

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

Volume 15 (2008-2009)
Issue 3 *William & Mary Journal of Women and
the Law*

Article 3

April 2009

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TRANSFORMING TRANSSEXUAL AND TRANSGENDER RIGHTS

L. CAMILLE HÉBERT*

INTRODUCTION

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ABSTRACT

State and federal employment anti-discrimination statutes have failed to adequately protect transsexual and transgendered individuals in the workplace. Although advancements have been made in recent years regarding the protection of sexual minorities, transsexual and transgendered employees continue to receive sporadic and noncomprehensive protection. Various approaches have been taken to extend protection against discrimination to these individuals, including the utilization of disability protection statutes, the expansion of anti-discrimination statutes, and the protection of transsexual and transgendered individuals as a class; however, these approaches have proven flawed in providing adequate protection.

An examination of anti-discrimination law shows that these measures, while perhaps desirable, are not necessary to protect transsexual and transgendered persons. This Article argues that existing legislation already provides a basis for protecting these minorities. That is, courts should recognize discrimination against transsexual and transgendered individuals as classic sex discrimination under Title VII of the Civil Rights Act of 1964 and corresponding state anti-discrimination statutes.

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INTRODUCTION

Although anti-discrimination laws, on both a federal and state level, extend protection against discrimination in employment for a broad range of classifications,¹ sexual minorities, including transsexual² and transgendered³ individuals, continue to receive only sporadic and non-comprehensive protection against discrimination in employment.⁴ The purpose of this Article is to suggest that the structure for providing comprehensive protection against employment discrimination that targets transsexual and transgendered individuals is already in place and that what is required in order to realize that protection is for courts to properly apply existing law.⁵

1. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000); see also James A. Sonne, *Monitoring for Quality Assurance: Employer Regulation of Off-Duty Behavior*, 43 GA. L. REV. 133, 145 n.57 (2008) (discussing state statutes that “‘mirror Title VII and other major federal statutes’”).

2. The term “transsexual” is generally used in this Article to refer to individuals who have sought or are in the process of seeking gender reassignment surgery and other treatment, including the use of hormones associated with the gender to which they are seeking reassignment. Many of these individuals have been diagnosed with gender identity disorder, defined as “a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex,” coupled with a “persistent discomfort about one’s assigned sex or a sense of inappropriateness in the gender role of that sex.” AM. PSYCHIATRIC ASSOC., DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text revision 2000) [hereinafter DSM-IV-TR].

3. The term “transgender” is generally used in this Article to refer to individuals who fail to conform to the traditional stereotypes and characteristics associated with the gender that they are assigned at birth, but who may or may not be seeking gender reassignment surgery, and who may or may not have been diagnosed with gender identity disorder. Accordingly, “transgender” is the broader and more inclusive category. See Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 733 n.12 (2008) (noting that the term “transgender” is the umbrella and preferred term to describe persons “who experience discrimination or bias because they identify or express gender differently than what is traditionally associated with the sex they were assigned at birth”). However, in describing cases in which a party has described himself or herself as “transsexual” or “transgender,” I have used the term by which that party has self-identified.

4. See Katie Koch & Richard Bales, *Transgender Employment Discrimination*, 17 UCLA WOMEN’S L.J. 243, 244-45 (2008) (stating that only “[a]bout one-third of the United States population is covered by transgender-inclusive anti-discrimination laws” and that both the judiciary and the legislature lack consensus on whether and how to protect the transgender population from discrimination).

5. I do not mean to suggest that members of the transgender community should not desire or seek protection against discrimination that addresses their specific situation, such as through a specific prohibition on gender identity discrimination. I simply suggest that even in the absence of such a legislative change, courts should extend protection against such discrimination under the current legal structure. I am aware that reliance on the present legal structure with respect to sex discrimination to provide protection to transsexual and transgendered individuals does pose a risk of reinforcing existing understandings of sex and gender. See Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 86 (2008) (discussing an approach for embracing gender variance that does not reaffirm existing gender norms); Anna Kirkland, *Victorious Transsexuals in the Courtroom:*

A number of different approaches have been attempted to obtain rights against discrimination in employment for transsexual and other transgendered individuals. Among these approaches has been the treatment of transsexual and other transgendered individuals as persons with a medical condition, so that protection might be sought under the protection accorded individuals with disabilities;⁶ this approach has been unsuccessful at the federal level and has been met with mixed results in the states.⁷ Some jurisdictions have sought to extend protection to transsexual and transgendered individuals by amending their anti-discrimination statutes to specifically prohibit discrimination on the basis of gender identity or gender expression, which has been interpreted to protect transsexual and transgendered individuals as a class;⁸ this approach has been unsuccessful on the federal level but has occurred in a number of states, although still a significant minority of the states.⁹ Another approach, somewhat more successful in recent years and in some jurisdictions, has been to seek protection for transsexual and transgendered individuals, not as a class, but to argue that they are entitled to the same protection against discrimination — particularly sex discrimination in the form of sex stereotyping — as is enjoyed by all men and women.¹⁰

Still another approach, which has been almost universally unsuccessful, is to argue that transsexual and transgendered individuals, as a class, should be protected against discrimination on the basis of sex, that is, that discrimination against transsexual and transgendered individuals is discrimination on the basis of sex.¹¹ The focus of this Article is on demonstrating that discrimination against transsexual and transgendered individuals — as transsexual and transgendered individuals — is in fact classic sex discrimination and should

A Challenge for Feminist Legal Theory, 28 LAW & SOC. INQUIRY 1, 7 (2003) (discussing the possibility that successful claims by transsexuals will risk reaffirmation of traditional views about gender). The purpose of this Article, however, is not to propose a fundamental restructuring of how the courts view gender, but instead to demonstrate that protection for sexual minorities, including transsexual and transgendered individuals, can be accomplished even without such a fundamental restructuring of conceptions of sex and gender.

6. See Part I of this Article for a discussion of the medicalization of transsexual and transgendered individuals and the legal treatment of transsexual and transgendered individuals under statutes providing protection against discrimination for individuals with disabilities.

7. See *infra* text accompanying notes 26-48.

8. See Part II of this Article for a discussion of state and federal attempts to add gender identity and gender expression as categories protected against discrimination.

9. See *infra* notes 52-80 and accompanying text.

10. See Part III of this Article for a discussion of attempts — both successful and unsuccessful — to obtain protection against sex stereotyping for transsexual and transgendered individuals.

11. See Part IV.

be recognized as such under Title VII of the Civil Rights Act of 1964 (Title VII), the federal statute prohibiting discrimination on the basis of sex, and similar state statutes.¹²

I. PROTECTION OF TRANSSEXUALISM OR TRANSGENDER STATUS AS A DISABILITY

In order for a medical condition to constitute a protected disability under federal and many state laws, the medical condition must generally be considered an impairment or condition that deviates from the norm for healthy individuals and must also cause some difficulty or impairment of what is considered “normal” functioning, often to a significant degree.¹³ For example, under the federal Americans with Disabilities Act (ADA), an “individual with a disability” is defined as a person with “a physical or mental impairment that substantially limits . . . [a] major life activit[y] of such individual” or a person with a record of, or who is regarded as, having such a substantially limiting impairment.¹⁴ While a “mental disorder” is included within the definition of a covered impairment,¹⁵ whether the impairment is considered to be substantially limiting requires a comparison with the way in which “the average person in the general population” can perform major life activities, including functions such as “caring for oneself” and “working.”¹⁶

The underlying basis for the contention that transsexual and transgendered individuals have a medical condition that might be considered a protected disability is the diagnosis of “gender identity disorder” found in the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-IV-TR), published by the American Psychiatric Association.¹⁷ According to the DSM-IV-TR, a diagnosis of gender identity disorder requires two necessary components.¹⁸ The first is “a strong and persistent” identification with the gender with which

12. See 42 U.S.C. § 2000e-2 (2000); see also Part IV of this Article for an explanation of how discrimination against transsexual and transgendered individuals — as transsexual or transgendered — constitutes discrimination on the basis of sex, already prohibited by federal and most state anti-discrimination employment statutes.

13. See Alex Long, *State Anti-Discrimination Law as a Model for Amending the Americans with Disabilities Act*, 65 U. PITT. L. REV. 597, 610, 628-30 (2004) (discussing the Americans with Disabilities Act’s definition of “disability” and how it compares to the states’ definitions of “disability”).

14. Americans with Disabilities Act, 42 U.S.C. § 12102(2) (2000).

15. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h)(2) (2007).

16. *Id.* § 1630.2(i), (j).

17. DSM-IV-TR, *supra* note 2, at 576.

18. *Id.*

one is not identified at birth; that is, biological males profess a desire to be or a claim to be female, while biological females profess a desire to be or a claim to be male.¹⁹ Among the identified indicators of this cross-gender identification is a repeatedly stated desire to pass as the other sex, be the other sex, or live and be treated as the other sex.²⁰ In children, indicators include a preference for dressing like the other sex, an intense desire to engage in stereotypical games or activities of the other sex, and a “strong preference for playmates of the other sex.”²¹

The second component of a diagnosis of gender identity disorder is a “persistent discomfort” with “or a sense of inappropriateness” of one’s assigned sex or the gender roles of that sex, resulting in a “clinically significant distress or impairment in social, occupational, or other areas of functioning.”²² Among children, this distress is demonstrated by a stated unhappiness with their assigned sex and preoccupation with cross-gender wishes, as well as an aversion to their genitals and secondary sex characteristics.²³ Adolescents and adults demonstrate a “preoccupation with getting rid of primary and secondary sex characteristics . . . through hormones, surgery, or other procedures,” and their distress often is seen in isolation, relationship difficulties, and impaired functioning at school or work.²⁴

A diagnosis of gender identity disorder on the part of a transsexual or transgendered person would presumably constitute a “mental impairment” under the ADA, as a recognized mental disorder. Similarly, a transsexual or transgendered person meeting the “distress” or “impairment” requirements of the diagnosis would presumably be found to be significantly limited in the major life activities of caring for oneself and working. Accordingly, most transsexual individuals — who presumably have demonstrated sufficient distress with their gender identity to seek sex reassignment treatment — would probably qualify as individuals with a disability under the general definition of the ADA.²⁵ Similarly, transgendered persons who have not

19. *Id.* Disorders not fitting this specific criteria may also be diagnosed within the category of “Gender Identity Disorder Not Otherwise Specified,” which can be used for persons whose gender identity problems are accompanied by a physical congenital intersex condition, in which individuals are born with physical traits associated with both sexes. *Id.* at 582.

20. *Id.* at 581.

21. *Id.*

22. *Id.* at 576.

23. *Id.* at 581.

24. *Id.* at 577, 581.

25. Indeed, in a claim brought by a transsexual person under the Rehabilitation Act of 1973, before the amendment of that Act to specifically exclude transsexuals from protection, the United States District Court for the District of Columbia in *Doe v. U.S.*

sought or are not seeking sex reassignment might still be able to demonstrate protected status under the ADA if they could demonstrate a significant level of distress or impaired functioning as a result of their gender identity. On the other hand, transgendered persons comfortable with their gender identity presumably would not be considered to be individuals with a disability under the ADA.

It may have been this analysis in part that lead Congress to specifically exclude transsexual and transgendered individuals from the definition of individuals with a disability who are provided protection by the ADA. While the ADA provides that "homosexuality and bisexuality are not impairments and as such are not disabilities under this chapter,"²⁶ the Act goes on to exclude other specified conditions from the protection of the ADA, suggesting that without this express exclusion they might otherwise be protected disabilities.²⁷ Those conditions expressly excluded from the protection of the ADA include "transsexualism" and "gender identity disorders not resulting from physical impairments," along with "other sexual behavior disorders."²⁸

The adoption of the amendment providing for this exclusion from the protection of the ADA appears to have been motivated by an attempt to appease conservative members of Congress who saw the ADA as favoring individuals whose "lifestyles" they did not approve of at the expense of those with religiously-motivated reasons for not wanting to hire those persons.²⁹ While one might argue for the exclusion of certain conditions from the definition of disability as justified

Postal Service refused to dismiss the plaintiff's claim of disability discrimination, holding that the plaintiff had sufficiently alleged that her transsexualism was an emotional or psychological disorder that substantially limited at least her major life activity of working. *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959, at *7-8 (D.D.C. June 12, 1985). The Rehabilitation Act of 1973 was amended in 1992 to incorporate the provisions of the ADA, including the provision excluding transsexuals and individuals with gender identity disorder from the definition of "individual with a disability." Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(f), 106 Stat. 4349 (codified at 29 U.S.C. § 705(20)(f) (2006)).

26. Americans with Disabilities Act, 42 U.S.C. § 12211(a) (2000).

27. *Id.* § 12211(b).

28. *Id.* § 12211(b)(1). Other conditions excluded from the protection of the ADA in the laundry list of apparently disfavored "[c]ertain conditions" are "transvestism, . . . pedophilia, exhibitionism, voyeurism, . . . compulsive gambling, kleptomania, . . . pyromania, [and] psychoactive substance use disorders resulting from current illegal use of drugs." *Id.* § 12211(b)(1)-(3).

29. The amendment was proposed as the result of a compromise to address the concerns of senators, including Senator Jesse Helms, about the scope of the definition of disability under the ADA. Prior to the amendment being proposed, Senator Helms expressed concern that employers would not be able to exercise their "moral standards" in making judgments about hiring of certain types of employees. *See* 135 CONG. REC. 19,863-64, 19,870, 19,884 (Sept. 7, 1989).

by not wanting to pathologize certain individuals and conditions,³⁰ this does not appear to have been the motivation of Congress.

At the state level, transsexual and transgendered individuals have been able to establish the existence of a protected disability under some state anti-discrimination statutes, but have been unsuccessful in doing so in other states.³¹ In general, this has depended on the broadness or narrowness of the definition of protected disabilities in the different statutes, as well as whether definitive steps have been taken to specifically exclude them from protection.³²

The Superior Court of New Jersey in *Enriquez v. West Jersey Health Systems*³³ held that gender dysphoria or transsexualism is a protected disability under the New Jersey Law Against Discrimination.³⁴ The term “disability” is defined in the statute to include “any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions or is demonstrable, medically or psychologically, by accepted clinical or laboratory diagnostic techniques.”³⁵ The court agreed with the defendants that simply because gender dysphoria is listed in the DSM-IV-TR does not necessarily make it a protected disability, but the court did note that its inclusion suggested that it was diagnosable by “acceptable clinical techniques.”³⁶ The court also noted that the condition of gender dysphoria or transsexualism can be accompanied by significant distress, including substantial discomfort with one’s “primary and secondary sexual characteristics.”³⁷ Accordingly, the court held that the condition is a disability under the state statute.³⁸

30. For example, portions of the transgender community object to the inclusion of gender identity disorder in the DSM-IV-TR precisely because of the resulting categorization of gender identity disorder as a mental illness and the resulting stigmatization. See Patricia Gagné, Richard Tewksbury & Deanna McGaughey, *Coming Out and Crossing Over: Identity Formation and Proclamation in a Transgender Community*, 11 GENDER & SOC’Y 478, 481 (1997) (describing intense debate within the transgender community, with some seeking to have gender identity disorder removed from the DSM-IV-TR, while others argue that diagnosis is only way to obtain access to sex reassignment surgery and hormones).

31. See *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 375 (N.J. Super. Ct. App. Div. 2001) (discussing the holdings of various state courts when answering the question of whether transsexualism can be considered a disability under state anti-discrimination statutes).

32. See *id.* (stating that the court could not find that gender dysphoria is not a disability because New Jersey’s anti-discrimination statute is very broad).

33. *Id.*

34. *Id.*; see also New Jersey Law Against Discrimination, N.J. STAT. ANN. § 10:5-4 (West 2002).

35. N.J. STAT. ANN. § 10:5-5(q).

36. *Enriquez*, 777 A.2d at 374, 376.

37. *Id.* at 376.

