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TRANSFORMING TRANSSEXUAL AND TRANSGENDER RIGHTS

L. Camille Hébert*

I. Introduction.

Although anti-discrimination laws, on both a federal and state level, extend protection against discrimination in employment for a broad range of classifications, sexual minorities, including transsexual¹ and transgendered² individuals, continue to receive only sporadic and non-comprehensive protection against discrimination in employment. The purpose of this article is to suggest that the structure for providing comprehensive protection against employment discrimination that targets transsexual and transgender individuals is already in place and that what is required in order to realize that protection is for courts to properly apply existing law.³

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¹The term “transsexual” is 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 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 a desire to be, or an 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.” See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* 576 (4th ed., text revision 2000).

²The term “transgender” is 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 generally are not seeking gender reassignment surgery and may or may not have been diagnosed with gender identity disorder.

³I 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 generally* Andrew Gilden, *Toward a More*

A number of different approaches have been attempted to obtain rights against discrimination in employment for transsexual and other transgendered individuals. Among those approaches have 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; this approach has been unsuccessful at the federal level and has met with mixed results in the states.⁴ 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; 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.⁵ Another approach, somewhat more successful in recent years and in some jurisdictions, has been to seek protection not for transsexual and transgendered individuals as a class, but to argue that they are entitled to the same protection against discrimination—particularly sex discrimination in the form of

Transformative Approach: The Limits of Transgender Formal Equality, 23 Berkeley J. Gender L. & Just. 83 (2008) (discussing an approach for embracing gender variance that does not reaffirm existing gender norms); Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1 (Winter 2003) (discussing the risks that successful claims by transsexuals with 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.

⁴See section II 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.

⁵See section III of this article for a discussion of state and federal attempts to add gender identity and gender expression as categories protected against discrimination.

sexual stereotyping—as is enjoyed by all men and women.⁶

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. 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 be recognized as such under Title VII of the Civil Rights Act of 1964, the federal statute prohibiting discrimination on the basis of sex, and similar state statutes.⁷

II. 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 conditions must generally be considered an impairment or condition that deviates from the norm for healthy individuals and that medical condition must cause some difficulty or impairment of what is considered “normal” functioning, often to a significant degree. For

⁶See section IV of this article for a discussion of attempts—both successful and unsuccessful—to obtain protection against sexual stereotyping for transsexual and transgendered individuals.

⁷See section V 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 states’ anti-discrimination in employment provisions.

example, under the federal Americans With Disabilities Act, an “individual with a disability” is defined a person with a physical or mental impairment that substantially limits a major life activity of that individual or a person with a record of or who is regarded as having such a substantially limiting impairment.⁸ Included within the definition of a covered impairment is a “mental . . . disorder,”⁹ while whether that 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.”¹⁰

The underlying basis for contentions that transsexual and transgendered individuals have a medical condition that might be considered to be 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.¹¹ According to the DSM-IV-TR, a diagnosis of gender identity disorder requires two necessary components. The first is a “strong and persistent” identification with the gender with which 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

⁸Americans with Disabilities Act § 3(2), 42 U.S.C. § 12102(2)(2001).

⁹Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (h) (2007).

¹⁰29 C.F.R. § 1630.2 (I), (j) (2007).

¹¹American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576 (4th ed., text revision 2000) (hereafter DSM-IV-TR).

claim to be male.¹² Among the identified indicators of this cross-gender identification is the repeated stated desire to be the other sex, “passing” as the other sex, and a desire to live and be treated as the other sex. In children, indicators include a preference for dressing like the other sex, a intense desire to engage in stereotypical games or activities of the other sex, and a strong preference for playmates of the other sex.¹³

The second component of a diagnosis of gender identity disorder is a persistent discomfort with or 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.¹⁴ 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; 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.¹⁵

¹²The diagnostic criteria for gender identity disorder specify that the category of “gender identity disorder not otherwise specified” 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 81.

¹³*Id.* at 581.

¹⁴*Id.* at 576.

¹⁵*Id.* at 581.

A diagnosis of gender identity disorder on the part of a transsexual or transgendered person would presumably constitute a “mental impairment” under the Act, 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 federal Act.¹⁶ Similarly, transgendered persons who have not sought or are not seeking sex reassignment might still be able to demonstrate protected status under the federal Act, 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 would not be considered to be individuals with a disability under the federal Act.

It may have been precisely this analysis that lead Congress to specifically exclude transsexual and transgendered individuals from the definition of individuals with a disability that are provided protection by the Americans with Disabilities Act. While the Act provides that homosexuality and

¹⁶Indeed, 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. United States Postal Service*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959 (D. D.C. 1985), refused to dismiss the plaintiff’s claim of disability discrimination, holding that the plaintiff had sufficiently alleged that her transsexualism was a emotional or psychological disorder that substantially limited at least her major life activity of working. 1985 U.S. Dist. LEXIS 18959, *5-9. The Rehabilitation Act of 1973 was amended in 1992 to incorporate the provisions of the Americans with Disabilities Act into the Rehabilitation Act, including the provision excluding transsexuals and individuals with gender identity disorder from the definition of “individual with a disability.” Pub. L. 102-569, § 102, 106 Stat. 4349 (1992) (codified at 29 U.S.C. § 705 (20)(F) (I) (2001).

bisexuality “are not impairments and as such are not disabilities under this Act,”¹⁷ the Act goes on to exclude “[c]ertain conditions” from the protection of the Act, suggesting that they might otherwise be protected disabilities. Those conditions expressly excluded from the protection of the federal Act include “transsexualism” and “gender identity disorders not resulting from physical impairments,” along with “other sexual behavior disorders.”¹⁸

The adoption of the amendment providing for this exclusion from the protection of the Act appears to have been motivated by an attempt to appease conservative members of Congress who saw the Act 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.¹⁹ While one might also argue for the exclusion of certain conditions from the definition of disability as a justification for not wanting to pathologize certain individuals and conditions,²⁰ this does not appear to have been the

¹⁷Americans with Disabilities Act § 511(a), 42 U.S.C. § 12211(a).

