, federal law demonstrates that there is an entrenched view of sex and gender in a traditional or narrow sense that, in some jurisdictions, is giving way to various approaches that blend the concepts together in a way that allows existing anti-discrimination policies to protected transgendered citizens. This is particularly promising for transgender individuals when considered alongside the tendency of Wisconsin courts to look to federal interpretations of Title VII when deciding cases concerning the analogous Wisconsin Fair Employment Act (WFEA) where the two statutory schemes do not explicitly depart from one another.[72] However, although many states have analogous laws to Title VII and the WFEA, state courts, and federal courts applying state law, are also split over how far to extend the reasoning of *Price Waterhouse*.[73]

E. State Judiciary's Statutory Interpretation

The question here is how Wisconsin's judiciary would analyze anti-discrimination statutes whose enactment predates Wis. Stat. § 440.45. To begin answering this question, this section lays out the current state of Wisconsin law regarding statutory interpretation. These principles are then applied to the question of whether "gender" or "sex" as used in older nondiscrimination laws should be read to include protection of "gender identity."

The Wisconsin Supreme Court has determined that deference to the constitutional role of the legislature requires that statutory interpretation begin with assessing the plain meaning of the explicit language of the statute itself.[74] This plain meaning looks to the "accepted" meaning of the statute's words themselves and to the statutory context of the statute.[75]

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70. *See* Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086 (7th Cir. 1984) (Congress intended for "sex" reference in Title VII to understood narrowly); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661-63 (9th Cir. 1977) (Title VII protects against sex-discrimination but not gender-discrimination, thus unavailing to transgendered employees); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (construing "sex" according to its "plain meaning" absent clear congressional intent to do otherwise).

71. *See* Levasseaur, *supra* note 3, at 974-80 (discussing *Price Waterhouse* and Schroer v. Billington, 424 F. Supp. 2d 203 (D.D.C. 2006)).

72. Marten Transp., Ltd. v. Dep't. of Industry, Labor and Human Relations, 176 Wis. 2d 1012, 1020-21 (1993).

73. *See* Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 371-73 (N.J. Super. Ct. App. Div. 2001) (gathering cases).

74. State *ex rel*. Kalal v. Circuit Court for Dane County, 2004 WI 58, 271 Wis. 2d 633, 681 N.W. 2d 110.

75. *Id.*, ¶¶ 44-46.

Dictionaries are oft-used tools in zeroing in on a key word's accepted or plain meaning[76] and statutory context can help choose between multiple relevant definitions given.[77]

Only if this first analysis leads to an ambiguous meaning should the court place much weight in other, "extrinsic" indications of a statute's meaning such as legislative history; the legislature is presumed to explicitly include its intent in the written law itself and only this enacted intent is normally binding on the public.78 As noted above, this type of extrinsic evidence sheds little light on the import of § 440.45 or pre-existing laws, which were likely written before the vast majority of the state's legislators were consciously considering the idea of gender identity and its significance to transgender citizens.

The American Heritage Dictionary provides two basic definitions for the term "gender."79 The first deals with the concept as a "grammatical category," that assigns gender to "nouns, pronouns, adjectives, and, in some languages, verbs" either arbitrarily or based on sex or animacy.80 The second category of definitions listed is more relevant here:

> a. Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions; sex.
> b. One's identity as female or male or as neither entirely female nor entirely male.
> c. Females or males considered as a group. . .[81]

The first definition affirms that gender is at least understood by some as a stand-in for a binary conception of male and female where biologically obvious physical traits determine one's "gender." The second definition, however, incorporates the idea of one's own identity as male or female and without making a clear connection between that identity and physical characteristics.

The same dictionary's most relevant given definitions of "sex" gives the same definition listed under "a." above and, significantly, adds "[t]he fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male" and "one's identity as either male or female."[82] Thus, this entry too suggests that "sex" could be referring simply to particular biological differences, or to differences in identity.