38. *Id.* The court remanded for a determination of whether the plaintiff could establish

In contrast, the United States District Court for the Eastern District of Pennsylvania in *Dobre v. National Railroad Passenger Corp.*³⁹ held that the plaintiff's transsexualism was not a protected disability under the Pennsylvania Human Relations Act (PHRA).⁴⁰ The PHRA prohibits discrimination in employment on the basis of an individual's "non-job related disability."⁴¹ A "[h]andicapped or disabled person" is defined under the statute as one who has "[a] physical or mental impairment which substantially limits one or more major life activities."⁴² The court in *Dobre* held that the plaintiff, a transsexual woman who alleged that her transsexualism did not interfere with her ability to perform her duties as an Amtrak employee, did not have a mental impairment as defined in the statute.⁴³ The court noted in its analysis that a mental impairment was defined under the PHRA "as 'a mental or psychological disorder, such as mental illness, and specific learning disabilities.'"⁴⁴ Although the court acknowledged that gender identity disorder is a diagnosable disorder by the American Psychological Association, the court held that this fact did not necessarily make it a mental impairment.⁴⁵ The court went on to conclude that the meaning of the term "mental impairment" was limited by the terms that gave it meaning — here "mental illness" and "specific learning disabilities," which the court said are, "unlike transsexualism, . . . inherently prone to limit major life activities."⁴⁶ The court concluded that the fact that transsexualism is not prone to have an effect on major life activities suggests that it was not intended to be included as a protected disability.⁴⁷ The court also indicated that because the Pennsylvania statute was modeled on the federal Rehabilitation Act, and because that federal Act had been "clarified" to exclude transsexual individuals from the definition of an individual with a disability, transsexualism was also not intended to be protected under the state statute.⁴⁸

Future attempts to protect transsexual and transgendered persons under state and federal laws intended to protect the disabled

a claim of disability discrimination under the statute by showing that she, who had already had sex reassignment surgery, had been properly diagnosed with gender dysphoria. *Id.* at 376-77.

39. *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284 (E.D. Pa. 1993).

40. *Id.* at 290.

41. 43 PA. CONS. STAT. ANN. § 955(a) (West Supp. 2007).

42. 16 PA. CODE § 44.4(i) (2008).

43. *Dobre*, 850 F. Supp. at 289.

44. *Id.* at 288 (quoting 16 PA. CODE § 44.4(ii) (A) (1992)).

45. *Id.* at 288-89.

46. *Id.* at 289.

47. *Id.*

48. *Id.*

would be problematic for a number of reasons. In addition to the stigmatization imposed by categorization of gender identity disorder as a mental illness, the protection provided by disability discrimination laws is likely to be incomplete and ineffective for large portions of the transgender community. Not only has the protection extended to individuals with disabilities not been as extensive as suggested when the federal ADA was enacted,⁴⁹ but the nature of the protection extended by these laws is likely to provide protection to only those individuals who are the most adversely affected by their condition, while not providing protection from discrimination in employment to those most comfortable with their condition and therefore most likely to be fully qualified for the jobs from which they are being excluded.

II. TRANSSEXUAL AND TRANSGENDERED PERSONS AS MEMBERS OF A PROTECTED CLASS

The exclusion of transsexual and transgendered individuals from the scope of the protection of the ADA and some state anti-discrimination statutes has made it necessary to use other methods to seek protection for transsexual and transgendered persons from discrimination in employment. The most direct way to accomplish this would be to expressly extend protection to those groups, either by amendment of existing anti-discrimination statutes or by the adoption of new statutes providing this protection. In recent years, there have been legislative attempts — some successful — to expressly include transsexual and transgendered persons within the protection of anti-discrimination laws.⁵⁰

At the federal level, the effort to provide protection from discrimination to transsexual and transgendered persons has been recent and unsuccessful. Although numerous attempts spanning several decades have been made to include sexual orientation within the categories protected by the federal anti-discrimination laws,⁵¹ only

49. See Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99-101, 103 (1999) (explaining that defendants prevail in ADA claims at an overwhelmingly high percentage); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 242, 248-49, 250-52 (2001) (recounting the experience of actions brought under the Act and indicating that defendants, including employers, win the overwhelming majority of cases brought under the Act).

50. See, e.g., CAL. GOV'T CODE § 12926(p) (West 2005); see also CAL. PENAL CODE § 422.56(c) (West Supp. 2008) (defining "gender" to include "gender identity"). California's employment anti-discrimination statute utilizes the penal code's definition of gender.

51. A discussion of these legislative attempts from 1975 to 2007 can be found in the House of Representative's Report on H.R. 3685, also known as the Employment Non-Discrimination Act of 2007. The first committee hearing to be held on a bill to

recently has legislation been introduced to include gender identity within the protection of those laws.⁵² The most recent attempt to enact a prohibition against discrimination in employment on the basis of sexual orientation, in the form of H.R. 3685, the Employment Non-Discrimination Act of 2007 (ENDA), passed in the House of Representatives by a vote of 235 to 184 after being favorably reported out of House Committee on Education and Labor by a vote of twenty-seven to twenty-one.⁵³ Four of the dissenting committee votes on the bill were explained by those members of Congress as attributable to the fact that the bill did not also include gender identity within its protection, as an earlier introduced version of ENDA had.⁵⁴ Those dissenting members of Congress, who had been co-sponsors of the earlier version of ENDA, objected to the fact that the narrower version of ENDA would not protect transgendered individuals.⁵⁵ They argued:

While we agree with H.R. 3685's objective of prohibiting workplace discrimination on the basis of sexual orientation, we do not support the decision to remove gender identity from the bill because it leaves the legislation woefully incomplete. H.R. 3685 fails to expressly protect transgender people, who are among the most at risk for discrimination. The decision to strip gender identity from the bill was not based on substantive concerns about the bill's language but rather on the perception that protecting this vulnerable group might jeopardize the bill's chances for clean passage on the House floor. We cannot support this rationale, which reinforces the very bias and discrimination that ENDA seeks to prohibit.⁵⁶

The remaining dissenting committee votes on the bill appeared to be based on an objection to extending federal protection against

prohibit sexual orientation discrimination was in 1994, and in 1996 the first floor vote on such a bill resulted in its rejection by a vote of fifty to forty-nine in the Senate. H.R. REP. NO. 110-406, pt. 1, at 2-7 (2007).

52. See, e.g., Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (1st Sess. 2007) (including protection for transsexuals).

53. The bill was introduced in the House of Representatives on September 27, 2007, reported out of Committee on October 22, 2007, and passed the House of Representatives on November 7, 2007. See H.R. 3685, 110th Cong. (1st Sess. 2007); see also Library of Congress, Bill Summary, <http://thomas.loc.gov> (follow "Bills, Resolutions" hyperlink; then "search Bill Summary and Status"; select 110th Congress; and enter "Employment Non-Discrimination Act H.R. 3685") (last visited Mar. 18, 2009) (displaying bill information).

54. H.R. REP. NO. 110-406, pt. 1, at 44-45 (2007) (discussing the dissenters' reasoning in voting against ENDA due to their support of an earlier version of the bill).

55. See *id.* at 44.

56. *Id.* The Minority Views on H.R. 3685 also indicated that the addition of "gender identity" to the bill was "politically untenable." *Id.* at 53 (minority views).

discrimination in employment to both sexual orientation and gender identity.⁵⁷

A proponent of the version of ENDA that did not include gender identity, Representative Barney Frank, explained his actions in support of the non-inclusive version of ENDA by noting that while there was sufficient support in the House to pass — for the first time — legislation providing protection from discrimination in employment on the basis of sexual orientation, there was not sufficient support “to include in that bill explicit protection for people who are transgender.”⁵⁸ He indicated that the difficult issue was whether to “pass up the chance to adopt a very good bill because it has one major gap” and expressed his view that pursuing passage of the non-inclusive version of ENDA, rather than trying and failing to obtain passage of the inclusive version, made it more likely that protection would ultimately be extended to the transgendered.⁵⁹

When H.R. 3685 was considered by the House of Representatives, an amendment to add protection against discrimination on the basis of gender identity to the bill was offered, discussed, and then withdrawn without a vote.⁶⁰ The proponent of the amendment, Representative Tammy Baldwin, argued that Congress should follow the lead of states, cities and towns, and private businesses by protecting against discrimination based on gender identity;⁶¹ she argued that transgendered individuals should be included in the legislation because they “share[] a common history with the rest of the lesbian, gay, and bisexual community.”⁶² She also argued that no one should lose a job merely because of a conflict between one’s body and “internal sense of gender.”⁶³ The sponsor of the amendment indicated that she had taken the approach of withdrawing the amendment without a vote because, while she believed that there were not enough votes for adoption of the amendment, she “believe[d] that those who will be left behind by this bill deserve to hear on this House floor that [they

57. The Minority Views on H.R. 3685 expressed by the minority Republican members of the Committee urged the House to “reject any attempt to amend this bill to add protections for gender identity.” *Id.* at 46.

58. Statement of Barney Frank on ENDA, The Employment Non-Discrimination Act, <http://www.house.gov/frank/ENDASeptember2007.html> (last visited Mar. 18, 2009).

59. *Id.*

60. See 153 CONG. REC. H13,247-48 (daily ed. Nov. 7, 2007) (statement of Rep. Baldwin). That proposed amendment would have protected from discrimination “gender identity,” defined to mean “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.” *Id.* at H13,247.

61. *Id.*

62. *Id.*

63. *Id.*

have] not [been] forgotten and [Congress's] job will not be finished until [they] too share fully in the American Dream."⁶⁴

Numerous supporters of the bill expressed regret that the version of the bill being considered did not also provide protection from discrimination based on gender identity and expressed support for a proposed amendment that would have added protection for gender identity to the bill.⁶⁵ A few comments by opponents of ENDA also made reference to the issue of gender identity and the amendment that would add protection for gender identity to the bill.⁶⁶ Some of those comments focused on an objection to the fact that the amendment was proposed and then withdrawn without a vote,⁶⁷ while other

64. *Id.* at H13,248.

65. *See, e.g., id.* at H13,230-31 (statement of Rep. Woolsey) (expressing concern that the legislation does not protect transgendered people and noting that "[t]ransgendered people are particularly subject to workplace discrimination, and nearly one-half of all transgendered people have reported employment discrimination at some point in their lives"); *id.* at H13,235 (statement of Rep. Davis) (expressing sorrow that the legislation being debated did not include gender identity); *id.* at H13,237 (statement of Rep. Pelosi) (wishing that gender identity had been included in the bill and noting that she supports the "passage of ENDA because its passage will build momentum for further advances on gender identity rights"); *id.* at H13,238 (statement of Rep. Sanchez) (noting that the Baldwin amendment, adding protection for gender identity, "is needed because protecting transgender people is the right thing to do"); *id.* at H13,238 (statement of Rep. Eshoo) (indicating "strong support" and intent to continue to advocate for inclusion of "protections for transgendered Americans in their jobs"); *id.* (statement of Rep. Langevin) (voicing "strong support for an amendment" that would add gender identity to protections of bill); *id.* at H13,239 (statement of Rep. Stark) (noting that he would have supported the Baldwin amendment to include gender identity and protection for the transgender community in the legislation); *id.* (statement of Rep. Honda) (noting that he was prepared to vote in favor of the Baldwin amendment, which would have provided protection to "the most vulnerable, least understood group within the LGBT community, transgender men and women," and indicating "dedication to further expanding protection to transgender men and women"); *id.* (statement of Rep. DeGette) (noting that she would support the proposed bill but "with deep regret the transgendered community has been denied the protections offered to gays and lesbians in this bill"); *id.* at H13,240 (statement of Rep. Levin) (indicating that "[t]omorrow we continue to educate and outreach around the need to also prohibit employment discrimination on the basis of gender identity"); *id.* (statement of Rep. Blumenauer) (noting sadness that gender identity is not included in the present bill but also noting a "commit[ment] to resolving this inequity in the future"); *id.* (statement of Rep. Hirono) (noting support for the Baldwin amendment and expressing regret "that political realities made it difficult to bring an inclusive ENDA to the floor today in the first place"); *id.* at H13,248 (statement of Rep. Maloney) (noting support for the Baldwin amendment and indicating that "[t]ransgender Americans need and deserve protection from employment discrimination" and further stating that "[a]ll too often they bear the brunt of brutal bigotry, and are subject to unspeakable hatred and violence inspired by fear and ignorance").

66. *See, e.g., id.* at H13,229 (statement of Rep. McKeon) (opposing H.R. 3685 and arguing that an amendment including gender identity would be problematic).

67. *Id.* at H13,228-29 (noting that "[t]here are serious practical and legal concerns with [the] amendment" to extend protection against discrimination to gender identity and describing the amendment as "an effort to make an end-run around the legislative process, considering the full scope of this proposal only when it is convenient for supporters").

comments seemed to express a substantive objection to providing protection on the basis of gender identity.⁶⁸

State legislative efforts to extend protection to transsexual and transgendered individuals have met with somewhat more success. A number of states expressly provide that employers may not discriminate in employment on the basis of gender identity. For example, the California Fair Employment and Housing Act has been amended to provide that the statute's prohibition against "sex" discrimination includes discrimination on the basis of gender, including "gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth."⁶⁹ Minnesota, which prohibits discrimination in employment on the basis of sexual orientation, has defined the term "sexual orientation" to include "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."⁷⁰ The New Mexico Human Rights Act defines "gender identity" to mean "a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."⁷¹ Other jurisdictions that expressly extend protection against discrimination in employment on the basis of gender identity include Rhode Island,⁷² Colorado,⁷³ the District of

68. *Id.* at H13,248 (statement of Rep. Souder) ("This amendment both would protect transgender in the sense of people who have had sex change operations, and transvestites, people who dress up as the opposite sex I don't really need a right to vote on it. I think most people probably know where I stand on the issue."). Furthermore, Rep. Souder stated:

This is the start of a move that many of us who just simply don't approve of the lifestyle, there are many different things we don't approve of, but this is a deeply held position of faith by millions of Americans. And this is an attempt, a start, of what's likely to be an increasing effort to have sexual liberties trump religious liberties.

Id.

69. CAL. GOV'T CODE § 12926(p) (West 2005); *see also* CAL. PENAL CODE § 422.56(c) (West Supp. 2008); *supra* note 50 (discussing the definition of sex in California's anti-discrimination statute).

70. MINN. STAT. § 363A.03 (2008).

71. N.M. STAT. ANN. §§ 28-1-2(Q), 7(A) (LexisNexis 2008).

72. R.I. GEN. LAWS §§ 28-5-6(10), 7 (2003).

"Gender identity or expression" includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.

Id. at § 28-5-6(10).

73. COLO. REV. STAT. §§ 24-34-401(7.5), 402 (2008) (defining "sexual orientation" to include "transgender status or an employer's perception thereof").

Columbia,⁷⁴ Illinois,⁷⁵ Iowa,⁷⁶ Maine,⁷⁷ Vermont,⁷⁸ and Washington.⁷⁹ The majority of states, however, do not expressly provide protection against discrimination in employment on the basis of gender identity.⁸⁰

III. TRANSEXUAL AND TRANSGENDERED PERSONS AS ENTITLED TO PROTECTION AGAINST SEX DISCRIMINATION

Even in the absence of legislation expressly extending protection against discrimination to transsexual or transgendered individuals as a class, there is still the possibility of extending protection against sex discrimination to transsexual and transgendered individuals. That is, just as an African-American transsexual or transgendered individual is entitled to protection from discrimination based on race and a Catholic transsexual or transgendered individual is entitled to protection from discrimination based on religion, transsexual and transgendered individuals — as men and women — are presumably entitled to protection from discrimination based on their sex.⁸¹

The idea that transsexual and transgendered individuals — as men and women — are entitled to protection against sex discrimination can be seen most clearly in the context of a hypothetical

74. D.C. CODE ANN. §§ 2-1401.02(12A), 1402.11 (LexisNexis 2008) (“Gender identity or expression” is defined to mean “a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual’s assigned sex at birth.”).

75. 775 ILL. COMP. STAT. ANN. §§ 5/1-103(O-1), (Q), 5/2-102 (West Supp. 2008) (“Sexual orientation” means “gender-related identity, whether or not traditionally associated with the person’s designated sex at birth.”).

76. IOWA CODE §§ 216.2(10), 216.6 (2008) (“Gender identity” is defined as “a gender-related identity of a person, regardless of the person’s assigned sex at birth.”).

77. ME. REV. STAT. ANN. tit. 5, § 4553 (9-C) (2008) (defining “sexual orientation” to include “gender identity or expression”).