¹⁸Americans with Disabilities Act § 511(b)(1), 42 U.S.C. § 12211(b)(1). Other conditions excluded from the protection of the federal Act in the laundry list of apparently disfavored “[c]ertain conditions” are transvestism, pedophilia, exhibitionism, voyeurism, compulsive gambling, kleptomania, pyromania, and psychoactive substantive use disorders resulting from the current illegal use of drugs.

¹⁹The 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 in the Act. Prior to the amendment being proposed, Senator Helms had 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. 19863-19855 (Sept. 7, 1989).

²⁰For example, portions of the transgender community object to the inclusion of gender identity disorder in the DSM-IV precisely because of the resulting categorization of gender identity disorder as a mental illness and the resulting stigmatization. *See* Patricia Gagne, Richard Tewksbury, and Deanna McGaughey, *Coming out and Crossing Over: Identity Formation and Proclamation in a Transgender Community*, 11 GENDER AND SOCIETY 478, 481 (Aug. 1997)

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. In general, this has depended on the broadness or narrowness of the definition of protected disabilities in the different statutes, as well as whether specific steps have been taken to specifically exclude them from protection.

The Superior Court of New Jersey in *Enriquez v. West Jersey Health Systems*²¹ held that gender dysphoria or transsexualism was a protected disability under the New Jersey Law Against Discrimination.²² The term “handicapped” is defined in the statute to include “suffering . . . from 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.”²³ The court agreed with the defendants that simply because the gender dysphoria is listed in the DSM-IV does not make it a protected handicap, but the court did note that its inclusion did suggest that it was diagnosable by acceptable clinical techniques. 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.

(describing intense debate within the transgender community, with some seeking to have gender identity disorder removed from the DSM-IV, while others argue that diagnosis is only way to obtain access to sex reassignment surgery and hormones).

²¹342 N.J. Super. 501, 777 A.2d 365 (2001).

²²N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (2002).

²³N.J. STAT. ANN. § 10:5-5(q).

Accordingly, the court held that the condition was a “handicap” under the state statute.²⁴

In contrast, the United States District Court for the Eastern District of Pennsylvania in *Dobre v. National Railroad Passenger Corp.*²⁵ held that the plaintiff’s transsexualism was not a protected disability under the Pennsylvania Human Rights Act. That statute prohibits discrimination in employment on the basis of an individual’s non-job related disability. A “handicapped 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.”²⁶ The court held that the plaintiff, who was 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. The court noted that a mental impairment was defined as a “mental or psychological disorder, such as mental illness, and specific learning disabilities.”²⁷ Although the district court acknowledged that gender identity disorder was a diagnosable order by the American Psychological Association, the court held that that did not make it an impairment.²⁸ The court went on to conclude that the meaning of the term “mental impairment” was limited by the terms that gave it meaning—here

²⁴342 N.J. Super. at 516-20, 777 A.2d at 373-76. The court remanded for a determination of whether the plaintiff could establish a claim of handicap discrimination under the statute by showing that she, who had already had sex reassignment surgery, had been properly diagnosed with gender dysphoria. 342 N.J. Super. at 376-77, 777 A.2d at 520-22.

²⁵850 F. Supp. 284 (E.D. Pa. 1993).

²⁶43 PA. CONS. STAT. ANN. § 955(a) (Supp. 2007); 16 PA. CODE § 44.4(I) (2008).

²⁷16 PA. CODE § 44.4(ii) (A) (2008).

²⁸850 F. Supp. at 288-89.

“mental illness” and “specific learning disabilities,” which the court said were “unlike transsexualism, [] inherently prone to limit major life activities.”²⁹ The court concluded that the fact that transsexualism was not prone to have an effect on major life activities suggested that it was not intended to be included as a protected disability.³⁰ 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.³¹

Future attempts to protect transsexual and transgendered persons under state and federal laws intended to protect the disabled would be problematic for a number of reasons. In addition to the possibility of 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 Americans with Disabilities Act was enacted,³² but the nature of the protection extended by these laws is likely to provide protection only to those individuals who are the most adversely affected by their condition,

²⁹*Id.* at 289.

³⁰*Id.*

³¹*Id.*

³²*See generally* Ruth Colker, *The Americans With Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C. L. L. REV. 99 (Winter 1999); Ruth Colker, *Winning and Losing under the Americans With Disabilities Act*, 62 OHIO ST. L. J. 239 (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).

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.

III. 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 federal Americans with Disabilities Act 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 the anti-discrimination laws.

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 of classes protected by the federal anti-discrimination laws,³³ only recently has legislation been introduced to

³³A discussion of these legislative attempts, from 1975 to 2007, can be found in the Report on H.R. 3685, Employment Non-Discrimination Act of 2007, 110th Cong., 1st Sess. (October 18, 2007). The first committee hearing to be held on a bill to 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 50-49 in the Senate.

include gender identity within the protection of those laws. 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, did pass 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 27-21.³⁴ 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.³⁵ 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 protected transgendered individuals. 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 chance for clean passage on the House floor. We cannot support this rationale, which

³⁴Employment Non-Discrimination Act of 2007, H.R. 3685. 110th Cong., 2nd Sess., 2008 Bill Tracking H.R. 3685, 110 Bill Tracking H.R. 3685. 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 on November 7, 2007.

³⁵See Letter from Rush Holt, Yvette Clark, Linda Sanchez, and Dennis Kucinich dated October 22, 2007, dissenting from H.R. 3685.

reinforces the very bias and discrimination that ENDA seeks to prohibit.³⁶

The remaining dissenting Committee votes on the bill appeared to be based on an objection to extending federal protection against discrimination in employment to both sexual orientation and gender identity.³⁷

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.³⁸ The proponent of the amendment argued that Congress should follow the lead of states, cities and towns, and private businesses of protecting against discrimination based on gender identity; 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. She also argued that no one should lose a job merely because of a conflict between one's

³⁶Letter from Rush Holt, Yvette Clark, Linda Sanchez, and Dennis Kucinich dated October 22, 2007, dissenting from H.R. 3685. The Minority Views on H.R. 3685, expressed by Republican members of the House Committee on Education and Labor, also indicated that the addition of "gender identity" to the bill was "politically untenable." (pg 7)

³⁷The 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." (pg 1.)