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76. *See, e.g.*, *id.*, ¶¶ 53-54 (using the American Heritage Dictionary to define "refuse").

77. *Id.*, ¶ 49.

78. *Id.*, ¶ 44.

79. AMERICAN HERITAGE DICTIONARY 730 (5th ed. 2015).

80. *Id.*

81. *Id.*

82. *Id.* at 1605.

If this complexity wasn't apparent enough, a usage note appears at the end of the "gender" entry denoting the complex conceptual relationship between "gender" and "sex," observing that some would have gender refer to "sociocultural roles" and sex to "biological aspects of being male and female."[83] This same entry, however, notes that while this distinction sometimes avoids ambiguity, it may also be "contrived to insist" that sex bias, for example, does not incorporate the notion of gender bias.[84]

In sum, dictionary definitions of sex and gender acknowledge that these terms are sometimes understood as equivocal and sometimes distinct, and that either term could be used to incorporate or exclude the more nuanced notion of "gender identity."

The immediate statutory contexts of Wisconsin's nondiscrimination statutes generally do little to refine the ambiguities of the above plain-meaning analysis. This is because nondiscrimination statutes usually represent a legislative concern with preventing discrimination that is distinct from the primary purpose of the statutory schemes and chapters such provisions are found in. Section 440.45, for example, has a context of regulating transportation network companies generally. As such, the rest of the subchapter or chapter provide little if any guidance in how to understand the individual components that particular section's protected classes.

Wisconsin Statute § 321.37 provides a similar example for a law older than subchapter IV of chapter 440. Section 321.37 encodes a nondiscrimination policy for admission into state-run defense forces and Wisconsin's branch of the National Guard and prevents the segregation of members of said forces. The statute protects against discrimination "on the basis of sex, color, race, creed, or sexual orientation."[85] As noted above, the explicit protection against sex-based discrimination is ambiguous as a matter of dictionary definition as to whether "sex" includes gender identity. Moreover, the rest of the relevant subchapter regulates the National Guard and state defense force generally, dealing with matters such as pay, discipline and decorations and awards.[86] Widening the contextual scope to look at all of chapter 321 is similarly unhelpful, as it deals with wide-ranging military matters.[87]

It is thus clear that Wisconsin's preliminary rules of statutory interpretation do not clearly indicate that state courts will feel comfortable importing protection of transgender status into gender or sex even in isolation of § 440.45. Once § 440.45 is considered as part of a statutory context considering the Wisconsin Statutes as whole, it is further possible that a court would yet more reluctant to understand "gender" or "sex" to

83. *Id.* at 730. The same usage note is cross-referenced in the entry for "sex."

84. *Id.*

85. WIS. STAT. § 321.37 (2013-2014).

86. *See* WIS. STAT. §§ 321.30-.51. The named examples refer to sections 321.35, 321.36 and 321.38 respectively.

87. *See* WIS. STAT. ch. 321 ("Department of Military Affairs").

include gender identity when the legislature has demonstrated a willingness to use this term expressly: The same reasoning undergirding the Wisconsin Supreme Court's current philosophy for statutory interpretation likely would compel it to withhold choosing an unennacted, expansive understanding or gender/sex when the legislature has openly used "gender identity" as a distinct term in a list also including "gender" and "sex." It could be that the court's judgment that the legislature included "gender identity" in Wis. Stat. § 440.45 precisely because of a concern that sex or gender do not clearly protect transgender individuals.