78. VT. STAT. ANN. tit. 1, § 144 (2007); tit. 21, § 495 (2007) (“The term ‘gender identity’ means an individual’s actual or perceived gender identity, or gender-related characteristics intrinsically related to an individual’s gender or gender-identity, regardless of the individual’s assigned sex at birth.”).

79. WASH. REV. CODE ANN. § 49.60.040(15) (LexisNexis 2008) (defining “sexual orientation” to include “gender expression or identity,” which is defined as “having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth”).

80. See 153 CONG. REC. H13,247 (daily ed. Nov. 7, 2007) (statement of Rep. Baldwin) (explaining that only “11 states have laws that include protections based on gender identity”).

81. By making this analogy, I do not mean to suggest that one’s status as a transsexual or transgendered individual is completely distinct from one’s sex, as religion and race are considered to be. Rather, as explained in this section, I contend that gender identity is in fact an element of sex. However, to the extent that courts view gender identity and sex as separate categories, a person with a gender identity that does not correspond to his or her biological sex still has a sex and presumably is entitled to protection against sex discrimination as a member of that sex.

employer policy that explicitly favors male transsexual or transgendered individuals over female transsexual or transgendered individuals.⁸² That is, if an employer refused to hire female transsexual or transgendered individuals but was willing to hire male transsexual or transgendered individuals, it would not be difficult for a court to conclude that sex discrimination was at work.⁸³

A somewhat more controversial claim of sex discrimination made by transsexual and transgendered individuals is that such persons are entitled, as men and women, to protection against discrimination based on sex stereotyping.⁸⁴ The reason that these claims are controversial is because, by definition, a claim of discrimination based on sex stereotyping seeks to extend protection to gender nonconformists, and transsexual and transgendered persons are generally viewed to be gender nonconformists of the most extreme type.⁸⁵ The

82. This Article uses the phrase “male transsexual or transgendered individual” or “transsexual man” to refer to a person whose gender identity is male, even if he was categorized as a female at birth. The phrase “female transsexual or transgendered individual” or “transsexual woman” refers to a person whose gender identity is female, even if she was categorized as a male at birth.

83. Courts, in rejecting claims of sex discrimination made by transsexual and transgendered individuals — as transsexual and transgendered individuals — have supported this proposition. For example, in *Holloway v. Arthur Anderson & Co.*, the United States Court of Appeals for the Ninth Circuit, reasoned that:

Pursuant to this court’s construction, Title VII remedies are equally available to all individuals for employment discrimination based on race, religion, sex, or national origin. Indeed, consistent with the determination of this court, transsexuals claiming discrimination because of their sex, male or female, would clearly state a cause of action under Title VII.

Holloway v. Arthur Anderson & Co., 566 F.2d 659, 664 (9th Cir. 1977). Similarly, in *James v. Ranch Mart Hardware, Inc.*, the United States District Court for the District of Kansas refused to dismiss the plaintiff’s claim of sex discrimination when the plaintiff, a transsexual woman, alleged that even though she “a male, working and living as a female” was terminated, a “female employee[] living and working as a male” would not have been terminated. *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 U.S. Dist. LEXIS 19102 (D. Kan. Dec. 23, 1994). See also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“If Eastern [Airlines] had considered Ulane to be female and had discriminated against her because she was female (i.e., Eastern treated females less favorably than males), then the argument might be made that Title VII applied . . . but that is not this case.”) (citation omitted); *Cox v. Denny’s, Inc.*, No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, at *5 (M.D. Fla. Dec. 22, 1999) (holding that even though transsexuals are not protected from discrimination based on their sexual identity, they may assert claims of discrimination or harassment if they can establish that the conduct was based on sex); *Dobre v. Nat’l Passenger Corp.*, 850 F. Supp. 284, 287 (E.D. Pa. 1993) (noting that while a transsexual “qua transsexual” cannot maintain a Title VII action, “transsexuals claiming discrimination because of their sex . . . would clearly state a cause of action”).

84. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that employment decision-making based on sex role stereotypes is illegal discrimination under Title VII).

85. It is true, of course, that whether transsexual and transgendered individuals are viewed as gender nonconformists or gender conformists depends on the sex to which they are perceived as belonging. For example, to the extent that transsexual women are

concern is that if these individuals are allowed to assert sex stereotyping claims, they will “bootstrap” protection from discrimination that they are supposed to be denied.⁸⁶ As the Sixth Circuit explained in *Vickers v. Fairfield Medical Center*,⁸⁷ when rejecting the attempted

viewed as “really men” — because they were categorized as male at birth — then their identity and presentation as women will be viewed as an extreme form of gender nonconformity. If they are viewed as “really women,” then their identity and presentation as women will presumably be viewed as gender conformity. However, whether transsexual and transgendered individuals are subject to discrimination because they are viewed as gender nonconformists or gender conformists, action taken because of that conformity or nonconformity constitutes discrimination on the basis of sex stereotypes.

86. For example, the Second Circuit in *Dawson v. Bumble & Bumble* expressed concern over sex stereotyping claims being used to “bootstrap” Title VII protection on the basis of sexual orientation. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218-19 (2d Cir. 2005). The court reasoned:

When utilized by an avowedly homosexual plaintiff, however, gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.” Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to “bootstrap” protection for sexual orientation into Title VII.”

Id. at 218 (citation omitted). The court’s argument seems to be that courts must be careful about allowing sex stereotyping claims by gays and lesbians, not because those claims are so different from “proper” gender stereotyping claims, but because they are so similar. *See also* *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (“We recognize that distinguishing between failure to adhere to sex stereotypes (a sexual stereotyping claim permissible under Title VII) and discrimination based on sexual orientation (a claim not covered by Title VII) may be difficult. This is especially true in cases in which a perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes.”). Judge Posner’s concurring opinion in *Hamm* also expresses some concern about the recognition of sex stereotyping claims, in part because of the difficulty that courts may have in distinguishing sex stereotyping claims from claims of sexual orientation discrimination:

Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter, especially the former. Effeminate men often are disliked by other men because they are suspected of being homosexual (though the opposite is also true — effeminate homosexual men may be disliked by heterosexual men because they are effeminate rather than because they are homosexual), while manish women are disliked by some men because they are suspected of being lesbians and by other men merely because they are not attractive to those men; a further complication is that men are more hostile to male homosexuality than they are to lesbianism. To suppose courts capable of disentangling the motives for disliking the nonstereotypical man or woman is a fantasy.

Id. at 1067 (Posner, J., concurring). Interestingly, Judge Posner’s conclusion about the difficulty of distinguishing between sex stereotyping and discrimination based on sexual orientation leads him to a suspicion of sex stereotyping claims, rather than to a conclusion that sexual orientation claims might be recognized as a form of sex stereotyping claim. This is particularly interesting in light of his apparent recognition that discrimination on the basis of sexual orientation appears to have a gendered component, in the sense that men are more hostile toward male homosexuality than female homosexuality.

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

sex stereotyping claim of a man perceived as homosexual by his co-workers:

Ultimately, recognition of Vickers' claim would have the effect of *de facto* amending Title VII to encompass sexual orientation as a prohibited basis for discrimination. In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand, as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.⁸⁸

That is, the court seems to reason, gay men and lesbians must be prevented from making claims of sex stereotyping because, otherwise, they would be able to successfully show that they have been discriminated against based on their gender nonconforming behavior, that is, precisely because they fail to comply with sex stereotypes.⁸⁹

But the lower courts' suspicion of sex stereotyping claims seems unwarranted in light of the Supreme Court's support of this line of jurisprudence. The Supreme Court has long held that employment decisions based on stereotypes about protected groups violate Title VII and the other federal anti-discrimination statutes.⁹⁰ In *City of Los Angeles Department of Water & Power v. Manhart*,⁹¹ the Court noted that employers were prohibited under Title VII from basing employment decisions on stereotypes, whether those stereotypes had a factual basis or not.⁹² The Court noted that "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females."⁹³ Similarly, the Court in *Hazen Paper Co. v. Biggins*,⁹⁴ a case decided under the federal Age Discrimination in Employment Act, indicated that the reliance on stereotypes about protected groups to disfavor members of those groups was the "essence" of disparate treatment;⁹⁵ the Court explained that "[i]t is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."⁹⁶ Indeed, the Court

88. *Id.* at 759, 764.

89. *See id.* An analysis of whether discrimination on the basis of sexual orientation, like discrimination on the basis of gender identity, is also properly a form of sex discrimination is beyond the scope of this Article.

90. *See, e.g., Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (stating that sex stereotypes violate the Family and Medical Leave Act); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (discussing illegal stereotypes under Title VII).

91. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

92. *See id.* at 709.

93. *Id.*

94. *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

95. *See id.* at 609.

96. *Id.* at 610.

indicated that the very enactment of the Age Discrimination in Employment Act was motivated by Congress's "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."⁹⁷ The Court's language not only recognizes the role of stereotypes in prohibited discrimination but seems almost to suggest that, without reliance on those stereotypes, the statute might not be violated.⁹⁸

The Supreme Court case of *Price Waterhouse v. Hopkins*⁹⁹ demonstrates that employers are not only barred from making employment decisions based on stereotyped assumptions about members of protected groups, but that employers are also prohibited from requiring that employees comply with sex and gender stereotypes in order to secure employment opportunities.¹⁰⁰ In the context of a woman denied promotion to partnership in an accounting firm because she was considered "macho" and overly aggressive,¹⁰¹ a plurality of the Court noted that the employer had engaged in unlawful sex stereotyping: "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."¹⁰² The plurality went on to make clear the illegality of reliance on sex stereotypes in making employment decisions by noting:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype 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."¹⁰³

97. *Id.*

98. *See id.* at 611 (noting that "[w]hen the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears").

99. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion) (stating that employers may not require employees to "match[] the stereotype associated with their group").

100. *See id.* at 251.

101. *Id.* at 235-37.

102. *Id.* at 250.

103. *Id.* at 251 (citing *City of Los Angeles v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))). The plurality did note that the mere existence of comments showing sex stereotyping does not prove the existence of discrimination, but that the employee must show that gender played a role in the challenged decision and that those comments can constitute evidence that gender played such a role. *Id.*; *see also id.* at 272-73 (O'Connor, J., concurring) (discussing the role that gender stereotypes play in establishing the existence of an intent to discriminate on the basis of sex). Even the dissenting Justices in *Price Waterhouse*

Reliance on sex and gender stereotypes would appear to be an inherent part of the treatment given to transsexual and transgendered individuals in the workplace. Indeed, both the medical and legal definitions of transsexual and transgendered individuals appear to rely heavily on sex and gender stereotypes. The diagnostic criteria for gender identity disorder contained in the DSM-IV-TR include, for boys, a "preference for cross-dressing or simulating female attire" and for girls, an "insistence on wearing only stereotypical masculine clothing," as well as an "intense desire to participate in the stereotypical games and pastimes of the other sex."¹⁰⁴ The legal definitions of gender identity also incorporate the stereotypical notion that certain standards of appearance or behavior are associated with men and women when they reference "gender-related identity, appearance, or mannerisms,"¹⁰⁵ or make clear that protection exists "whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."¹⁰⁶

seemed to recognize that reliance on sex stereotypes in making employment decisions would violate Title VII. They noted that while "Title VII creates no independent cause of action for sex stereotyping," "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent." *Id.* at 294 (Rehnquist, Scalia & Kennedy, JJ., dissenting). They went on to explain that the ultimate question was whether the discrimination caused harm to the plaintiff, seeming to equate sex stereotyping with discrimination as long as causation was established. *See id.*

104. DSM-IV-TR, *supra* note 2, at 581. The description of the diagnostic features of gender identity disorder is rife with gender stereotypes, apparently making clear distinctions between what are considered "normal" male and female activities. For example, it is noted that boys "may have a preference for dressing in girls' or women's clothes" and may "particularly enjoy playing house, drawing pictures of beautiful girls and princesses and watching television or videos of their favorite female characters." *Id.* at 576. It is noted that boys may play with Barbie dolls and "avoid rough-and-tumble play and competitive sports and have little interest in cars and trucks and other nonaggressive but stereotypical boys' toys." *Id.* Girls, on the other hand, may have "negative reactions to . . . attempts to have them wear dresses or other feminine attire," instead "prefer[ring] boys' clothing and short hair." *Id.* at 576-77. Girls may "show little interest in dolls or any form of feminine dress-up or role-play activity," preferring Batman and Spiderman and "contact sports, rough-and-tumble play, and traditional boyhood games." *Id.* at 577. Adults are said to "adopt the behavior, dress, and mannerisms of the other sex" and have "an intense desire to adopt the social role of the other sex." *Id.*; *see also* DSM-IV-TR CASEBOOK: A LEARNING COMPANION TO THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 363-65 (Robert L. Spitzer et al. eds., 4th ed. 1994) (noting that there should be little question of diagnosis of gender identity disorder for an eight-year-old boy who plays with dolls instead of "toy cars, trucks, or trains," and who "enjoys playing with kitchen toys," playing in the role of a female, and "drawing female figures").

105. See the definition of "gender identity" in a proposed amendment to H.R. 3685. Amendment to H.R. 3685, As Reported, Offered by Ms. Baldwin of Wisconsin, http://www.rules.house.gov/110/amendments/hr3685_baldwin.pdf (last visited Mar. 18, 2009).

106. See the definition of "gender identity and expression" in Rhode Island's anti-discrimination in employment statute. R.I. GEN. LAWS § 28-5-6(10) (2003).

A number of courts have recently concluded that transsexual and transgendered individuals can indeed assert claims under Title VII for discrimination based on their gender nonconforming behavior or appearance or failure to comply with sex stereotypes held by their employers.¹⁰⁷ These cases do not generally hold that transsexual and transgendered persons as such are entitled to protection, only that they are entitled to the same protection that other men and women have against being disadvantaged for engaging in gender nonconforming behavior or failing to comply with sex stereotypes.¹⁰⁸

One of the first cases to recognize such a claim was *Smith v. City of Salem*.¹⁰⁹ The plaintiff, a lieutenant with the fire department, was a pre-operative transsexual woman who had been diagnosed with gender identity disorder.¹¹⁰ After her diagnosis, she began to “express[] a more feminine appearance,” prompting comments from her co-workers that her “appearance and mannerisms were not ‘masculine enough.’”¹¹¹ In response, the plaintiff informed her supervisor of her diagnosis and that her “treatment would eventually include complete physical transformation from male to female.”¹¹² In spite of the plaintiff’s request to her supervisor not to divulge her condition to superiors at the fire department, the supervisor did so, resulting in a series of actions taken in order to bring about her termination, including repeated requirements that she undergo psychological evaluations and a suspension.¹¹³ The plaintiff’s claim of sex discrimination under Title VII was dismissed by the district court on the pleadings.¹¹⁴

107. See *infra* notes 110-53 and accompanying text.

108. *Id.*

109. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Similarly, an earlier district court case within the Sixth Circuit refused to dismiss a female transsexual plaintiff’s Title VII claim, holding that the plaintiff could bring a sex stereotyping claim based on her contention that the employer fired her because of her appearance, even if the plaintiff could not assert a claim of sex discrimination based on her transsexualism. *Doe v. United Consumer Fin. Serv.*, No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509, at *8-13 (N.D. Ohio Nov. 9, 2001) (indicating that while it was conceivable that the plaintiff was fired simply because of her transsexualism, it was also conceivable that she was fired at least in part because “her appearance and behavior did not meet [the employer’s] gender expectations”). Another case from the same court seemed to recognize the possibility that the female transsexual plaintiff could have stated a claim for sex stereotyping in spite of her transsexualism, but held that the evidence did not support such a claim because the employer “only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms.” *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999-1000 (N.D. Ohio 2003).

110. The court indicated that Smith was “biologically and by birth a male” and used the male pronoun to refer to the plaintiff. *Smith*, 378 F.3d at 568. The plaintiff’s first name is listed in the case as “Jimmie.” *Id.* at 566. It is not clear from the decision whether this represented a feminization of her “male” name or whether this was her name from birth.

111. *Id.* at 568.

112. *Id.*

113. *Id.* at 568-69.

114. *Id.* at 569.