³⁸*See* Proposed Amendment to H.R.3685, As Reported, Offered by Ms. Baldwin of Wisconsin. 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 individuals, with or without regard to the individual's designated sex at birth."

body and internal sense of gender.³⁹ 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 believed that “those who will be left behind by this bill deserve to hear on this House floor that you are not forgotten and our job will not be finished until you too share fully in the American Dream.”⁴⁰

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.⁴¹ A few

³⁹Employment Non-Discrimination Act of 2007, 110th Cong., 1st Sess., 153 CONG. REC. H. 13228, 13247 (daily ed. Nov. 7, 2007) (statement of Rep. Baldwin).

⁴⁰153 CONG. REC. H 13248 (statement of Rep. Baldwin).

⁴¹*See, e.g.*, Employment Non-Discrimination Act of 2007, 110th Cong, 1st Sess., 153 CONG. REC. H. 13228, 13231 (daily ed. Nov. 7, 2007) (statement of Rep. Woolsey) (expressing concern that 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”); 153 CONG. REC. H. 13235 (statement of Rep. Davis) (expressing sorrow that legislation being debated does not include gender identity); 153 CONG. REC. H. 13237 (statement of Rep. Pelosi) (expressing wish that gender identity would have been included in bill and noting that she supports passage of ENDA because its passage “will build momentum for further advances on gender identity rights”); 153 CONG. REC. H. 13237 (statement of Rep. Sanchez) (noting that Baldwin amendment adding protection for gender identity is needed “because protecting transgender people is the right thing to do”); 153 CONG. REC. H. 13237 (statement of Rep. Eshoo) (indicating strong support and intent to continue to advocate for inclusion of “protections for transgendered Americans in their jobs”); 153 CONG. REC. H. 13237 (statement of Rep. Langevin) (voicing strong support for amendment that would add gender identity to protections of bill); 153 CONG. REC. H. 13239 (statement of Rep. Stark) (noting that he would have supported Baldwin amendment to include gender identity and protection for the transgender community in the legislation); 153 CONG. REC. H. 13239 (statement of Rep. Honda) (noting that he was prepared to vote in favor of Baldwin amendment, which would have provided protection to “the most vulnerable, least understood group within the LGBT community, transgender men

comments by opponents of H.R. 3685 also made reference to the issue of gender identity and the amendment that would add protection for gender identity to the bill. Some of those comments focused on an objection to the fact that the amendment was proposed and then withdrawn without a vote,⁴² while other comments seemed to express a substantive objection to providing protection on the basis of gender identity.⁴³

State legislative efforts to extend protection to transsexual and transgendered individuals have

and women,” and indicating dedication to “further expanding protection to transgender men and women”); 153 CONG. REC. H. 13239 (statement of Rep. DeGrette) (noting that she would support the proposed bill but with “deep regret the transgendered community has been denied the protection offered gays and lesbians in this bill”); 153 CONG. REC. H. 13240 (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”); 153 CONG. REC. H. 13240 (statement of Rep. Blumenauer) (noting sadness that gender identity is not included in the present bill but noting commitment to “resolving this inequity in the future”); 153 CONG. REC. H. 13240 (statement of Rep. Hirono) (noting support for Baldwin amendment and expressing regret that “political realities made it difficult to bring an inclusive ENDA to the floor today in the first place”); 153 CONG. REC. H. 13248 (statement of Rep. Maloney) (noting support for Baldwin amendment and indicating that “[t]ransgender Americans need and deserve protection from employment discrimination, noting 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”).

⁴²Employment Non-Discrimination Act of 2007, 110th Cong., 1st Sess. 153 CONG. REC. H. 13228, 13229 (statement of Rep. McKeon) (noting that there are serious “practical and legal concerns” with the amendment to extend protection against discrimination to gender identity and describing 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”).

⁴³153 CONG. REC. H. 13248 (statement of Rep. McKeon) (“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.”); 153 CONG. REC. H. 13248 (statement of Rep. McKeon) (“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.”).

meet with somewhat more success. A number of states expressly provide that employers may not discriminate in employment on the basis of gender identity. 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.”⁴⁴ 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.”⁴⁵ The New Mexico Human Rights Act was amended to include “gender identity” within its protections against employment discrimination; “gender identity” is defined 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 on 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.”⁴⁶ Other states that expressly extend protection against discrimination in employment on the basis of gender identity include Rhode

⁴⁴ AL. GOVT CODE § 12926 (p) (2005); CAL. PENAL CODE § 422.56 (Supp. 2008).

⁴⁵ MINN. STAT. ANN. § 363A.03 subd. 44 (2004).

⁴⁶ N.M. STAT. ANN. §§ 28-1-2(Q), 28-1-7(A) (Supp. 2007).

Island,⁴⁷ Colorado,⁴⁸ the District of Columbia,⁴⁹ Illinois,⁵⁰ Iowa,⁵¹ Maine,⁵² Vermont,⁵³ and Washington.⁵⁴ The majority of states, however do not expressly provide protection against discrimination in employment on the basis of gender identity.

IV. Transsexual and Transgendered Persons as Entitled to Protection Against Sex

⁴⁷R.I. GEN. LAWS §§ 28-5-6 (10), 28-5-7 (2003) (“gender identity or expression” is defined as “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”).

⁴⁸COLO. REV. STAT. §§ 24-34-401 (7.5), 23-34-402 (2007) (“sexual orientation” defined to include “transgender status or an employer’s perception thereof”).