Without a clear meaning or explicit extrinsic evidence to rely on, Wisconsin courts may turn to any number of interpretational theories to determine the meaning of "gender" or "sex" employed in its older nondiscrimination statutes. Applying originalism, for example, a court would consider either how the legislators enacting a particular nondiscrimination law or the public understanding of the law at the time it was enacting in determining the scope of its protected classes.[88] Such an analysis could look at the low level of awareness of transgender individuals throughout much of the state's history to conclude that most nondiscrimination statutes protecting sex and gender discrimination don't also protect gender identity.[89] It's also possible that a strict originalist view would create inconsistent results where the court detects changing attitudes over the course of time the state has enacted its anti-discrimination protections.[90]

Alternatively, a "living document" type approach could look to current understandings and policies to interpret past statutory protections. This approach would be much more likely to wield protections of "gender" and "sex" to protect transgendered individuals. This could possibly be the case even where leaps in awareness of transgender issues are deemed only to have created a robust debate over how public policy interacts with those issues.[91]

Other state courts have extended nondiscrimination protections to transgender claimants,[92] but many of these provisions are based on explicit statutory protections of gender identity.[93] In contrast, other state

88. *See* Jacobs v. Major, 139 Wis. 2d 492, 536-38 407 N.W.2d 832, 850-51 (1987).

89. *See Ulane*, 742 F. 2d 1081, 1086 (determining in 1984 that Congress' legislative intent in passing Title VII in 1964 was to protect a binary conception of sex/gender, not gender identity).

90. Using Title VII jurisprudence as an example, it is possible to view *Price Waterhouse* (decided in 1991) as a national turning point for how to view gender and sex relative to physiological or birth-assigned sex. With that in mind, it could be possible to view nondiscrimination laws from before 1991 as applying a binary view of gender/sex while laws passed in some year later would incorporate more an expression- or identity-based approach.

91. *See Obergefell*, 135 S. Ct. at 2605.

92. *See Enriquez* 777 A.2d at 372-73.

93. *See* Goins v. West Group, 619 N.W.2d 424, 428 (Minn. Ct. App. 2000) (state law that included "having or being perceived as having a self-image or identity not

courts have ruled that "sex," for example, is not meant to protect transsexuals in the context of nondiscrimination statutes.[94]

i. Municipal and Local Regulation

Even where the State of Wisconsin fails to offer protections on the basis of gender identity, it is possible for lower levels of government to fill the void with anti-discrimination rules of their own. For example, both the cities of Madison[95] and Milwaukee[96] offer protections against discrimination to classifications based on gender identity in the areas of housing, public accommodation or employment. These protections, like all municipal ordinances, derive their political power from state law. Regarding the aforementioned protections, the Wisconsin Statutes specifically empower Madison and Milwaukee to offer better-than-state-level protection to gender identity as a "protected class."[97]

Similarly, counties are allowed to set a higher floor for anti-discrimination protections by requiring that contractors agree to certain nondiscrimination policies in their employment practices.[98] Dane County has used this authority to enact protections for sexual orientation that are defined by its ordinances to include gender identity.[99]

In the future, however, state laws can be amended to withdraw or preempt the ability of municipalities generally[100] or specifically from adopting protections that go beyond the state-level safeguards. Presently, some of the powers granted by the Wisconsin Statutes are not as meaningful or efficacious as the opportunity to vindicate rights in a court of law.[101]

Perhaps the most significant drawback to this approach is the patchwork of protection it creates for nonconforming persons. Those who currently live, or might like to live, in rural areas of Wisconsin, or cities in

traditionally associated with one's biological maleness or femaleness" extended to protect an individual born male who, though not undergoing reassignment surgery, took hormones and expressed as a female).

94. Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 473-74 (1983).

95. Madison, Wis., Code § 39.03 (2016).

96. Milwaukee, Wis., Code § 109-1 (2008).

97. WIS. STAT. §§ 66.0125(1)-(3), 66.1011(2) (2009). *See also* WIS. STAT. § 106.50(1m)(nm) (2008).

98. *See* 70 ATTY. GEN. 64 (interpreting WIS. STAT. § 59.52).

99. Dane Cnty., Wis., § 19.04(7); See also WIS. STAT. § 66.0103 (2013).

100. *See, e.g.*, Ark. Code Ann. § 14-1-403 (2015) (prohibiting a "county, municipality, or other political subdivision of the state" from "adopt[ing] or enforce[ing] an ordinance, resolution, rule, or policy that creates a protected classification or prohibits discrimination on a basis not contained in state law").