The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, holding that the plaintiff had “sufficiently pleaded claims of sex stereotyping and gender discrimination” by alleging that the defendant’s actions were based on her “failure to conform to sex stereotypes concerning how a man should look and behave.”¹¹⁵ The court of appeals indicated that the district court had erred in relying on a succession of pre-*Price Waterhouse* cases to conclude that a transsexual person could not make out a claim of sex discrimination under Title VII.¹¹⁶ The court noted that those earlier cases had refused to recognize sex stereotyping claims because of their conclusion that the discrimination that had occurred had been on the basis of “‘gender’ rather than ‘sex,’” but that the Supreme Court in *Price Waterhouse* had established that Title VII prohibits both discrimination based on “sex” — discrimination based on biological differences between men and women — and discrimination based on “gender” — discrimination based on failure to conform to stereotypical gender norms.¹¹⁷ The court reasoned that discrimination against men for engaging in gender nonconformity in their behavior and dress was just as unlawful under Title VII as discrimination against women for engaging in gender nonconforming behavior.¹¹⁸

The court expressly rejected the conclusions of other courts that discrimination against transsexual persons is different in kind from discrimination based on sex stereotyping and that the gender nonconforming conduct of the plaintiff was not subject to protection simply because of the plaintiff’s generally unprotected status as a transsexual person.¹¹⁹ The court reasoned:

115. *Id.* at 572.

116. *Id.*

117. *See id.* at 572-73.

118. The court reasoned:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.

Id. at 574.

119. The court described the analysis of those other courts in the following terms:

Yet some courts have held that this latter form of discrimination is of a different and somehow more permissible kind. For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination

Such analyses cannot be reconciled with *Price Waterhouse*, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual — and therefore fails to act and/or identify with his or her gender — is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman. Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.¹²⁰

Accordingly, the court of appeals held that the plaintiff had stated a claim for sex discrimination under Title VII.¹²¹

A completely different panel of the Sixth Circuit Court of Appeals in *Barnes v. City of Cincinnati*¹²² also concluded that a transsexual person could state a claim for sex stereotyping under Title VII, upholding a substantial jury verdict in favor of the plaintiff, a pre-operative transsexual woman who lived as a male while on duty but as a female off duty.¹²³ The plaintiff in that case had been conditionally promoted to the position of a sergeant with the police department, but failed her probationary period when she was subjected to extensive supervision and training not required of other probationary employees.¹²⁴ Among the comments made to the plaintiff was that she did not seem masculine enough and needed to stop wearing make-up in order to be promoted.¹²⁵ The *Barnes* court followed the reasoning of the court of appeals in *Smith* to conclude that the plaintiff, as a transsexual individual, was not precluded from asserting a claim of sex stereotyping.¹²⁶ The court indicated that the plaintiff could bring this claim because she was a member of a protected class under

"because of . . . sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.

Id.

120. *Id.* at 574-75.

121. *Id.* at 575.

122. *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

123. *Id.* at 733-35. The court of appeals noted that the plaintiff's name had been Phillip and was now Philecia and used the male pronoun to refer to the plaintiff. *Id.* at 733.

124. *Id.* at 733-34.

125. *Id.* at 735.

126. *Id.* at 737.

Title VII — “whether as a man or a woman.”¹²⁷ The court also specifically held that a Title VII sex discrimination claim could be based on a claim of discrimination based on sex stereotypes.¹²⁸

Other courts have also concluded that transsexual and transgendered individuals are allowed to assert claims that they were discriminated against based on sex under Title VII when they were penalized for engaging in gender nonconforming behavior.¹²⁹ In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,¹³⁰ the United States District Court for the Southern District of Texas held that the plaintiff, a transsexual woman diagnosed with gender identity disorder, had stated a legally viable claim for sex discrimination when she alleged that she was not hired based on her failure to comply with traditional male stereotypes.¹³¹ Rejecting the conclusions of other courts that the gender nonconformity of transgendered individuals was different in kind from that protected by rules against sex stereotyping, the court indicated that the plaintiff’s transsexualism did not bar her sex stereotyping claim.¹³² The court reasoned:

The Court cannot ignore the plain language of Title VII and *Price Waterhouse*, which do not make any distinction between a transgendered litigant who fails to conform to traditional gender stereotypes and an “effeminate” male or “macho” female who, while not necessarily believing himself or herself to be of the opposite gender, nonetheless is perceived by others to be in nonconformity with traditional gender stereotypes. There is nothing in existing case law setting a point at which a man becomes *too*

127. *Id.* at 737-39.

128. *Id.* at 741.

129. See, e.g., *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cas. (BNA) 609, 611-12 (N.D. Ind. 2007) (holding that a transsexual woman could state a claim that she was terminated for failure to comply with sex stereotypes, when she alleged that she was told to appear more masculine during business hours); *Schroer v. Billington*, 525 F. Supp. 2d 58, 60, 63 (D.D.C. 2007) (holding that the transsexualism of the plaintiff, a pre-operative transsexual woman applying for the position of terrorism research analyst with the Library of Congress, did not act as “a bar to her sex stereotyping claim”); *Mitchell v. Axcan Scandipharm, Inc.*, No. 05-243, 2006 U.S. Dist. LEXIS 6521, at *2-5 (W.D. Pa. Feb. 17, 2006) (holding that a pre-operative transsexual woman who alleged that she had been harassed and terminated because of her gender nonconforming behavior had stated a claim under Title VII). The court in *Mitchell* noted that while some courts have refused to extend protection to transsexuals under this theory, “neither the Court nor the Court of Appeals for the Third Circuit has set forth this distinction.” *Id.*

130. *Lopez v. River Oaks Imaging & Diagnostic Group Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

131. *Id.* at 655-56, 660-61. The court referred to the plaintiff, who the court indicated was biologically male but lived as a woman, as Izza Lopez, noting that her legal name was Raul Lopez, Jr., and used the female pronoun to refer to her. *Id.* at 655.

132. *Id.* at 659-60.

effeminate, or a woman becomes *too* masculine, to warrant protection under Title VII and *Price Waterhouse*.¹³³

Instead, the court held that Title VII is violated whenever an employer discriminates against an employee for failing to act “sufficiently masculine or feminine,” whether or not that employee is a transsexual individual.¹³⁴

The United States District Court for the District of Columbia in *Schroer v. Billington*¹³⁵ also held that a transsexual individual was not precluded from making a claim of sex discrimination based on sex stereotyping, even though the court initially concluded in a prior memorandum order that discrimination against transsexual persons is different in kind from discrimination based on sex stereotyping.¹³⁶ The court noted that the plaintiff, a pre-operative transsexual woman applying for the position of terrorism research analyst with the Library of Congress,¹³⁷ had alleged sex discrimination under two different theories — one claiming that she had been discriminated against based on sex stereotypes and one alleging that discrimination against transsexual persons is itself sex discrimination.¹³⁸ The court, in its first opinion considering the employer’s motion to dismiss, held that the plaintiff had not stated facts to support a claim for sex stereotyping.¹³⁹ The court indicated that the purpose of *Price Waterhouse* was to “create[] space for people of both sexes to express their sexual identity in nonconforming ways” but that the plaintiff in this case did “not wish to go against the gender grain, but with it.”¹⁴⁰ Accordingly, the court held that “[p]rotection against sex stereotyping is different, not in degree, but in kind, from protecting men, whether effeminate or not, who seek to present themselves *as* women, or women, whether masculine or not, who present themselves *as* men.”¹⁴¹ The court indicated that a transsexual individual might be able to state a sex stereotyping claim if he or she alleged discrimination for failure to appear masculine or feminine enough based on the employee’s appearance or conduct, but held that the plaintiff had

133. *Id.* at 660.

134. *Id.*

135. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

136. *Schroer v. Billington*, 424 F. Supp. 2d 203, 210 (D.D.C. 2006) (mem).

137. *Id.* at 205. The court noted that the plaintiff was classified as a male at birth and christened David John Schroer, but that she had changed her name to Diane Schroer and began living full-time as a woman. The court used the female pronoun to refer to the plaintiff. *Id.*

138. *See id.* at 207.

139. *Id.* at 211.

140. *Id.* at 210-11.

141. *Id.* at 210.

not made such a claim, and instead alleged that she had been discriminated against because of her gender identity and intent to present herself as a woman.¹⁴² The court denied the employer's motion to dismiss, however, because of the possibility that the plaintiff could show that discrimination against transsexual persons — as transsexuals — was literally discrimination based on sex.¹⁴³

On consideration of a second motion to dismiss filed by the employer, the district court in *Schroer* held that the plaintiff, who had amended her complaint, now stated a claim for sex discrimination based on sex stereotyping.¹⁴⁴ The court indicated that the plaintiff's complaint now alleged that she had not been selected for the position in part because of the employer's reaction to seeing photographs of the plaintiff in female clothing — that the employer thought that the plaintiff looked “like a man in women's clothing rather than what she believed a woman should look like.”¹⁴⁵ The court went on to conclude that this allegation stated a claim for sex stereotyping because she was essentially alleging that she was discriminated against because, when presenting as a woman, she did not conform to the employer's stereotypical notions of what a woman should look like.¹⁴⁶ The court indicated that an allegation by a female transsexual that she did not appear feminine enough would state a claim under Title VII,¹⁴⁷ although, as suggested in the court's prior memorandum order, an allegation by a transsexual woman that she did not appear masculine enough would not state such a claim.¹⁴⁸ Because the court concluded that the plaintiff now stated a claim for sex stereotyping, the court indicated that it did not have to decide whether she could also state a claim under her theory that discrimination against transsexuals was prohibited sex discrimination.¹⁴⁹

In its decision after trial on the merits, the district court in *Schroer* held that the plaintiff did establish that she had been

142. *Id.* at 211.

143. *Id.* at 211-13. For a discussion of this portion of the court's opinion, see *infra* text accompanying notes 219-27.

144. *Schroer v. Billington*, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) (mem.).

145. *Id.*

146. *Id.* at 63.

147. *Id.* at 62-63. The court restated its prior contention that protection against sex stereotyping is different in kind, rather than degree, from protecting transsexuals as transsexuals. *Id.* at 63. Furthermore, the court said that the plaintiff's gender dysphoria was relevant to her claim of sex discrimination because she would not make out such a claim if her only contention was that she was not selected for the position because of disclosing her gender dysphoria or her intent to present herself as a woman. *Id.*

148. *Schroer v. Billington*, 424 F. Supp. 2d 203, 210-11 (D.D.C. 2006) (mem.).

149. *Schroer*, 525 F. Supp. 2d at 62-63. This portion of the court's opinion is discussed at text accompanying *infra* notes 228-35.

discriminated against on the basis of sex stereotyping.¹⁵⁰ The court concluded that the plaintiff had presented direct evidence that the Library of Congress's hiring decision was based on sex stereotypes, based in part on the testimony of the decisionmaker that the plaintiff looked like "a man in women's clothing" in the photographs of the plaintiff in traditionally female attire.¹⁵¹ The court also relied on the decisionmaker's conversations with her co-workers to the effect that she had particular difficulty understanding the plaintiff's decision to become a woman because of the plaintiff's background in the Special Forces and therefore status "as a particularly masculine kind of man."¹⁵² The district court concluded that the plaintiff had established the existence of discrimination based on sex under her sex stereotyping theory regardless of whether she was viewed as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual."¹⁵³

Other courts, however, have argued that transsexual and transgendered persons should not be able to make out claims of sex stereotyping under Title VII because of the fundamental differences between the type of sex stereotyping prohibited by *Price Waterhouse* and the objections that employers express concerning transsexual and transgendered employees and job applicants.¹⁵⁴ For example, in *Etsitty v. Utah Transit Authority*,¹⁵⁵ the United States District Court for the

150. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300 (D.D.C. 2008).

151. *Id.* at 305.

152. *Id.*

153. *Id.* The district court did note that the plaintiff's sex stereotyping claim was "difficult" because "direct evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII." *Id.* However, unlike other courts that have concluded that this similarity between the claims was grounds for refusing to recognize sex stereotyping claims when brought by transsexual and transgendered individuals, the *Schroer* court found this similarity to be grounds for recognizing that discrimination against transsexuals was in fact sex discrimination. The portion of the court's opinion finding that the plaintiff had established a claim of sex-based discrimination on the basis of transsexualism is discussed at text accompanying *infra* notes 236-47.

154. *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634, at *13-15 (D. Utah June 24, 2005), *aff'd*, 502 F.3d 1215 (10th Cir. 2007); *Oiler v. Winn-Dixie La., Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *26, 30 (E.D. La. Sept. 16, 2002).

155. *Etsitty*, 2005 U.S. Dist. LEXIS 12634, at *1. The court of appeals affirmed the decision of the district court to grant summary judgment for the employer without deciding the question of whether transsexuals can state claims for sex stereotyping. Instead the court assumed that such a claim was available, but that the plaintiff had not established that claim because the employer's asserted concern about the plaintiff using women's bathrooms while she retained male genitalia was a legitimate, non-discriminatory reason for the plaintiff's termination, which had not been shown to be pretextual. *Etsitty*, 502 F.3d at 1224-27.

District of Utah rejected on summary judgment the plaintiff's claim that she had been fired for failing to comply with gender stereotypes.¹⁵⁶ The plaintiff in that case was a pre-operative transsexual woman who was hired as a transit operator while presenting as a man, but was fired after she disclosed that she was transsexual and would begin to present as a woman at work.¹⁵⁷ The employer justified its decision to terminate her employment on the grounds that it was concerned about her using women's restrooms while she retained male genitalia and marked her termination record as "eligible for rehire after completion of 'his surgery (transformation).'"¹⁵⁸

The district court in *Etsitty* expressly rejected the analysis of the Sixth Circuit in *Smith v. City of Salem*¹⁵⁹ that discrimination against a transsexual person for gender nonconforming behavior is not different from the discrimination faced by the plaintiff in *Price Waterhouse* who was penalized for not acting enough like a stereotypical woman.¹⁶⁰ The *Etsitty* court held that "there is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman."¹⁶¹ In arguing that the "drastic action" of changing one's sex should not be "characterized as a mere failure to conform to stereotypes," the court cited to the DSM-IV-TR for authority that gender identity disorder should not be confused with "simple nonconformity to stereotypical sex role behavior."¹⁶²

The district court went on to justify its conclusion by noting that the logical extension of the *Smith* court's reasoning would be the "complete rejection of sex-related conventions," a result not contemplated by Congress or the Court in *Price Waterhouse*.¹⁶³ The court reasoned that if transsexuals could not be penalized for dressing as a member of the opposite sex, then the same rules would apply to non-transsexuals.¹⁶⁴ Accordingly, the court said, if protection against sex stereotyping were extended to transsexuals, "then any male employee could dress as a woman, appear and act as a woman, and use the

156. *Etsitty*, 2005 U.S. Dist. LEXIS 12634, at *16-19.

157. *Id.* at *1-5.

158. *Id.* The court noted that the plaintiff had changed her name from Michael Etsitty to Krystal Sandoval Etsitty and was taking female hormones, but retained her male genitalia. The court described the plaintiff as follows: "From the time she was a small child, she has always felt that she is female, despite being born with a male body." The court used the female pronoun to refer to the plaintiff. *Id.* at *1-2.

159. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

160. *Etsitty*, 2005 U.S. Dist. LEXIS 12634, at *11-12.

161. *Id.* at *12.

162. *Id.* at *12-13.

163. *Id.* at *15.

164. *Id.* at *14.

women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII."¹⁶⁵

It is not clear at all, however, that the *Etsitty* court's parade of horrors is a conceivable result of the recognition of sex stereotyping claims by transsexuals, much less a likely one. The jurisdictions that have recognized such claims do not appear to have faced a rash of claims by non-transsexual men trying to dress "like women" or to use women's shower facilities. In addition, the fact that "the medical community does not equate transsexualism with a mere failure to conform to stereotypes"¹⁶⁶ — and therefore does not diagnose all persons who engage in gender nonconforming behavior as having gender identity disorder — does not answer the legal issue of whether an employer's negative reaction to a transsexual person's gender nonconformity is legally equivalent to an employer's negative reaction to a non-transsexual person's gender nonconformity. That is, the question is not whether the two situations are medically the same, but whether individuals will be precluded from asserting their right to be free from the need to conform to sex stereotypes merely because they are transsexual or transgendered and therefore their gender nonconformity is more profound.