⁴⁹D.C. CODE ANN. §§ 2-1401.02, 2-1402.11 (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”).

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

⁵¹IOWA STAT. §§ 216.2(10), 216.6 (Supp. 2008) (“gender identity” defined to mean “a gender-related identity of a person, regardless of the person’s assigned sex at birth”).

⁵²ME. REV. STAT. ANN. tit. 5, § 4553 (9-C) (Supp. 2007) (“sexual orientation” defined to include “gender identity or expression”).

⁵³VT. STAT. ANN. tit. 1, § 144, tit. 21, § 495 (Supp. 2007) (“gender identity” defined to mean “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”).

⁵⁴WASH. REV. CODE ANN. § 49.60.040 (15) (Supp. 2008) (“sexual orientation” defined to include “gender expression or identity” and “gender expression or identity” defined to mean “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”).

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 presumably entitled not to be discriminated against based on race and a Catholic transsexual or transgendered individual is entitled not to be discriminated against based on religion, transsexual and transgendered individuals—as men and women—are presumably entitled not to be discriminated against based on their sex.

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 employer policy that explicitly favored male transsexual⁵⁵ or transgendered individuals over female transsexual or transgendered individuals. 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.⁵⁶

⁵⁵This 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.

⁵⁶Courts, in rejecting claims of sex discrimination made by transsexual and transgendered individuals—as transsexual and transgendered individuals—have at least said that this was so. For example, in *Holloway v. Arthur Anderson and Co.*, 566 F.2d 659 (9th Cir. 1977), the United States Court of Appeals for the Ninth Circuit, reasoned that:

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 sexual stereotyping. 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 non-conformists, and transsexual and transgendered persons are gender non-conformists of the most extreme type. The concern is that if these individuals are allowed to assert sex stereotyping claims, they will “bootstrap” protection from discrimination that is supposed to be denied them.⁵⁷ As the Sixth Circuit explained in *Vickers v. Fairfield Medical Center*,⁵⁸ in rejecting the

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.

Id. at 664. Similarly, the United States District Court for the District of Kansas in *James v. Ranch Mart Hardware, Inc.*, No. 94-2235-KHV, 1994 U.S. Dist. LEXIS 19102 (D. Kan. 1994), 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. *Id.* at * 3.

See also *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984) (“If Eastern 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 the case.”) (citations omitted); *Dobre v. National 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 state a cause of action); *Cox v. Denny’s, Inc.*, No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, * 5 (M.D. Fla. 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).

⁵⁷For example, the Second Circuit in *Dawson v. Bumble & Bumble*, 398 F.2d 211, 218-223 (2d Cir. 2005), expressed concern that a sex stereotyping claim under Title VII not be used to “bootstrap” protection on the basis of sexual orientation. The court reasoned:

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

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 “stereotypical 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 be used to “bootstrap protection for sexual orientation into Title VII.”

Id. at 218. The court’s reasoning seems to be that courts must be careful about allowing gender stereotyping claims by gay men 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 Products, 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 v. Weyauwega Milk Products, Inc.* also expresses some concern about recognition of sex stereotyping claims, in part because of the difficulty that courts would 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 mannish 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 fantasy.

Id. at 1067 (Posner, J., concurring). Interestingly, Judge Posner’s conclusion about the difficulty between 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 perhaps sexual orientation claims might be recognized as a form of sexual 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 to male homosexuality than female homosexuality.

⁵⁸453 F.3d 757 (6th Cir. 2006).

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.⁵⁹

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 non-conforming behavior, that is, precisely because they fail to comply with sex stereotypes.⁶⁰

The lower courts' suspicion of sex stereotyping claims seems unwarranted. The United States Supreme Court has long held that employment decisions based on stereotypes about protected groups violate Title VII and the other federal anti-discrimination statutes. In *City of Los Angeles Department of Water and Power v. Manhart*,⁶¹ 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. The Court noted that "[I]t is now well recognized that employment decisions cannot be

⁵⁹*Id.* at 764.

⁶⁰An analysis of whether discrimination on the basis of sexual orientation, like discrimination on the basis of sexual identity, is also properly a form of sex discrimination is beyond the scope of this article.

⁶¹435 U.S. 702 (1978).

predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”⁶² Similarly, the Court in *Hazen Paper Co. v. Biggins*,⁶³ 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; 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 age.”⁶⁴ Indeed, the Court indicated that the very enactment of the Age Discrimination in Employment Act was motivated by Congress’ concern “that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes.”⁶⁵ 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.⁶⁶

The Supreme Court case of *Price Waterhouse v. Hopkins*⁶⁷ demonstrates that not only may employers not make employment decisions based on stereotyped assumptions about members of protected groups, but that employers are also prohibited from requiring that employees comply with

⁶²*Id.* at 707.

⁶³507 U.S. 604 (1993).

⁶⁴*Id.* at 610.

⁶⁵*Id.* at 610.

⁶⁶The Court noted that “[w]hen the employer’s decision *is* wholly motivated by factors other age, the problem of inaccurate and stigmatizing stereotypes disappears.” *Id.* at 611.

⁶⁷490 U.S. 228 (1989) (plurality decision).

sexual and gender stereotypes in order to secure employment opportunities. In the context of a woman found to have been denied promotion to partnership in an accounting firm because of she was considered “macho” and overly aggressive,⁶⁸ a plurality of the Court noted that the employer had engaged in unlawful sexual 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.”⁶⁹ The plurality went on to make clear the illegality of reliance on sexual 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.’”⁷⁰

⁶⁸*Id.* at 234-37, 256.

⁶⁹*Id.* at 250.

⁷⁰*Id.* at 251 (citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. at 708 n.13 (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 do 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.* at 251. *See also id.* at 272-73 (opinion of O’Connor, J.) (discussing role that gender stereotypes play in establishing existence of intent to discriminate on the basis of sex).