101. WIS. STAT. § 66.0125(3) (2009) (empowering cities to address discrimination against gender identity in various areas of community life, but limits powers to things like community outreach).

the state that have not enacted such protections would be left without any expanded protections in the absence of statewide action.[102]

ii. The Best Solution: Comprehensive, or At Least Deliberate Legislation to Address the Inconsistency

The surest means of ensuring consistent protections of transgender rights in Wisconsin is through a more comprehensive use of state law to defend "gender identity."

This could be accomplished by amending existing lists that include only "sex, gender or sexual orientation" to additionally include "gender identity." Similar digging into the Wisconsin Statutes to single out its nondiscrimination provisions and amend them one by one have been made for "sex"[103] and "sexual orientation,"[104] adding those protective classes to existing law. This type of legislation has been employed by other states.[105]

Alternatively, the legislature could codify a broader interpretational principle that states that notwithstanding § 440.45's use of "gender identity" the protection against discrimination on the basis of "sex" or "gender" already should be read to include "gender identity." The use of such interpretational rules applying over the statutes generally has been employed in Wisconsin before.[106] Section 990.01 lists dozens of words and phrases to be interpreted according to specified rules throughout the Wisconsin Statutes. Another example, § 990.001(2), provides that the grammatical gender of a term "extend and may apply to any gender." The legislature could similarly add a rule for "gender" and "sex" that includes a provided definition of "gender identity or expression."

Either of the above forms of state legislative enactment avoids the risks and limitations explored in discussing other legal and political methods. Wisconsin-based legislative efforts side steps the possibility judicial statutory interpretation could fail to construe some or all of the existing protections against gender- or sex-based discrimination to protect transgender individuals.

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102. *See* Miles Bryan, *'Patchwork of Protection' In Rural Areas for LBGT Community Has Limits*, NPR (Nov. 2, 2015, 4:33 PM) http://www.npr.org/2015/11/02/453954078/patchwork-of-protection-in-rural-areas-for-lgbt-community-has-limits.

103. 431 1975 Assemb. (Wis. 1975).

104. 70 1981 Assemb. (Wis. 1982).

105. *See*, *e.g.*, Conn. Gen. Stat. § 1-1n (2015). This law defines "gender identity or expression" as "a person's gender-related identity, appearance or behavior, whether or not that gender-related identity, appearance or behavior is different from that traditionally associated with the person's physiology or assigned sex at birth." This definition is used for the purpose of several nondiscrimination statutes including those for state government contracts (Conn. Gen. Stat. § 4a-60), public schools (§ 10-15c) and various property development and housing provisions (§§ 8-169s, 8-265c, 8-294, and 8-315).

106. *See, e.g.*, WIS. STAT. §§ 990.001-.08 (2015).

It also provides protection in a more comprehensive way than relying on federal actors to change or reconstrue federal statutory or regulatory protections. Moreover, state law can reach past state-actor limitations of federal constitutional protections of gender identity and go beyond the federal constitution should federal courts decline to find such protections exist in the first place.

Similarly, legislatively enacting nondiscrimination provisions entrenches these protections more deeply and comprehensively than relying on state executive actors to use regulations to achieve the same ends in piecemeal fashion. Rather than tying said protections to the fate of one electable office, legislative provisions require a sympathetic majority be replaced with one of an opposing view point and that highly prioritizes removing or replacing such protections.

IV. CONCLUSION

As has often been true for other forms of civil rights progress, achieving more protections for transgender individuals in Wisconsin can be accomplished through a variety of legal and political means, but none perhaps so long-lasting and far-reaching as through legislative means. Looking forward from Wis. Stat. § 440.45's seemingly simple milestone of explicitly codifying the idea of gender identity, the only sure way of increasing and enforcing transgender civil rights in the current patchwork of law is to sew up the patches and address the issue of gender identity more openly and honestly through more comprehensive legislation.