Analysis similar to that of the district court in *Etsitty* is found in the decision of the United States District Court for the Eastern District of Louisiana in *Oiler v. Winn-Dixie Louisiana, Inc.*¹⁶⁷ The plaintiff in that case indicated that he was not transsexual but transgendered, having been diagnosed with "transvestic fetishism with gender dysphoria"; the court called him a "male crossdresser."¹⁶⁸ The plaintiff was discharged after he disclosed to his supervisor that he was transgendered and asked whether he would be fired if the company's president ever saw him crossdressed as a woman.¹⁶⁹ The decision was then made to terminate his employment on the grounds that customers, if they recognized the plaintiff as a crossdresser while working, would disapprove of his lifestyle and shop elsewhere.¹⁷⁰

The district court rejected the plaintiff's claim that he had been discharged based on unlawful sex stereotyping.¹⁷¹ The court held that the discrimination against the plaintiff was fundamentally different

165. *Id.* at *14-15.

166. *Id.* at *13.

167. *Oiler v. Winn-Dixie La., Inc.*, No. 00-3144, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002).

168. *Id.* at *4.

169. *Id.* at *7-9.

170. *Id.* at *9-10.

171. *Id.* at *28.

than that involved in sex stereotyping: “[t]his is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex.”¹⁷² In rejecting the plaintiff’s contention that he had been disparately treated compared to women who dressed in a masculine manner, the court noted that those women were differently situated from the plaintiff:

There is no evidence in the record establishing that any woman who worked for the defendant was a crossdresser, i.e., a woman who adorned herself as a man in order to impersonate a man and who used a man’s name. While there were women working for the defendant who wore jeans, plaid shirts, and work shoes while working in the warehouse or in refrigerated compartments, there is no evidence that they were transgendered or that they were crossdressers, i.e., that they impersonated men and adopted masculine personas or that they had gender identity disorders.¹⁷³

It is difficult to understand the court’s attempt to distinguish the female employees of the employer who wore stereotypically masculine clothes — and it is difficult to imagine more stereotypically masculine clothes than jeans, plaid shirts, and work boots — from the plaintiff, who wore stereotypically female clothes; the court described him as wearing “women’s clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish.”¹⁷⁴ The only distinctions appear to be that the plaintiff was transgendered and the women were not, and that the plaintiff was a man and the women were women. Accordingly, what the court may be saying is that while non-transgendered individuals are entitled to wear clothing associated with the other gender, transgendered persons are not. Alternatively, the court may be saying that while women are allowed to dress in stereotypically male clothing, men who dress in stereotypically female clothing are not protected from discrimination. Either conclusion would send a troublesome message about the protections of Title VII. The first message seems to indicate that only the non-transgendered are allowed to be gender nonconformists — that is, that the transgendered are denied the protections against sex discrimination available to all other persons. And it would be difficult to conclude that the second message was unrelated to “sex.” Men who wear dresses are “crossdressers,” while women who wear men’s plaid shirts and work boots apparently are not. Instead, the distinction apparently

172. *Id.* at *30.

173. *Id.* at *36.

174. *Id.* at *28.

being drawn by the court — and perhaps by society — about the different level of acceptance of men and women engaging in gender nonconforming behavior and dress appears to be classic discrimination on the basis of sex or gender.

IV. DISCRIMINATION AGAINST TRANSEXUAL AND TRANSGENDERED PERSONS AS PROHIBITED SEX DISCRIMINATION

The apparently different standards applied to men and women who engage in gender nonconforming behavior suggest that our societal standards concerning the line between mere gender nonconformity and the extreme gender nonconformity demonstrated by transsexual and transgendered persons is itself gendered. That is, the reasons that members of society, including members of the workforce, react negatively to transsexual and transgendered individuals may be precisely related to sex or gender. There are a number of reasons for believing that this is true.

As suggested by the court's analysis in the *Oiler* case, society appears to be more tolerant of gender nonconformity of women than men.¹⁷⁵ Even as children, "tomboys" — young girls who act "like boys" — are more accepted than "sissies" — young boys who are considered too effeminate.¹⁷⁶ Societal standards of acceptable dress among children and adults also reflect this uneven approval of gender nonconformity between the sexes. Women can wear what would have once been considered "masculine" clothing — pants, suits, and even ties — without any sanction; indeed, professional women are generally expected to dress in a manner that de-emphasizes their secondary sex characteristics.¹⁷⁷ Men, on the other hand, are generally ridiculed for dressing in a way that is considered traditionally feminine. A man in a dress instantly stands out,¹⁷⁸ only relatively

175. See *id.* at *36.

176. See Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: "How Does One Know if One is Male or Female?"*, 55 SEX ROLES 589, 595 (2006) (indicating that "a male that exhibits feminine behaviors sufficient to be considered a sissy is much less tolerated than a female tomboy").

177. Even in the case of *Jespersion v. Harrah's Operating Co.*, in which the court of appeals upheld a dress code requirement that women, but not men, wear facial makeup, the dress code imposed on both male and female bartenders required that they wear the same "uniform of black pants, white shirt, black vest, and black bow tie," and comfortable black shoes. *Jespersion v. Harrah's Operating Co.*, 444 F.3d 1104, 1105-07 (9th Cir. 2006). What the court characterized as a "unisexual" dress code unmistakably imposed a traditionally male style of dress. See *id.* at 1112; see also Michael Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL'Y 467, 470 (2007) (noting the irony that while female bartenders were required to wear makeup, the uniform that female — and male — bartenders were required to wear was "very male in appearance").

178. Indeed, in the case of *Rosa v. Park West Bank & Trust Co.*, a biological male seeking to apply for a bank loan, who was wearing "traditionally female attire," was sent

recently have men been able to wear earrings or makeup or carry a purse — a “man bag” — without social disapproval. It is not enough to dismiss these differences as just a matter of social norms; it cannot be an accident that “masculine” dress is acceptable for women, but “feminine” dress is not acceptable for men. Instead, it appears that society is willing to accept a woman who strives to emulate men, while looking with disapproval on a man who demeans himself by “aping” women.¹⁷⁹

Society’s greater disapproval of gender nonconformity among men also appears to extend to the gender nonconformity evidenced by transsexual and transgendered individuals. Evidence suggests that men in general object to transsexualism more than women do;¹⁸⁰ this may be particularly true with respect to transsexual women.¹⁸¹ Men who view women as inferior may well find it especially repugnant that transsexual women intentionally and willingly give up the societal advantages that are provided to men by becoming women. Men, even those who do not hold negative views of women, may find it incomprehensible that transsexual women are willing and even eager to give up their penises.¹⁸² And some men may also feel that

home and told to dress in a more gender-appropriate manner if he wanted to receive a loan application. *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000). It is one thing to expect employees to conform to societal gender norms in their dress; employers are used to telling employees what to do. It is much more startling for a service business to seek to impose its standards of appropriate dress on customers, showing the strength of the objection to a man in a dress, given that it was strong enough to overcome the “customer is always right” tendency.

179. For example, a higher degree of fashion is associated in our society with women’s dress, while male dress is considered more somber. This difference is not just a difference, but reflects negatively on women, because “[d]ress is viewed, negatively, as a superficial, female concern.” See Julie A. Seaman, *The Peahen’s Tale, or Dressing Our Parts at Work*, 14 DUKE J. GENDER L. & POL’Y 423, 441 n.96, 462 & n.210 (2007). As is often the case, traits associated with women tend to be undervalued and viewed negatively, while traits associated with men tend to be highly valued and viewed positively. See Cecilia L. Ridgeway & Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOC’Y 510, 513, 522-23 (2004).

180. See Mikael Landén & Sune Innala, *Attitudes Toward Transsexualism in a Swedish National Survey*, 29 ARCHIVES OF SEXUAL BEHAV. 375, 375, 378, 381-85, 387 (2000) (noting that in a survey of 992 Swedish citizens, men were found to have more restrictive views of transsexualism than women, which was consistent with prior research findings).

181. The reactions of men and women to other gender nonconforming behavior, such as same-sex sexual conduct, also appears to be gendered. Cf. Jeni Loftus, *America’s Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AM. SOC. REV. 762, 780 (2001) (reporting that research indicates that “men report more positive attitudes toward lesbians than they do toward gay men, while women report slightly more negative attitudes toward lesbians than they do gay men”).

182. The second of these two views may be reflected in the opinion of a male appellate court judge considering the claim of a transsexual woman that she had been discriminated against not just as a transsexual but as a woman. The judge noted:

transsexual men are merely “passing” as men and therefore seeking a status and privileges to which they are not entitled; sometimes these feelings are expressed in the form of sex-based violence and rape.¹⁸³

Similarly, some women may view transsexual women as interlopers and not true women and transsexual men as traitors.¹⁸⁴ The first of these views appears to be reflected in a letter written by a mother responding to her son’s disclosure of her transsexualism:

It is insulting to me, as a woman, that you assume that the outer trappings of femaleness somehow entitle you to all the other baggage that women carry — baggage that can only be acquired by growing up female in a male world. For you to think that donning female attire entitles you to appropriate and fully understand all that being a woman encompasses is unfair to me and to women in general. It denigrates my experience. The way you appear to grasp all this is so *male*.¹⁸⁵

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.

Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984). The reference to “what remains of a man” would appear to be a reference to the removal of the plaintiff’s penis and other external sex organs.

183. In the film “Boys Don’t Cry,” Brandon Teena, the main character, a transsexual or transgendered male, was beaten, raped, and then murdered by the men with whom he had been socializing and drinking — as a man — after they discovered that he was, in fact, biologically a woman. Their anger — as portrayed in the film — appeared to be based at least in part on their embarrassment for having been “taken in”; their actions of committing rape appeared to be a result of a desire to “put her in her place.” See *BOYS DON’T CRY* (Fox Searchlight Pictures 2000). This film was based on the real life rape and murder of Brandon Teena in Humboldt, Nebraska in 1993. See Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in *TRANSGENDER RIGHTS* 183 (Paisley Currah, Richard M. Juang & Shannon Price Minter eds., 2006). Brandon Teena’s mother brought a civil lawsuit against Richardson County, Nebraska and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress concerning actions surrounding the rape and murder. *Brandon v. County Richardson*, 624 N.W.2d 604, 604, 610-11 (Neb. 2000).

184. See Shannon Price Minter, *Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion*, in *TRANSGENDER RIGHTS*, *supra* note 183, at 141, 155 (recounting the views of “lesbian feminist theorists” who “demonized transsexual women as the epitome of misogynist attempts to invade women’s space and appropriate women’s identity”); Kirkland, *supra* note 5, at 3 (recounting the hostility that some feminists hold toward transsexuals, viewing transsexual women just as “men who had mutilated themselves and because of their still-remaining male psyche and upbringing” should be excluded from feminism “since they continue to exhibit traits of their male dominance” and transsexual men as women who have “discarded their womanhood to join the patriarchy”).

185. See MILDRED L. BROWN & CHLOE ANN ROUNSLEY, *TRUE SELVES: UNDERSTANDING TRANSEXUALISM — FOR FAMILIES, COWORKERS, AND HELPING PROFESSIONALS* 175-76

It is difficult to understand these reactions as other than gendered or motivated by issues of sex and the proper role and status of the sexes. Many of these reactions are clearly based on gender hostility, such as the mother's characterization of her son's behavior as "so male" and the fact that the hostility of men who discover the transsexualism of a drinking buddy is expressed by rape. And even these reactions that are not based purely on hostility do appear to be motivated by beliefs about sex and gender. Accordingly, it appears that negative views about transsexual and transgendered individuals are related to gender and therefore are motivated, at least in part, because of sex.

If discrimination against transsexual and transgendered individuals is even partially motivated by gender or sex, then discrimination against transsexual and transgendered persons should appropriately be considered discrimination on the basis of sex, as sex would have been "a motivating factor" for the challenged employment practice, "even though other factors also motivated the practice."¹⁸⁶ However, courts have almost uniformly resisted this conclusion.

Before the recent trend by some courts to allow transsexual and transgendered individuals to assert claims of sex discrimination under a sex stereotyping theory, courts traditionally held that transsexual and transgendered persons simply were not entitled to the protection of Title VII, on the grounds that the congressional prohibition against sex discrimination was not intended to extend protection to those individuals.¹⁸⁷ Courts expressed this conclusion in a number of ways. For example, a number of courts concluded that the plain meaning of "sex" in Title VII does not include change of sex,¹⁸⁸ but instead only referred to biological sex.¹⁸⁹ Some went further to

(1996) (setting forth a letter written by a mother to son who disclosed her transsexualism and intent to become a woman).

186. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(m) (2000).

187. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) ("Simply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism.").

188. See, e.g., *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) ("[F]or the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise."); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) ("Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of 'sex' in mind."); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, at *8-10 (D. N.J. Sept. 10, 1975), *aff'd w/o opinion*, 538 F.2d 319 (3d Cir. 1976) ("In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term 'sex' other than its plain meaning."); *Powell v. Read's, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) ("A reading of the statute to cover plaintiff's grievance would be impermissibly contrived and inconsistent with the plain meaning of the words.").

189. *Doe v. U.S. Postal Serv.*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959, at *4-5 (D.D.C. June 12, 1985).

explain that Title VII was intended "to ensure that men and women are treated equally"¹⁹⁰ and to "prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred,"¹⁹¹ apparently concluding that either a transsexual man or a transsexual woman would have faced the same treatment by the employer.¹⁹²

In concluding that the plain language of Title VII indicates that transsexual persons were not entitled to the protection of the statute, the district court in *Dobre v. National Railroad Passenger Corp.*¹⁹³ drew a distinction between the term "sex" and the term "gender." The court explained that "[t]he term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity."¹⁹⁴ The court apparently concluded that the term "sex" does not include "gender," noting that Title VII meant only that an employer could not discriminate against a woman because she was a woman (or, presumably, a man because he was a man).¹⁹⁵

Attempts by courts to exclude transsexual and transgendered individuals from the protection of Title VII by defining the term "sex" not to include "gender" are clearly inconsistent with Supreme Court precedent interpreting Title VII, in particular its decision in *Price Waterhouse v. Hopkins*.¹⁹⁶ The plurality in that case seemed to draw no distinction between sex and gender, seeming to use the terms interchangeably.¹⁹⁷ Even more clearly, the plurality equated "gender" and

[I]n the absence of legislative history suggesting that Congress intended the word "sex" to mean anything other than the biological male or female sexes, we agree with the court in *Ulane*, that a "prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they are born."

Id.

190. *Holloway*, 566 F.2d at 663.

191. *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd w/o opinion*, 570 F.2d 354 (9th Cir. 1978).

192. *See id.* (stating that discrimination based on being a transsexual does not fall under Title VII).

193. *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286 (E.D. Pa. 1993).

194. *Id.*

195. *Id.*; *see also Cox v. Denny's, Inc.*, No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, at *5 (M.D. Fla. Dec. 22, 1999) ("Title VII protects against discrimination or harassment of males because they are male and females because they are female.").

196. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion).

197. For an example of the Court's interchangeable use of "sex" and "gender," compare *id.* at 237 (stating "even if a plaintiff shows that her *gender* played a part in an employment decision") (emphasis added), with *id.* at 239 ("Congress made the simple but momentous announcement that sex . . . [is] not relevant to the selection, evaluation, or compensation of employees.").

“sex” with the following reference to the language of the statute: “Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”¹⁹⁸ After quoting the statutory language prohibiting discrimination “because of such individual’s . . . sex,” the plurality went on to say that “[w]e take these words to mean that gender must be irrelevant to employment decisions.”¹⁹⁹ Justice O’Connor, in her concurrence, also used the term “gender” to refer to the protections of Title VII.²⁰⁰ Even the dissent seems to have equated the two words, using them interchangeably.²⁰¹ That the use of the term was not an accident is made obvious by the fact that the Court clearly extended protection to Ann Hopkins based on her gender nonconforming behavior, a trait not defined by her biological sex but by social expectations of the way women should act.²⁰²

198. *Id.* at 239.

199. *Id.* at 240.

200. *See id.* at 261 (O’Connor, J., concurring) (“[T]he burden of persuasion should shift to the employer to demonstrate by a preponderance of the evidence that it would have reached the same decision concerning Ann Hopkins’ candidacy absent consideration of her gender.”).