Even the dissenting justices in *Price Waterhouse* seemed to recognize that reliance on sexual stereotypes in making employment decisions would violate Title VII. They noted that while “Title VII creates no independent cause of action in sex stereotyping,” “[e]vidence of use by decision-makers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent.” They went on to explain that the ultimate question was whether the discrimination caused the harm of the plaintiff, seeming to equate sex stereotyping with discrimination as long as causation was established. *See id.* at 294 (Kennedy, Rehnquist, and Scalia, J., dissenting).

Reliance on sexual 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 sexual and gender stereotypes. The diagnostic criteria for gender identity disorder contained in the Diagnostic and Statistical Manual of Mental Disorders include, for boys, “a preference for cross-dressing or simulating female attire” and for girls, 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.⁷¹ 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”⁷² or make clear that protection exists “whether or not that

⁷¹DSM-IV-TR 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.” It is noted that boys may play with Barbie 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.* at 576. Girls, on the other hand, may have a negative reaction to “attempts to have them wear dresses and other feminine attire,” instead preferring “boys’ clothing and short hair.” Girls may show little interests 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 opposite sex” and have an intense desire to “adopt the social role” of the other sex. *Id.* at 577. *See also* DSM-IV Casebook: A Learning Companion to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition 363-65 (eds. Spitzer, Gibbon, Skodol, Williams, First 1994) (noting that there should be little question of diagnosis of gender identity disorder for 8-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).

⁷²See definition of “gender identity” in Proposed Amendment to H.R. 3685, as Reported, Offered by Ms. Baldwin of Wisconsin, Employment Non-Discrimination Act of 2007, 110th Cong., 1st Sess., 153 CONG. REC. H. 13228, 13247 (daily ed., Nov. 7, 2007).

gender identity, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."⁷³

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 non-conforming behavior or appearance or failure to comply with sexual stereotypes held by their employers. 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 non-conforming behavior or failing to comply with sexual stereotypes.

One of the first cases to recognize such a claim was *Smith v. City of Salem, Ohio*.⁷⁴ The plaintiff, a lieutenant with the fire department, was a pre-operative transsexual woman who had been

⁷³See definition of "gender identity and expression" in Rhode Island's anti-discrimination in employment statute. R.I. GEN. LAWS §§ 28-5-6 (10), 28-5-7 (2003).

⁷⁴378 F.3d 566 (6th Cir. 2004). An earlier district court case within the Sixth Circuit had refused to dismiss the 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 because of discrimination based on her transsexualism). *Doe v. United Consumer Financial Services*, No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509, * 8-13 (N.D. Ohio 2001)(court indicated 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 fit the employer's gender expectations). Another case from that 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 the court held that the evidence did not support such a claim because the employer in that case "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).

diagnosed with gender identity disorder.⁷⁵ After her diagnosis, she began to express a more feminine appearance, prompting comments from her co-workers that her mannerisms and appearance were not “masculine enough.” In response, the plaintiff informed her supervisor of her diagnosis and that her treatment would eventually include complete physical transformation from male to female.⁷⁶ 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. The plaintiff’s claim of sex discrimination under Title VII was dismissed by the district court on the pleadings.⁷⁷

The United States Court of Appeals for the Sixth Circuit reversed the decision of the district court, holding that the plaintiff had sufficiently pleaded a claim of sex stereotyping and gender discrimination by alleging that the defendants’s actions were based on her “failure to conform to stereotypes about how a man should look and behave.”⁷⁸ The court of appeals indicated that the district court had erred in relying on pre-*Price Waterhouse* cases to conclude that a transsexual person could not make out a claim of sex discrimination under Title VII. The court noted that those earlier

⁷⁵The court indicated that Smith was “biologically and by birth a male” and used the male pronoun to refer to the plaintiff. *Id.* at 568. The plaintiff’s first name is listed as “Jimmie.” It is not clear from the decision whether this represented a feminization of her “male” name or whether this was her name from birth.

⁷⁶*Id.*

⁷⁷*Id.* at 568-69.

⁷⁸*Id.* at 572.

cases had refused to recognize those 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.⁷⁹ The court reasoned that discrimination against men for engaging in gender non-conformity in their behavior and dress was just as unlawful under Title VII as discrimination against women for engaging in gender non-conforming behavior.⁸⁰

The court expressly rejected the conclusions of other courts that discrimination against transsexual persons was different in kind from discrimination based on sexual stereotyping and that the gender non-conforming conduct of the plaintiff was not subject to protection simply because of the plaintiff’s generally unprotected status as a transsexual person.⁸¹ The court reasoned:

⁷⁹*Id.* at 572-73.

⁸⁰The 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 or 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.

⁸¹The 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, a man who acts in ways typically

Such analysis 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 transsexual—and therefore fails to act and/or identity 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.⁸²

Accordingly, the court of appeals held that the plaintiff had stated a claim for sex discrimination under Title VII.⁸³

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 “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. at 574 (citations omitted).

⁸²*Id.* at 574-75.

⁸³*Id.* at 575.

A completely different panel of the Sixth Circuit Court of Appeals in *Barnes v. City of Cincinnati*⁸⁴ 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.⁸⁵ 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. Among the comments made to the plaintiff was that she did not appear to be masculine and needed to stop wearing makeup and be more masculine in order to be promoted.⁸⁶ 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; the court indicated that the plaintiff could bring this claim because she was a member of a protected class under Title VII—“whether as a man or a woman.”⁸⁷ The court also specifically held that a Title VII sex discrimination claim could be based on a claim of discrimination based on sexual stereotypes.⁸⁸

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

⁸⁴401 F.3d 729 (6th Cir. 2005).

⁸⁵The 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.

⁸⁶*Id.* at 733-35.

⁸⁷*Id.* at 737-39.