201. *See id.* at 284-85 (Rehnquist, Scalia & Kennedy, J.J., dissenting) (“That sex may be the legitimate cause of an employment decision where gender is a BFOQ is consistent with the opposite command that a decision caused by sex in any other case justifies the imposition of Title VII liability.”). A later case demonstrates that any attempt to draw a clear legal distinction between the meaning of the terms “sex” and “gender” has garnered the support of only a minority of the justices. In *J.E.B. v. Alabama*, the majority of the Court held that use of peremptory challenges for jurors on the basis of gender violated the Equal Protection Clause of the Fourteenth Amendment. *J.E.B. v. Alabama*, 511 U.S. 127, 128 (1994). Justice Scalia’s dissent, joined only by Justice Thomas and then Chief Justice Rehnquist, sought to draw a distinction between the meaning of “sex” and the meaning of “gender” in the following way:

Throughout this opinion, I shall refer to the issue as sex discrimination rather than (as the Court does) gender discrimination. The word “gender” has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male. The present case does not involve peremptory strikes exercised on the basis of femininity or masculinity (as far as it appears, effeminate men did not survive the prosecution’s peremptories). The case involves, therefore, sex discrimination plain and simple.

Id. at 157 n.1 (Scalia, J., dissenting). It is not clear at all, however, that Justice Scalia was correct in his assertion that the discrimination in that case was based on physical rather than “attitudinal” characteristics, given that men in that case were apparently subject to challenge, not because they had penises, but because it was assumed that they would be more sympathetic to the male litigant who was a defendant in a paternity and child support action. *Id.* at 137-38 (majority opinion). Indeed, the majority in that case expressly rejected the attempt of the state to rely on gender-based stereotypes to justify its gender-based challenges: “We shall not accept as a defense to gender-based peremptory challenges ‘the very stereotype the law condemns.’” *Id.* at 138.

202. *See Price Waterhouse*, 490 U.S. at 251 (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming

At least one court has concluded that the Supreme Court's equating of the terms "sex" and "gender" means that transsexual persons — as persons "who do not conform to socially-prescribed gender expectations" — have been subjected to gender, and therefore, sex discrimination.²⁰³ In *Schwenk v. Hartford*,²⁰⁴ the United States Court of Appeals for the Ninth Circuit considered a female transsexual inmate's claim that a sexual assault by a male prison guard violated the Gender Motivated Violence Act,²⁰⁵ which was a part of the Violence Against Women Act of 1994.²⁰⁶ In interpreting the Act's requirement that the violence be motivated by gender, the court looked to Title VII law, including *Price Waterhouse*, as evidence of the meaning of the term "gender."²⁰⁷ The court concluded that under both statutes, the terms "sex" and "gender" are interchangeable and that discrimination on both grounds is prohibited.²⁰⁸ Accordingly, the court said, "[d]iscrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII."²⁰⁹ In concluding that the plaintiff had presented sufficient evidence that the sexual assault had occurred because of gender, the court relied on evidence that the guard was aware that the plaintiff considered herself transsexual and a female and that the actions of the guard were motivated at least in part by her gender, which the court indicated in this case was "her assumption of a feminine rather than a typically masculine appearance or demeanor."²¹⁰ Accordingly, the court seems to have concluded that the prohibition on actions based on gender include action based on one's transsexualism.²¹¹

However, even courts that have found that transsexual and transgendered individuals can state claims under Title VII under a sex stereotyping theory have generally held that a sex discrimination

or insisting that they matched the stereotype associated with their group . . ."); see also *id.* at 272 (equating consideration of failure to conform to gender stereotypes as "discriminatory input into the decisional process").

203. *Schwenk v. Hartford*, 204 F.3d 1187, 1202 n.12 (9th Cir. 2000).

204. *Id.*

205. *Id.* at 1194; 42 U.S.C. § 13981 (2000). The Supreme Court in *United States v. Morrison* later held that Congress did not have the authority to enact this provision. *United States v. Morrison*, 529 U.S. 598, 598 (2000).

206. *Morrison*, 529 U.S. at 605 (discussing 42 U.S.C. § 13981 (2000)).

207. *Schwenk*, 204 F.3d at 1200-02.

208. *Id.*

209. *Id.*

210. *Id.*

211. See *id.* The court concluded that the conduct of the prison guard was covered by the Act, despite the guard's contention that "it was not clearly established at the time of the attack that gender motivation and animus encompassed acts motivated by a victim's transsexualism." See *id.* at 1204-05. The court responded to the guard's argument by stating that the Act clearly covered "all persons in the United States," including transsexuals. *Id.* at 1205.

claim cannot be made based on a claim of discrimination for being transsexual or transgendered. For example, the district court in *Creed v. Family Express Corp.*²¹² rejected the assertion of the plaintiff that the Supreme Court's decision in *Price Waterhouse* had "eviscerated" the prior court holdings that had concluded that transsexuals were not protected against discrimination by Title VII.²¹³ The *Creed* court concluded that while transsexuals can state a claim of sex stereotyping if their assertion that they were discriminated against for a failure to act or appear masculine or feminine enough arose from their appearance or conduct, they could not establish a claim of sex discrimination based on discrimination against transsexuals as transsexuals.²¹⁴

A few courts, however, have concluded — some only temporarily — that discrimination on the basis of transsexualism is a form of sex discrimination prohibited by Title VII. In a portion of the opinion later withdrawn, the United States Court of Appeals for the Sixth Circuit in *Smith v. City of Salem*,²¹⁵ after concluding that the female transsexual plaintiff could make out a claim of sex stereotyping, also indicated that an allegation of discrimination based on "self-identification as a transsexual — as opposed to his specific appearance and behavior" would also state a claim under Title VII.²¹⁶ The court reasoned:

By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. *Ergo*, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission — for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman — itself violates the prevalent sex stereotype that a man should perceive himself as a man. Discrimination based on transsexualism is rooted in the insistence that sex (organs) and gender (social classification of a person as belonging to one sex or the other) coincide. This is the very essence of sex stereotyping.²¹⁷

In the new opinion issued after this one was withdrawn, this paragraph was simply deleted, as was another sentence indicating that

212. *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cases (BNA) 609 (N.D. Ind. 2007).

213. *See id.* at 610.

214. *Id.* at 611.

215. *Smith v. City of Salem*, 369 F.3d 912 (6th Cir. 2004), *withdrawn*, 2004 U.S. App. LEXIS 15574 (6th Cir. July 28, 2004).

216. *Id.* at 921.

217. *Id.* at 921-22.

the court found the plaintiff's claim of discrimination "because of his identification as a transsexual" to be actionable under Title VII.²¹⁸ Accordingly, the court of appeals ultimately did not decide the question of whether discrimination against a transsexual person, as a transsexual, constituted discrimination on the basis of sex in violation of Title VII.

Another set of three opinions involves a court first suggesting — but not quite holding — that transsexual individuals as transsexuals are protected by Title VII, then backing away from that suggestion, before ultimately concluding that discrimination against transsexual individuals as transsexuals is prohibited sex discrimination. In *Schroer v. Billington*,²¹⁹ on consideration of the employer's initial motion to dismiss, the United States District Court for the District of Columbia held open the possibility that the plaintiff, a transsexual woman who had been denied a position as a terrorism research analyst with the Congressional Research Service, might be able to state a claim of sex discrimination based on discrimination because of her transsexualism.²²⁰ Courts holding that discrimination based on transsexualism is not protected by Title VII have often relied on the decision of the United States Court of Appeals for the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.*,²²¹ which concluded that transsexuals are not protected under Title VII, rejecting the district court's decision to the contrary.²²² The district court in *Schroer* suggested that it might be time to revisit the decision of the district court in *Ulane*²²³ "that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex.'" ²²⁴ The *Schroer* court cited to intervening changes in what "sex" under Title VII means, changing jurisprudence on the meaning of legislative history, and a need for a better understanding of the science of gender identity.²²⁵ The *Schroer* court reasoned that this "straightforward way" of dealing with transsexualism was appropriate in light of "the factual complexities that underlie human sexual identity," including "real variations in how the different components of biological sexuality — chromosomal, gonadal, hormonal, and neurological — interact with

218. Compare *id.* at 918, 921-22, with *Smith v. City of Salem*, 378 F.3d 571, 575 (6th Cir. 2004).

219. *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (mem.).

220. *Id.* at 212-13.

221. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286-87 (E.D. Pa. 1993) (citing *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984)).

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

223. *Schroer*, 424 F. Supp. 2d at 212-13.

224. *Id.* at 212 (citing *Ulane v. E. Airlines, Inc.* 581 F. Supp. 821, 825 (N.D. Ill. 1983)).

225. *Id.*

each other, and in turn, with social, psychological, and legal conceptions of gender.”²²⁶ The court indicated, however, that this decision could not be made on the pleadings, citing the need for a factual record to be compiled that reflected the scientific basis of sexual identity and gender dysphoria.²²⁷

On consideration of the employer’s new motion to dismiss, after a factual record had been compiled as to the scientific basis of gender identity, the district court in *Schroer* once again considered the issue of whether discrimination against transsexual individuals because they are transsexual constituted discrimination based on sex.²²⁸ The court again declined to decide this issue, this time because the court concluded that the plaintiff already survived the employer’s motion to dismiss because she had adequately made out a claim of sex discrimination based on sex stereotyping.²²⁹ The court did note that the testimony of the defendant’s expert — to the effect that sex was medically determined solely by chromosomes — could not be controlling on the legal meaning of “sex” because, as a legal matter, sex clearly refers to more than chromosomes, including social expectations of gender-related behavior.²³⁰ However, the court also cast doubt on whether discrimination on the basis of transsexualism should be recognized as sex discrimination as a legal matter, based on recent legislative action in Congress concerning gender identity.²³¹ The court noted that legislation was originally introduced that would have prohibited discrimination both on the basis of sexual orientation and gender identity, but that the legislation passed by the House of Representatives addressed only sexual orientation.²³² The court reasoned:

If Title VII itself bans discrimination on the basis of sexual or gender identity, the omission of protection for transsexuals in H.R. 3685 may be meaningless, but, even in an age when legislative history has been dramatically devalued as a tool for statutory interpretation, one proceeds with caution when even one house of Congress has deliberated on a problem and, *mirabile dictu*, negotiated a compromise solution.²³³

226. *Id.*

227. *Id.* at 213.

228. *Schroer v. Billington*, 525 F. Supp. 2d 58, 61 (D.D.C. 2007).

229. *Id.* at 63.

230. *See id.* at 61-63 (noting that the testimony of the expert offered by the plaintiff indicated “that a person’s sex is a multifaceted concept that incorporates a number of factors, including sex assigned at birth, hormonal sex, internal and external morphological sex, hypothalamic sex, and gender identity”).

231. *Id.* at 63-64.

232. *Id.*

233. *Id.* at 64. The legislative history referred to by the district court related to the Employment Non-Discrimination Act of 2007, which is not an amendment to Title VII,

While this recent legislative history might provide some evidence of the meaning that Congress presently gives to the word “sex” in Title VII, it is difficult to give serious weight to a 2008 legislative compromise in providing content to a term included in different legislation forty-four years earlier. In addition, as the district court in *Schroer* recognized in its earlier decision, the unanimous Supreme Court in *Oncale v. Sundowner Offshore Services, Inc.*²³⁴ pronounced that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”²³⁵ Accordingly, if the term “sex” in Title VII includes factors other than biological sex, such as gender identity, then the particular intent of the 1964 or 2008 Congress to provide protection against discrimination to transsexual and transgendered individuals should not be controlling.

The district court in *Schroer*, in its most recent opinion finding for the plaintiff after trial on the merits,²³⁶ also concluded that this recent legislative action was not controlling on the question of the meaning of “sex” as it relates to transsexual and transgendered individuals.²³⁷ The district court noted the hazard of relying on subsequent “legislative non-history” to give content to the intent of an earlier Congress and indicated that another reasonable interpretation of Congress’s action was “that some Members of Congress believe that the *Ulane* court and others have interpreted ‘sex’ in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation.”²³⁸

The district court concluded that the Library of Congress’s decision not to hire the plaintiff because of her “decision to transition, legally, culturally, and physically, from male to female” constituted discrimination on the basis of sex.²³⁹ The court noted the existence of expert testimony to the effect that the relevant scientific community

but, if enacted, would be a separate statute. See *supra* Part II for a discussion of that proposed legislation and the issue of gender identity. The term “*mirabile dictu*,” not previously known by this author, is defined in the WEBSTER’S COLLEGE DICTIONARY 864 (1991) as “strange to say; marvelous to relate.” THE ENCARTA WORLD ENGLISH DICTIONARY (North American ed., 2009), available at <http://encarta.msn.com> (search “*mirabile dictu*” within the dictionary link) (last visited Mar. 18, 2009) defines “*mirabile dictu*” as an “expression of wonder: used to introduce the announcement of something the speaker, genuinely or ironically, considers to be amazing.”

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

235. *Id.* at 79.

236. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

237. *See id.* at 308.

238. *Id.*

239. *Id.*

recognized gender identity to be one of several components of sex,²⁴⁰ but also noted that there was conflicting evidence presented.²⁴¹ The court indicated that resolving the dispute about the proper scientific definition of sex was not within the competence of the court but also was unnecessary.²⁴² Instead, the court relied on the legal definition of “sex” gleaned from the plain language of the statute.²⁴³ The court noted that the evidence established that the Library of Congress revoked the offer of employment “when it learned that a man named David intended to become . . . a woman named Diane” and that this was discrimination because of sex.²⁴⁴ In concluding that discrimination based on change of sex equates to sex discrimination, the court drew an analogy to religion, demonstrating that discrimination based on a change of religion would constitute unlawful religious discrimination.²⁴⁵ The court also noted that discrimination on the basis of race had not been defined narrowly to include only “discrimination for being one race or another.”²⁴⁶ Finally, the court concluded that even if “sex” was defined narrowly to include only biological sex, the Library of Congress’s decision not to hire her because she intended “to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”²⁴⁷

Before the recent district court decision in *Schroer*, the decision that had concluded most definitely that discrimination against transsexual and transgendered persons should be considered sex discrimination under Title VII was that of the United States District Court for the Northern District of Illinois in *Ulane*,²⁴⁸ a decision, as indicated previously, that was later reversed by the Seventh Circuit.²⁴⁹

240. *Id.* at 306 & n.7. (noting the testimony of Dr. Walter Bockting, Associate Professor at the University of Minnesota Medical School specializing in gender identity disorders, that the “nine factors that constitute a person’s sex” are gender identity, “chromosomal sex, hypothalamic sex, fetal hormonal sex, pubertal hormonal sex, sex of assignment and rearing, internal morphological sex, external morphological sex, and gonads”).

241. *Id.* at 306 (noting the conflicting testimony of Dr. Chester Schmidt, Professor of Psychiatry at the Johns Hopkins University School of Medicine that gender identity is “a component of ‘sexuality’ rather than ‘sex,’” in that components of sex have “a determined biologic etiology,” which gender identity does not).

242. *Id.*

243. *Id.* at 306-07 (indicating that other courts have allowed their focus on the issue of transsexualism to “blind them to the statutory language itself” and that the reasoning of courts that Title VII prohibits only discrimination against men because they are men and discrimination against women because they are women “represent[s] an elevation of ‘judge-supposed legislative intent over clear statutory text’”) (quoting *Zuni Pub. Sch. Dist. v. Dep’t of Educ.*, 550 U.S. 81 (2007) (Scalia, J., dissenting)).

244. *Id.*

245. *Id.*

246. *Id.* at 307 n.8.

247. *Id.* at 308.

248. *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill 1983).

249. *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

The *Ulane* case involved a transsexual woman who was fired as a pilot after she had sex reassignment surgery and sought to return to work.²⁵⁰ In considering the motion to dismiss filed by the employer on the grounds that Title VII did not reach the plaintiff's claim, the district court acknowledged that Congress did not specifically consider the question of whether transsexuals should be covered by the statute at the time Title VII was enacted, but did not find that fact to be controlling.²⁵¹ Instead, the district court relied on the "literal language" of the statute and the fact that Congress had not acted to exclude transsexuals from the term "sex," as well as the fact that cases decided since the enactment of Title VII had broadened what might have originally been meant by the term "sex."²⁵² The court indicated that it was not free "to disregard that plain language."²⁵³ The court reasoned:

I do not see how it can be said here, assuming for purposes of the motion the truth of the allegations of the complaint, that plaintiff was not fired because of her sex. It seemed to me the plaintiff made a telling argument in her brief when she suggested that the firing was, in effect, a statement that a condition of plaintiff's continued employment was that she remain a male. And if that suggestion is valid, then clearly the allegations of the complaint show that the discharge was because of sex. . . .