⁸⁸*Id.* at 741.

penalized for engaging in gender non-conforming behavior.⁸⁹ In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*,⁹⁰ 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.⁹¹ Rejecting the conclusions of other courts that the gender non-conformity of transgendered individuals was different in kind from that protected by rules against sex stereotyping, the court indicated that the plaintiff's transsexuality was not bar to her sex stereotyping claim. 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

⁸⁹*See, e.g., Mitchell v. Axcan Scandipharm, Inc.*, 2006 U.S. Dist. LEXIS 6521, * 3-5 (W.D. Pa. 2006) (holding that pre-operative transsexual woman who alleged that she had been harassed and terminated because of her gender non-conforming behavior had stated a claim under Title VII; court noted that while some courts had refused to extend protection to transsexuals under this theory, neither the Supreme Court nor the United States Court of Appeals for the Third Circuit had made such a distinction); *Schroer v. Billington*, 525 F. Supp. 2d 58 (D. D.C. 2007) (holding that the transsexuality 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); *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cases (BNA) 609, 611-12 (N.D. Ind. 2007) (holding that transsexual woman could state claim that she was terminated for failure to comply with sexual stereotypes, when she alleged that she was told to appear more masculine during business hours).

⁹⁰542 F. Supp. 2d 653 (S.D. Tex. 2008).

⁹¹The 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.

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* effeminate, or a woman becomes *too* masculine, to warrant protection under Title VII and *Price Waterhouse*.⁹²

Instead, the court held, 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.⁹³

The United States District Court for the District of Columbia in *Schroer v. Billington*⁹⁴ also held that a transsexual individual was not precluded from making a claim of sex discrimination based on sex stereotyping, even though that court did conclude that discrimination against transsexual persons was different in kind from discrimination based on sex stereotyping. The court noted that the plaintiff, a pre-operative transsexual woman applying for the position of terrorism research analyst with the Library of Congress,⁹⁵ 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 was itself sex discrimination. The court, in its first opinion

⁹²*Id.* at 659-60 (emphasis in original).

⁹³*Id.* at 660.

⁹⁴525 F. Supp. 2d 58 (D. D.C. 2007).

⁹⁵The 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 now lives full-time as a woman. The court used the female pronoun to refer to the plaintiff.

considering the employer’s motion to dismiss, held that the plaintiff had not stated a claim for sex stereotyping. 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 “does not wish to go against the gender grain, but with it.”⁹⁶ 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.”⁹⁷ 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 not made such a claim, instead alleging that she had been discriminated against because of her gender identity and intent to present herself as a woman.⁹⁸ 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.⁹⁹

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

⁹⁶424 F. Supp. 2d 203, 210-11 (D. D.C. 2006).

⁹⁷*Id.* at 210.

⁹⁸*Id.* at 211.

⁹⁹*Id.* at 211-13. For a discussion of this portion of the court’s opinion, see text accompany notes 153 to 159, *infra*.

discrimination based on sex stereotyping. 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 the 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.”¹⁰⁰ 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 herself as a woman, she did not conform to the employer's stereotypical notions of what a woman should look like. The court indicated that an allegation by a female transsexual that she did not appear feminine enough would state a claim under Title VII,¹⁰¹ although apparently an allegation by a transsexual woman that she did not appear masculine enough would not state such a claim.¹⁰² 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.¹⁰³

Other courts, however, have argued that transsexual and transgendered persons should not be

¹⁰⁰525 F. Supp. 2d at 62.

¹⁰¹*Id.* at 61, 62-63.

¹⁰²The court restated its prior contention that protection against sex stereotyping was different in kind, rather than degree, from protecting transsexuals as transsexuals. That is, 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 her gender dysphoria or her intent to present herself as a woman. *Id.* at 63.

¹⁰³*Id.* at 63. This portion of the court's opinion is discussed at text accompanying notes 160 to 163, *infra*.

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. For example, in *Etsitty v. Utah Transit Authority*,¹⁰⁴ the United States District Court for the District of Utah rejected on summary judgment the plaintiff's claim that she had been fired for failing to comply with gender stereotypes. 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; 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)."¹⁰⁵

The district court in *Etsitty* expressly rejected the analysis of the Sixth Circuit in *Smith* that discrimination against a transsexual person for gender non-conforming behavior was not different

¹⁰⁴No. 2:04CV616DS, 2005 U.S. Dist. LEXIS 12634 (D. Utah 2005), *aff'd*, 502 F.3d 1215 (10th Cir. 2007). 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 sexual stereotyping, instead assuming 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. 502 F.3d at 1224-27.

¹⁰⁵*Id.* at * 1-5. The court noted that the plaintiff had changed her name from Michael Etsitty to Krystal Sandoval Etsitty and was making female hormones, but retained her male genitalia. The court described the plaintiff as follows: "From the time that 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.

from the discrimination faced by the plaintiff in *Price Waterhouse* who was penalized for not acting enough like a stereotypical woman. The *Etsitty* court held that there was there was 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.”¹⁰⁶ 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 for authority that gender identity disorder should not be confused with “simple nonconformity to stereotypical sex role behavior.”¹⁰⁷

The court district went on to justify its conclusion by noting 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*.¹⁰⁸ The court reasoned that if transsexuals could not be penalized for dressing as a member of opposite sex, then the same rules would apply to non-transsexuals. 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 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.”¹⁰⁹

It is not clear at all, however, that the *Etsitty* court’s parade of horrors is a conceivable result

¹⁰⁶*Id.* at * 12.

¹⁰⁷*Id.* at * 12-13.

¹⁰⁸*Id.* at * 15.

¹⁰⁹*Id.* at * 15-16.

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 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”—and therefore does not diagnose as having gender identity disorder all persons who engage in gender non-conforming behavior—does not answer the legal issue of whether an employer’s negative reaction to a transsexual person’s gender non-conformity is legally equivalent to an employer’s negative reaction to a non-transsexual person’s gender non-conformity. 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 non-conformity 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.*¹¹⁰ The plaintiff in that case was not transsexual but was transgendered, having been diagnosed with transvestic fetishism with gender dysphoria; the court called him a “male crossdresser.”¹¹¹ The plaintiff was discharged after he disclosed to his supervisor that he was transgendered and asked whether he would be fired if the president of the company ever saw him cross-dressed as a woman. The decision was then made to terminate his employment, on the grounds that customers, if they saw

¹¹⁰No. 00-3144 Section I, 2002 U.S. Dist. LEXIS 17417 (E.D. La. 2002).

¹¹¹*Id.* at * 4.

the plaintiff dressed as a woman and then recognized him while working, would disapprove of his lifestyle and shop elsewhere.¹¹²

The district court rejected the plaintiff's claim that he had been discharged based on unlawful sex stereotyping. The court held that the discrimination against the plaintiff was fundamentally different 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."¹¹³ In rejecting the contention of the plaintiff 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 on that they had gender identity disorders.¹¹⁴

¹¹²*Id.* at * 8-9.

¹¹³*Id.* at * 30.

¹¹⁴*Id.* at * 35 (footnotes omitted).

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 prosthesis, wigs, make-up, and nail polish¹¹⁵—other than the fact that the plaintiff was transgendered and the women apparently were not or 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 non-conformists—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 “cross-dressers,” while women who wear men’s plaid shirts and work boots apparently are not. Instead, the distinction apparently being drawn by the court—and perhaps by society—about the different level of acceptance of men and women engaging in gender non-conforming behavior and dress appears to be classic discrimination on the basis of sex or gender.

V. Discrimination Against Transsexual and Transgendered Persons as Prohibited Sex

¹¹⁵*Id.* at 28.

Discrimination.

The apparent different standards applied to men and women who engage in gender non-conforming behavior suggest that our societal standards concerning the line between mere gender non-conformity and the extreme gender non-conformity 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 non-conformity of women than men. Even as children, "tom boys"—young girls who act "like boys"—are more accepted than "sissies"—young boys who are considered too effeminate.¹¹⁶ Societal standards of acceptable dress among children and adults also reflect this uneven approval of gender non-conformity 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.¹¹⁷

¹¹⁶See 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 who exhibits "feminine behaviors sufficient to be considered a sissy is much less tolerated than a female tomboy").

¹¹⁷Even in the case of *Jespersion v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1105, 1107 (9th Cir. 2006), in which the court of appeals upheld against a claim of sex discrimination a requirement that women, but not men, wear facial make-up, the dress code imposed on both male and female bartenders required that they wear the same uniform of black pants, white shirt, black vest, black bow tie, and comfortable black shoes. What the court characterized as a "unisex" dress code, *id.* at 1112, unmistakably imposed a traditionally male style of dress. See Michael

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,¹¹⁸ only recently have men been able to wear earrings or make-up 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 that strives to emulate men, while looking with disapproval on a man who demeans himself by “aping” women.¹¹⁹

Society’s greater disapproval of gender non-conformity among men also appears to extend to the gender non-conformity evidenced by transsexual and transgendered individuals. Evidence

Selmi, *The Many Faces of Darlene Jespersen*, 14 DUKE J. GENDER L. & POL’Y 467, 470 (Jan. 2007) (noting the irony that while female bartenders were required to wear make-up, the uniform that female—and male—bartenders were required to wear was “very male in appearance”).

¹¹⁸Indeed, in the case of *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000), a biological man seeking to apply for a bank loan, who was wearing a dress, was sent home and told to dress in a more gender-appropriate manner if he wanted to receive a loan application. 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.

¹¹⁹For 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 Julia A. Seaman, *The Peahen’s Tale, or Dressing Our Parts at Work*, 14 DUKE J. GENDER L. & POL’Y 423, 440 & n. 96, 462 & n. 210 (Jan. 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 and Shelley J. Correll, *Unpacking the Gender System: A Theoretical Perspective on Gender Beliefs and Social Relations*, 18 GENDER & SOCIETY 510, 513, 522-23 (August 2004).

suggests that men in general object to transsexuality more than do women¹²⁰; this may be particularly true with respect to transsexual women.¹²¹ 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.¹²² And some men may also feel that transsexual men are merely “passing” as men and therefore seeking a status and privileges to which they are not entitled; sometimes these

¹²⁰See Mickael Landén and Sune Innala, *Attitudes Toward Transsexualism in a Swedish National Survey*, 29 ARCHIVES OF SEXUAL BEHAVIOR 375, 378, 381-84, 385, 387 (2000) (noting that in a survey of 992 Swedish citizens, men were found to have more restrictive views of transsexuality than women, which was consistent with prior research findings).

¹²¹The reactions of men and women to other gender non-conforming behavior, such as same-sex sexual conduct, also appears to be gendered. See Jeni Loftus, *America’s Liberalization in Attitudes Toward Homosexuality, 1973 to 1998*, 66 AMERICAN SOCIOLOGICAL REVIEW 762, 780 (Oct. 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 toward gay men).

¹²²The second of these two views may be reflected in the opinion of a male district 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:

Ulane is entitled to any person 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. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (1984) (opinion of Judge Harlington Wood, Jr.). 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.

feelings are expressed in the form of sex-based violence and rape.¹²³

Some women may view transsexual women as interlopers and not true women and transsexual men as traitors.¹²⁴ The first of these views appears to be reflected in the letter written by a mother responding to her son's disclosure of her transsexuality:

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

¹²³In 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 she 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* (Twentieth Century Fox 2000). This film was based on the 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 PAISLEY CURRAH, RICHARD M. JUANG, AND SHANNON PRICE MINTER, *TRANSGENDER RIGHTS* 183 (2006). A civil lawsuit against Richardson County, Nebraska and Sheriff Charles B. Laux for negligence, wrongful death, and intentional infliction of emotional distress brought by Brandon Teena’s mother concerning actions surrounding the rape and murder is reported at *Brandon v. County of Richardson*, 261 Neb. 636, 624 N.W.2d 604 (2001).