What does seem to me apparent is that there is no way out of the conclusion that whatever the physiology may be it has [something] to do with sex, as that term is commonly understood. And what I meant when I said earlier that the statute must be given both a literal and a broad interpretation is that the discharge need only have some causal connection to a sexual consideration in order to be prohibited by the statute.²⁵⁴

The court's analysis, rendered some time before the Supreme Court's decision in *Price Waterhouse* and the subsequent amendment of

250. For a description of the facts of the case, see the district court's consideration of the parties' motions for summary judgment, *Ulane v. E. Airlines, Inc.*, No. 81 C 4411, 1983 U.S. Dist. LEXIS 17407, at *1-3 (N.D. Ill. Apr. 26, 1983).

251. *Ulane v. E. Airlines, Inc.*, No. 81 C 4411, 1982 U.S. Dist. LEXIS 13049, at *2-3 (N.D. Ill. Apr. 21, 1982).

252. *Id.* at *2.

253. *Id.*

254. *Id.* at *3-4. The transcript of the court's ruling on the motion to dismiss actually uses the word "nothing" in the bracketed portion of the quotation. However, in the transcript of the court's findings of fact and conclusions of law on the merits of the case, the district court judge indicated that the statement as quoted was the exact opposite of what he intended to say. He asked that the word "something" be substituted for the word "nothing," so that he did "not go down in posterity as someone who cannot articulate a reason for a decision." *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 838-39 (N.D. Ill. 1984).

Title VII by § 107(a) of the Civil Rights Act of 1991,²⁵⁵ appears to have accurately predicted both the broadening of the meaning of the term “sex” that occurred in the Court decision and the fact that an employment practice will be found to be unlawful sex discrimination even if it is motivated in part by sex and in part by other considerations.

In a later opinion denying the parties’ motions for summary judgment, the district court in *Ulane* reiterated its prior conclusion that the plaintiff had made out a claim of sex discrimination, noting its previous order to the effect that Title VII is violated by firing an employee for having a sex change operation.²⁵⁶ The court also rejected several of the justifications provided by the employer in its letter terminating the plaintiff’s employment as insufficient to rebut the plaintiff’s prima facie case of sex discrimination, including the contention that the plaintiff had severed the employment relationship by an operation changing her into a different person than the one that the employer had hired.²⁵⁷ The court indicated that the assertion that the “plaintiff is no longer qualified because she was male when she applied for the job but is no[w] female, goes right to the heart of Title VII’s prohibition of sexual discrimination.”²⁵⁸

The final reported decision of the *Ulane* district court was its order, including findings of fact and conclusions of law, after trial of the case. On the issue of whether discrimination against transsexuals was prohibited by Title VII, the court addressed the meaning of the word “sex,” after apparently hearing substantial medical and scientific evidence about the nature of gender identity and its relationship to the determination of an individual’s sex:

I find by the greater weight of the evidence that sex is not a cut-and-dried matter of chromosomes, and that while there may be some argument about the matter in the medical community, the evidence in this record satisfies me that the term, “sex,” as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.²⁵⁹

255. Civil Rights Act of 1991, § 107(a), Pub. L. No. 102-166, 105 Stat. 1071 (1991) (amended § 703(m) of Title VII, codified at 42 U.S.C. § 2000e-2(m) (2000)) (providing that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice”).

256. *Ulane v. E. Airlines, Inc.*, No. 81 C 4411, 1983 U.S. Dist. LEXIS 17407, at *5 & n.2 (N.D. Ill. Apr. 26, 1983).

257. *Id.* at *4-5.

258. *Id.* at *5.

259. *Ulane*, 581 F. Supp. at 825.

The court acknowledged that Congress had not thought about the issue of whether the word "sex" includes transsexuals, but that the court was required to interpret the language used by Congress.²⁶⁰ The court held that the most reasonable way to interpret the word "sex" was to conclude that the word "literally applies to transsexuals and that it applies scientifically to transsexuals," based on the factual record developed in the case.²⁶¹

Although the district court in *Ulane* found the literal language of Title VII and the failure of Congress to specifically address the issue of whether Title VII protected transsexual persons to support its interpretation of the statute, the court of appeals in *Ulane* relied on the same factors to reach the opposite conclusion.²⁶² The court of appeals found the plain language of the statute to mean that it is unlawful to discriminate against women because they are women and men because they are men, but that the term "sex" did not reach "discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born."²⁶³ The court found the lack of legislative history on the meaning of the word "sex" to strongly reinforce this interpretation.²⁶⁴

The court of appeals indicated that a person with a sexual identity disorder was "a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male."²⁶⁵ The court of appeals would seem to have been describing someone who, in the reasoning of the district court, had a different sexual identity than his or her chromosomal sex, both of which the district court thought, based on the medical and scientific evidence, were components of the determination of "sex."²⁶⁶ But the court of appeals seemed almost dismissive of the efforts of the district court to educate itself about transsexualism before deciding whether

260. *Id.*

261. *Id.*

262. *Ulane v. E. Airlines, Inc.*, 742 F. 2d 1081, 1085 (7th Cir. 1984).

263. *Id.*

264. *Id.* The court of appeals said that the lack of legislative history indicates that Congress had only the traditional concept of sex in mind because "[h]ad Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation." *Id.* But, of course, the district court judge had conceded that Congress had not specifically considered the application of the statute to transsexuals, and the court of appeals failed to mention that there was "not the slightest suggestion in the legislative record" that would give any hint of the meaning of the term "sex." *See id.*

265. *Id.*

266. *See supra* notes 259-61 and accompanying text.

discrimination on that basis was motivated, at least in part, by sex. The court of appeals indicated that:

We do not believe that the interpretation of the word “sex” as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof.²⁶⁷

However, if the legislative history of Title VII is silent on the issue of whether transsexual and transgendered individuals were intended to be protected by the prohibition of sex discrimination — as it certainly is — and if the Supreme Court dictates that “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed,”²⁶⁸ — as the Court has said — then all we have to go on to determine whether transsexual and transgendered persons are protected by Title VII is the meaning of the term “sex.” The often-asserted position that the word “sex” means simply biological sex is no longer defensible in light of Supreme Court decisions, including *Price Waterhouse*, that have clearly defined the word “sex” to include sex- and gender-linked characteristics within the scope of the term.²⁶⁹ The remaining question, then, is whether sexual identity or gender identity is one of the gender-linked characteristics properly included within the scope of the word “sex.”

In the absence of relevant legislative history as to the meaning of the word “sex” in Title VII, there are a number of sources that might be consulted in order to provide meaning to the term. One source is the common societal meaning of the word, including definitions of “sex” set forth in dictionaries in use at the time of the enactment of the statute,²⁷⁰ which may have been the concept sought to be captured by Congress in enacting the statute. Another source

267. *Ulane*, 742 F.2d at 1086. The court of appeals concluded that it was up to Congress to protect transsexuals from discrimination “[i]f Congress believes that transsexuals should enjoy the protection of Title VII,” and that for the court to hold that Title VII protects transsexuals “would take us out of the realm of interpreting and reviewing and into the realm of legislating.” *Id.* at 1086-87.

268. *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 79 (1998).

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

270. The Supreme Court has previously looked to dictionaries in determining the meaning of race in interpreting 42 U.S.C. § 1981. In *St. Francis College v. Al-Khazraji*, the unanimous Court looked to the definition of “race” in dictionaries from the nineteenth century, because the statute was originally enacted as part of the Civil Rights Act of 1866 and the Voting Rights Act of 1870, to determine the meaning of the term “race.” *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610-11 (1987).

might be the meaning of the term as understood by medical professionals responsible for determining an individual's sex. Finally, one might look to legal meanings of the term "sex" as included in Title VII, for instance, by looking at how other similar terms and classifications in Title VII have been interpreted.

Definitions of the word "sex" from dictionaries in use at or around the time of the enactment of Title VII of the Civil Rights Act of 1964 suggest a meaning of "sex" not restricted to biological sex. *Webster's Third New International Dictionary of the English Language*, published in 1961, defines "sex" as a noun to include not only "one of the two divisions of organic esp. human beings respectively designated male or female" — which arguably means biological sex — but also "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction" — which would seem to include aspects of sex that are not strictly biological, including behavioral aspects of sex.²⁷¹ Similarly, *Webster's Seventh New Collegiate Dictionary*, published in 1965, defines "sex" as a noun to mean "either of two divisions of organisms distinguished respectively as male or female," as well as "the sum of the structural, functional, and behavioral peculiarities of living beings that subserve reproduction by two interacting parents and distinguish males and females."²⁷² *The Random House Dictionary of the English Language*, published in 1966, defines "sex" to include both "the fact or character of being either male or female" and "the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences."²⁷³ Although it is true that the first meaning of the term in each of these dictionaries is the one that suggests the "biological" meaning, the second and broader meaning of the word "sex" is by no means an unusual or uncommon meaning that would have been

271. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2081 (G. & C. Merriam Co. 1961). The word "transsexual" is not found in the dictionary, but the word "transvestism" is defined to mean "the practice of adopting the dress, the manner, and frequently the sexual role of the opposite sex." *Id.* at 2431. The word "gender" is defined, in addition to its linguistic meaning, to mean "sex." *Id.* at 944.

272. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 795 (G. & C. Merriam Co. 1965). The word "gender" is defined to mean "sex," as well as its given linguistic meaning. *Id.* at 347. The word "transsexual" is not found in the dictionary. *Id.* at 941-42. The word "transvestism" is defined to mean "adoption of the dress and often behavior of the opposite sex." *Id.* at 942.

273. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1307 (Jess Stein & Lawrence Urdang, eds., Random House 1966). The second meaning of the term "gender" is "sex"; the first meaning is the linguistic one. *Id.* at 589. The word "transsexual" is not found in the dictionary, but the word "transvestism" is defined to mean "the practice of wearing clothing appropriate to the opposite sex, often as a manifestation of homosexuality." *Id.* at 1507.

unknown to the members of the 1964 Congress. There is nothing about these dictionary definitions that would suggest that gender-related characteristics, including gender identity, are excluded from this term. Instead, it would appear that gender identity would be one of the behavioral or functional differences between the sexes referred to in the broader versions of the definition of the word “sex.”

Some courts have found this broader meaning of the word “sex” to apply in interpreting statutes that, like Title VII, prohibit discrimination on the basis of sex, suggesting that the meaning of the term “sex” is not so plain. For example, in *Enriquez v. West Jersey Health Systems*,²⁷⁴ the New Jersey Superior Court had to decide whether the female transsexual plaintiff could state a claim of sex discrimination under the New Jersey Law Against Discrimination (LAD)²⁷⁵ based on her claim that she was terminated because of her external transformation from male to female.²⁷⁶ Although recognizing that Title VII’s prohibition against sex discrimination had not been interpreted to prohibit discrimination on the basis of transsexualism,²⁷⁷ the court indicated that it disagreed with the rationale of decisions finding that discrimination on the basis of transsexualism is not discrimination on the basis of sex, finding them to use “too constricted” a view of sex discrimination.²⁷⁸ The court reasoned:

A generation ago, when Justice Handler served in the Appellate Division, he found that “[t]he evidence and authority which we have examined, however, show that a person’s sex or sexuality embraces an individual’s gender, that is, one’s self-image, the deep psychological or emotional sense of sexual identity and character.” We agree with Justice Handler that “sex” embraces an “individual’s gender,” and is broader than anatomical sex. “[S]ex is comprised of more than a person’s genitalia at birth.” The word “sex” as used in the LAD should be interpreted to include gender, protecting from discrimination on the basis of sex or gender.²⁷⁹

The court, finding “incomprehensible” an interpretation of the statute that condones discrimination against men and women who seek

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

275. *Id.* at 367. The prohibition of sex discrimination was added to the statute in 1970. 1970 N.J. Laws page no. 299 (effective June 2, 1970); see also N.J. STAT. ANN. § 10:5-3 (West 1976). The common meaning of “sex” at that time, as reflected in dictionaries of that period, appears to have been the same as when Title VII was enacted.

276. *Enriquez*, 777 A.2d at 367-68.

277. The court did note, however, that the Supreme Court’s decision in *Price Waterhouse* “signaled a possible change in the federal approach to gender dysphoria.” *Id.* at 371.

278. *Id.* at 372.

279. *Id.* at 373 (citations omitted).

to change their anatomical sex, concluded that "sex discrimination under the LAD includes gender discrimination so as to protect [the] plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman."²⁸⁰

Another example of a court giving a broader interpretation to the term "sex" can be found in the decision of the European Court of Justice in the decision of *P. v. S. and Cornwall County Council*.²⁸¹ In that case, the court, lacking either a clear definition of the term "sex" or relevant legislative history, had to decide whether article 2(1) of European Union Council Directive 76/207/EEC, which provided that "there shall be no discrimination whatsoever on grounds of sex,"²⁸² should be interpreted to prohibit discrimination in employment on the basis of transsexualism.²⁸³ The plaintiff was a transsexual woman who was given notice of dismissal when she indicated that she intended to undergo gender reassignment.²⁸⁴ The court concluded that the provision prohibiting discrimination on the basis of sex "cannot be confined simply to discrimination based on the fact that a person is of one or the other sex" but instead applied to discrimination arising from the gender reassignment of the plaintiff.²⁸⁵ In reaching this conclusion, the court apparently adopted the argument of the Advocate General, who had reasoned as follows in his recommendation to the court that discrimination on the basis of transsexualism be held to be discrimination on the basis of "sex":

The objection is taken too much for granted, and has been raised on several occasions in these proceedings that the factor of sex discrimination is missing on the ground that 'female transsexuals' are not treated differently from 'male transsexuals.' In short, both are treated unfavourably, hence there can be no discrimination at all. . . .

I am not convinced by that view. It is quite true that even if P. had been in the opposite situation, that is to say changing from female to male, it is possible that she would have been dismissed anyway. One fact, however, is not just possible, but is certain: P. would not have been dismissed if she had remained a man.

So how can it be claimed that discrimination on grounds of sex was not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, where

280. *Id.*

281. Case C-13/94, *P. v. S. & City of Cornwall County Council*, 1996 E.C.R. I-2159.

282. Council Directive 76/207, art. 2, 1976 O.J. (L 39) 40.

283. *See* Case C-13/94 at I-2164.

284. *See id.* at I-2160.

285. *See id.* at I-2165.

unfavourable treatment of a transsexual is related to (or rather is caused by) a change of sex, there is discrimination by reason of sex or on grounds of sex, if that is preferred.²⁸⁶

The Advocate General also noted that discrimination against women is generally not based on their physical characteristics but the “image which society has of women.”²⁸⁷ The Advocate General indicated that the same thing was generally true with respect to transsexual individuals, suggesting the equivalence of discrimination on the basis of transsexualism and sex discrimination against women.²⁸⁸ He also indicated that denying the plaintiff protection against discrimination because the discrimination was based on her change of sex “would be a quibbling formalistic interpretation and a betrayal of the true essence of that fundamental and inalienable value which is equality.”²⁸⁹ Finally, the Advocate General argued that extending protection to transsexualism as a form of sex discrimination was appropriate because of “a universal fundamental value” that declares sex irrelevant to employment, which would be violated if an employee were allowed to be dismissed “because he or she changes from one of the two sexes (whichever it may be) to the other by means of an operation which — according to current medical knowledge — is the only remedy capable of bringing body and mind into harmony.”²⁹⁰

Medical and psychological research has confirmed that determining an individual’s sex — whether he is a man or she is a woman — is indeed more complex than the courts have generally recognized. It is true, of course, that in most circumstances, the different components that go into determining an individual’s sex coincide, so that the determination of sex is not controversial or disputed. Babies who are “sexed” at birth by a study of external genitals generally also have the “proper” chromosomes and internal sexual organs to correspond to their assigned sex. But the existence of intersexed individuals, whose chromosomes, internal sex organs, and external sex organs are not consistent with a uniform determination of male or female, demonstrate that these physical components of sex can vary among individuals.²⁹¹ It appears that gender identity, or psychological

286. Opinion of Advocate General Tesauro, in *P. v. S. & City of Cornwall County Council*, Case C-13/94, 1996 E.C.R. I-2143, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61994C0013:EN:html> (last visited Mar. 18, 2009).

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. See generally, Anne Fausto-Sterling, *Of Gender and Genitals: The Use and Abuse of the Modern Intersexual*, in *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 3, 3-77 (2000), for a discussion of determinates of the assignment of gender

sex, may also vary from other components of determining sex. That is, some individuals whose physical manifestations of sex would suggest one gender instead self-identify as a member of the other gender. One leading scholar of gender identity has indicated his belief that transsexual and transgendered persons are “intersexed in their brains.”²⁹²

Studies of gender-role development suggest that children acquire stereotypes about the roles of each gender at a very early age from a variety of familial, social, and cultural influences and that a child’s gender identity — self-categorization as a boy or girl — is acquired around age three.²⁹³ Other studies indicate that gender identity may have a biological component and have demonstrated that the brain components of transsexual persons are more similar to those whose gender identity they share than those who have genitals like theirs.²⁹⁴ To the extent that gender identity is found to have a biological component, it will be increasingly difficult for the courts to draw clear distinctions between gender identity and “biological” sex.

The realities of sex discrimination in the context of employment suggest that the legal definition of “sex” should be broader than what is commonly thought of as biological sex. Although biological sex might be thought to be determined by chromosomes, internal sex organs, and external genitals, employers do not commonly engage in discrimination on the basis of these characteristics.²⁹⁵ Employers do not generally require tests of or have access to information about chromosomes before making employment decisions.²⁹⁶ Nor do employers conduct examinations of internal or external genitalia before engaging in sex discrimination.²⁹⁷ Instead, employers make assumptions

at birth and the ways in which the chromosomes, internal sex organs, and external sex organs of intersex individuals differ from the expected determinates of gender.

292. Diamond, *supra* note 176, at 597 n.14.

293. See Alexa A. Albert & Judith R. Porter, *Children’s Gender-Role Stereotypes: A Sociological Investigation of Psychological Models*, 3 SOC. F. 184, 186-90 (1988); see generally Marsha Weinraub, et al., *The Development of Sex Role Stereotypes in the Third Year: Relationships to Gender Labeling, Gender Identity, Sex-typed Toy Preference, and Family Characteristics*, 55 CHILD DEV. 1493 (1984).

294. Diamond, *supra* note 176, at 593.

295. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding sex discrimination based on the employer’s sex stereotype in stating that a female employee needed “to take ‘a course at charm school’”); *Wilson v. S.W. Airlines Co.*, 517 F. Supp. 292 (N.D. Tex. 1981) (rejecting Southwest Airlines’ assertion that discrimination against males was justified because of a bona fide occupation qualification requiring only females be hired because of “sex appeal”). These types of claims do not hinge on the employer’s awareness of an employee’s chromosomes or reproductive organs.

296. Cf. Press Release, U.S. Equal Employment Opportunity Commission (Feb. 9, 2001), <http://www.eeoc.gov/press/2-9-01-c.html> (stating that it is the Commission’s “position that basing employment decisions on genetic testing violates the ADA”).

297. For a rare case, see *Kastl v. Maricopa County Cmty. Coll. Dist.*, 2004 U.S. Dist. LEXIS 29825, at *4, *10-12 (D. Ariz. June 2, 2004) (refusing to grant the employer’s

and decisions about sex based on an employee's gender presentation or, perhaps, secondary sex characteristics. However, depending on the progress of a transsexual individual's transitioning, the individual may well have a gender presentation and secondary sex characteristics consistent with his or her gender identity. And, as the litigated cases show, employers generally take employment actions against transsexual and transgendered individuals based on their gender presentation or secondary sex characteristics, not based on their chromosomes, internal sex organs, or genitals.²⁹⁸

Legal definitions of the word "sex" also suggest that a broader interpretation of the term is the more appropriate one. Although the term "sex" was not defined in Title VII at the time of its enactment,²⁹⁹ an amendment to this statute added a partial definition of "sex" that suggests that it means something more than whether one is a man or a woman. In the Pregnancy Discrimination Act of 1978,³⁰⁰ Congress added a definition of "sex" to the Act, providing that "because of sex" includes but is not limited to "on the basis of pregnancy, childbirth, or related medical conditions."³⁰¹ Although pregnancy clearly has a biological component, the addition of this definition to Title VII suggests that the statute was aimed at more than just protecting men because they are men and women because they are women, in that protection was also extended to pregnancy, a sex-linked characteristic.³⁰² Indeed, the employment discrimination against pregnant women that the statute was intended to address is likely often based on the societal and cultural expectations of pregnant women rather than the physical aspects of pregnancy.³⁰³

motion to dismiss plaintiff's Title VII sex discrimination claim based on a restroom use policy). It is true that in *Kastl* an employer sought to justify its termination of a pre-operative transsexual woman because of her refusal to use the men's restroom based on the argument that its "restroom policy segregate[d] restroom use by genitalia" rather than sex and that "a legitimate genitalia-based policy cannot constitute sex discrimination," but the employer apparently required only the plaintiff and one other transsexual employee to provide proof as to the state of their genitals. *See id.* at *4, *11, *34.

298. *See id.* at *4, *7-8.

299. *See* Sheila Hatami & David Zwerin, Note, *Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena*, 25 HOFSTRA LAB. & EMP. L.J. 311, 316 (2007) (discussing the lack of debate and legislative history regarding the meaning of "because of sex" under Title VII).

300. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

301. *Id.*

302. *See id.*

303. For example, in House Report No. 95-948 on the bill that became the Pregnancy Discrimination Act, the Committee on Education and Labor indicated the following with respect to the purpose of the bill:

As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead end jobs. H.R. 6075

Additional evidence of the meaning of “sex” in Title VII, in particular as to whether the term should be interpreted to include gender-related characteristics, including gender identity, can be gleaned from the other categories of discrimination protection set forth in the statute. Title VII, in addition to prohibiting discrimination on the basis of sex, also prohibits discrimination on the basis of race and national origin,³⁰⁴ classifications that might, like sex, be narrowly interpreted to apply to only those who are identifiably part of the classification as a matter of biology or historical fact. Accordingly, one might ask whether these other classifications extend protection to only a narrowly defined classification — whether one has a certain level of “blood” of a particular race or a sufficient number of ancestors from a particular country — or whether protection is also properly extended by the statute to behaviors, expressions, and appearances related to those classifications. That is, does Title VII’s prohibition against racial discrimination prohibit an employer from discriminating against an individual who identifies as a member of a particular racial or ethnic group only if he or she can show a sufficient genetic connection to that group, regardless of whether he or she self-identifies and engages in practices associated with that group?³⁰⁵ Does Title VII’s

unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.

H.R. REP. NO. 95-948, at 3 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4751 (1978). The House Report also made clear that the bill represented a clarification of Congress’s original intent as to the meaning of the term “sex” rather than a change in the meaning of the statute. *Id.* at 4.

304. 42 U.S.C. § 2000e-2 (2000). Title VII also prohibits discrimination on the basis of religion, but because religion is defined broadly in the statute to “include[] all aspects of religious observance and practice, as well as belief,” it might be argued that the broader meaning of this term is statutorily required, unlike the term “sex.” 42 U.S.C. § 2000e(j). It should be noted, however, that this definition, like the definition of sex to include pregnancy and related conditions, was also added because of court decisions that too narrowly interpreted the original provisions of the statute. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); 118 CONG. REC. 705-731 (Jan. 21, 1972) (statement of Sen. Randolph) (proposing an amendment to add a definition of religion to Title VII in order to provide, through legislation, what was originally intended by the Civil Rights Act but “clouded” by court decisions).

305. It is true that discrimination has been allowed on the basis of some types of dress that might well be viewed as an aspect of racial identity, such as the wearing of cornrows or dreadlocks. However, the “grooming code” cases — in which courts have allowed employers to engage in a broad range of behavior that would appear to be discriminatory in an analytical sense — are sufficiently different from other types of discrimination cases that they should be regarded as *sui generis*, at least with respect to conducting a proper analysis of the meaning of discrimination. *See, e.g.,* *Pitts v. Wild Adventurers, Inc.*, No. 7:06-CV-62-HL, 2008 U.S. Dist. LEXIS 34119, at *4, *15 (M.D. Ga. Apr. 25, 2008) (upholding an employer prohibition of dreadlocks and cornrows against a challenge of racial discrimination because, even if hairstyles are worn predominately by African Americans, “grooming policies are typically outside the scope of federal

protection of national origin dictate that employment actions not be based only on the country from which one comes but also on his or her language and accent?³⁰⁶

In *Perkins v. Lake County Department of Utilities*,³⁰⁷ the district court considered the argument of the employer that the plaintiff could not make out a claim of racial discrimination based on his status as a Native American because he was not in fact a Native American.³⁰⁸ In support of this contention, the employer engaged in a study of the plaintiff's genealogy in order to prove that he was not a Native American.³⁰⁹ The district court, in refusing to grant the employer's motion for summary judgment, noted "that the issue of membership in a given racial classification is deceptively complex."³¹⁰ The district court noted that "the Supreme Court [has] recognized the problematic nature of racial categorization" and that many scientists "conclude that racial classifications are for the most part sociopolitical, rather than biological."³¹¹ The district court went on to find that the categorization of individuals into racial groups is largely a matter of perception and self identification. The court refused to find that the fact that the plaintiff may have had less than one-sixteenth Native American blood meant that he was not Native American, in light of his belief that he was Native American and his representation of himself as Native American.³¹²

employment discrimination statutes because they do not discriminate on the basis of immutable characteristics").

306. Courts have generally held that discrimination based on a foreign accent is discrimination on the basis of national origin, subject only to the bona fide occupational qualification defense. *See, e.g.,* *Gold v. FedEx Freight E., Inc.*, 487 F.3d 1001, 1008-09 (6th Cir. 2007) (stating comments about accent were direct evidence of national origin discrimination because "accent and national origin are inextricably intertwined."); *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1044-45 (7th Cir. 2000) (stating that a comment that foreign accent cannot be understood supports inference of national origin discrimination). And while the case law surrounding language discrimination is a little more ambiguous, compare *Garcia v. Gloor*, 618 F.2d 264, 270-71 (5th Cir. 1980) (holding that while the ability to speak a language other than English might be equated with national origin, a requirement that employees who can speak English do so while on duty does not violate Title VII), with *Maldonado v. City of Altus*, 433 F.3d 1294, 1301-09 (10th Cir. 2006) (finding evidence of a hostile work environment based on an English-only rule), while the EEOC takes the position that English-only rules implicate national origin discrimination because "[t]he primary language of an individual is often an essential national origin characteristic." *See* Guidelines on Discrimination Because of National Origin, 29 C.F.R. § 1606.7 (2008).

307. *Perkins v. Lake County Dep't of Utilities*, 860 F. Supp. 1262 (N.D. Ohio 1994).

308. *Id.* at 1264.

309. *See id.* at 1266.

310. *Id.* at 1271.

311. *Id.* at 1272 (quoting *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987)).

312. *Id.* at 1276-77. The court also noted the oddity of this case, in which the employer went to great lengths to try to establish that the plaintiff was not a member of the racial group in which he claimed membership. The court noted that "it is difficult to imagine

Similarly, in *Bennun v. Rutgers State University*,³¹³ the court of appeals upheld the trial court's conclusion that the plaintiff was Hispanic and therefore could bring a claim of national origin discrimination.³¹⁴ The employer had sought to rely on the fact that the plaintiff's mother was born in Romania and his father in Israel in contending that the plaintiff was not Hispanic.³¹⁵ The district court had found the plaintiff to be Hispanic based not only on the fact that his father was a Sephardic Jew who could trace his lineage to Jews expelled from Spain during the Spanish Inquisition, but also the fact that the plaintiff was born in Argentina, believed that he was Hispanic, spoke Spanish in his home, and adopted Spanish culture in his life.³¹⁶ The court of appeals agreed with the district court's conclusion, holding that this conclusion was supported by his "birth in a Latin American country where Hispanic culture predominates, his immersion in Spanish ways of life and the fact that he speaks Spanish in the home."³¹⁷ Accordingly, the court gave weight not only to historical facts and ancestry, but also to the plaintiff's identity as a member of a particular national origin and possession of traits associated with that national origin.³¹⁸

That courts have been willing to extend protection to individuals based on their racial identity or national origin identity under the protected categories of "race" and "national origin" suggests that one's sexual or gender identity should be subject to protection under the category of "sex." These comparisons are not tricks of semantics. Sexual or gender identity is not fundamentally different from racial identity and national origin identity, other than the fact that we have created new words and categories of persons to describe persons with a gender identity incongruent with their biological sex — "transsexual" or "transgendered" — while no such word or concept can be clearly articulated with respect to the other classifications.

an employer challenging an employee's status as an African-American and requiring proof of ancestry in a Title VII case in which a black Plaintiff alleged employment discrimination." *Id.* at 1278 n.20.

313. *Bennun v. Rutgers State Univ.*, 941 F.2d 154 (3d Cir. 1991).

314. *Id.*

315. *Id.* at 171.

316. *Id.* at 172-73.

317. *Id.* at 171-73.

318. *See id.*; *see also* *Eriksen v. Allied Waste Sys., Inc.*, No. 06-13549, 2007 U.S. Dist. LEXIS 23909, at *17, *28 (E.D. Mich. Apr. 2, 2007) (concluding that the plaintiff had shown sufficient evidence to raise an issue of fact as to whether she was a Native American for purposes of her claims of national origin discrimination under a state anti-discrimination statute, which, like Title VII, does not contain a definition of "national origin," and relying on the fact that the plaintiff represented herself as a Native American, participated in Native American social and ceremonial events, and testified as to her belief about her Native American ancestry).

We do not have a readily available word to describe someone whose racial identity is not congruent with their “real” race because we have not generally felt a need to classify those persons — although in less enlightened times, society followed the “one drop of blood” rule and imposed sanctions on minorities who tried to “pass” as white.³¹⁹ Members of a particular national origin who do not conform to their expected language and customs are not subject to sanction because as a society we tolerate and value — and sometimes even force — assimilation.³²⁰

But gender identity has been treated differently because sex and gender classifications continue to be rigid in our society and failure to comply with the expectations associated with those categories causes discomfort and anger. The more gender nonconforming the behavior, the more discomfort and anger that is created. But these societal realities do not justify providing less protection to gender nonconformists than to individuals who fail to conform to the societal expectations of other protected classifications. After all, Title VII was enacted at least in part to counteract the prejudices of society toward individuals because of traits associated with these protected classifications, so the prejudices that society holds toward gender nonconformists — including transsexual and transgendered individuals — should not be a justification for denying them protection against what is, at its essence, discrimination on the basis of sex.

CONCLUSION

Sexual minorities, including transsexual and transgendered individuals, have continued to fall largely outside of the protections of the workplace discrimination statutes at a federal level and in a majority of states. But the structure necessary to provide such protection is already in place. Title VII of the Civil Rights Act of 1964 and virtually all state statutes prohibit discrimination in employment on the basis of sex. As demonstrated in this Article, the term

319. See generally the discussion of the implications of the “one drop” rule, which classified individuals as black with as little as one drop of “black blood,” originally as a way to expand the slave population to include slaveholders’ children with their slaves and later as a way to keep the white race “pure,” in Lawrence Wright, *One Drop of Blood*, NEW YORKER, July 25, 1994, at 46.

320. See Juan F. Perea, *Buscando América: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1426-33 (2004) (discussing the history of forced assimilation of Latinos through attempts to eliminate use of Spanish in schools and in the workplace); see also Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 876-96 (2002) (discussing “assimilationist bias” with respect to race and language and tendency of this bias to force groups protected by anti-discrimination statutes to engage in compulsory assimilation).

“sex” should be defined more broadly than courts have seen fit to do with respect to sexual minorities, because the term has been defined quite broadly, in other contexts, to extend protection not only based on biological characteristics but also on the basis of gender-linked traits. Gender identity — or psychological gender — would appear to be a classic gender-linked trait and therefore the essence of what should be provided protection by the prohibition against sex discrimination. Indeed, even if sex discrimination were to be narrowly defined to mean discrimination against men because they are men and women because they are women, it would appear that discrimination on the basis of gender identity — the innate sense of whether one is a man or one is a woman — would be prohibited discrimination on the basis of sex.