¹²⁴See Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 *LAW & SOC. INQUIRY* 1, 3 (Winter 2003) (recounting the hostility that some feminists hold toward transsexuals, viewing transsexual women as “just men who had mutilated themselves and because of their still-remaining male psyche and upbringing” “continue to exhibit traits of their male dominance” and transsexual men as women who have “discarded their womanhood to join the patriarchy”); Shannon Price Minter, “Do Transsexuals Dream of Gay Rights? Getting Real about Transgender Inclusion,” in PAISLEY CURRAH, RICHARD M. JUANG, AND SHANNON PRICE MINTER, *TRANSGENDER RIGHTS* 141, 155-56 (2006) (recounting the views of “lesbian feminist theorists” to “demonize[] transsexual women as an epitome of misogynist attempts to invade women’s space and appropriate women’s identity”).

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*.¹²⁵

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 transsexuality 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 to be 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."¹²⁶ However, courts have almost uniformly resisted this conclusion.

Before the recent trend by some courts to allow transsexual and transgendered individuals to

¹²⁵See MILDRED L. BROWN & CHLOE ANN ROUNSLEY, TRUE SELVES: UNDERSTANDING TRANSEXUALISM 175-76 (Paperback ed. 2003) (setting forth letter written by mother to son who disclosed her transsexuality and intent to become a woman).

¹²⁶42 U.S.C. § 2000e-2(m) (2000).

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.¹²⁷ 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 sex¹²⁸ but instead only referred to biological sex.¹²⁹ Some went further to explain that Title VII was intended “to ensure that men and women are treated equally”¹³⁰ and to “prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred,”¹³¹

¹²⁷See *Dobre v. National Railroad 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 based on their transsexualism.”).

¹²⁸See, e.g., *Grossman v. Bernards Township Board of Education*, No. 74-1904, 1975 U.S. Dist. LEXIS 16261, * 8-11 (D. N. J. 1975) (“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.”), *aff’d w/o opinion*, 538 F.2d 319 (3d Cir. 1976); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 370-71 (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.”); *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.”); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (“for the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise”).

¹²⁹*Doe v. United States Postal Service*, No. 84-3296, 1985 U.S. Dist. LEXIS 18959, * 4-5 (D. D.C. 1985) (“in 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’).

¹³⁰*Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663 (9th Cir. 1977).

¹³¹*Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff’d w/o opinion*, 570 F.2d 354 (9th Cir. 1978).

apparently concluding that either a transsexual man or a transsexual woman would have faced the same treatment by the employer.

In concluding that the plain language of Title VII indicated that transsexual persons were not entitled to the protection of the statute, the district court in *Dobre v. National Railroad Passenger Corp.*¹³² 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.”¹³³ The court apparently concluded that the term “sex” did not include “gender,” noting that Title VII meant that an employer could not discriminate against a woman because she was a woman (or, presumably, a man because he was a man.)¹³⁴

Attempts by courts to exclude transsexual and transgendered individuals from the protection of Title VII by defining the term “sex” not to include “gender” is clearly inconsistent with Supreme Court precedent interpreting Title VII, in particular its decision in *Price Waterhouse v. Hopkins*.¹³⁵ The plurality in that case seemed to draw no distinction between sex and gender, seeming to use the

¹³²850 F. Supp. 284 (E.D. Pa. 1993).

¹³³*Id.* at 286.

¹³⁴*Id.* See also *Cox v. Denny’s, Inc.*, No. 98-1085-CIV-J-16B, 1999 U.S. Dist. LEXIS 23333, * 5 (M.D. Fla. 1999) (“Title VII protects against discrimination or harassment of males because they are male and females because they are female”).

¹³⁵490 U.S. 228 (1989).

terms interchangeably.¹³⁶ Even more clearly, the plurality equated “gender” and “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.”¹³⁷ 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.”¹³⁸ Justice O’Connor, in her concurrence, also used the term “gender” to refer to the protections of Title VII.¹³⁹ Even the dissent seems to have equated the two words, using them interchangeably.¹⁴⁰ That the use of the term “gender” by the members of the Court was not an

¹³⁶*See id.* at 237 (plurality opinion) (“even if a plaintiff shows that her gender played a part in an employment decision”); *id.* at 239 (“Congress made the simple but momentous announcement that sex . . . are not relevant to the selection, evaluation, or compensation of employees”).

¹³⁷*Id.* at 239-40.

¹³⁸*Id.* at 240.

¹³⁹*See id.* at 261 (O’Connor, J., concurring) (“the burden of persuasion should shift to the employer to demonstrate that it would have reached the same decision concerning Ann Hopkins’ candidacy absent consideration of her gender”).

¹⁴⁰*See id.* at 284-85 (Kennedy, 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*, 511 U.S. 127 (1994), 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. 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

accident is made obvious by the fact that the Court clearly extended protection to Ann Hopkins based on her gender non-conforming behavior, a trait not defined by her biological sex but by social expectations of the way that women should act.¹⁴¹

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. In *Schwenk v. Hartford*,¹⁴² the United States Court of Appeals for the Ninth Circuit considered the claim of a female transsexual inmate that a sexual assault by a male prison guard violated the Gender Motivated

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 a penis 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. 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 138-40.

¹⁴¹*See id.* at 251 (“[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype 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).

¹⁴²204 F.3d 1187 (9th Cir. 2000).

Violence Act,¹⁴³ part of the Violence Against Women Act.¹⁴⁴ In interpreting the requirement of the Act 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.” The court concluded that under both statutes, the term “sex” and “gender” are interchangeable and that discrimination on both grounds is prohibited. 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.”¹⁴⁵ 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 on her gender, which the court indicated in this case was “her assumption of a feminine rather than a typically masculine appearance or demeanor.”¹⁴⁶ Accordingly, the court seems to have concluded that the prohibition on actions based on gender included action based on one’s transsexuality.¹⁴⁷

However, even courts that have found that transsexual and transgendered individuals can state

¹⁴³Gender Motivated Violence Act, 42 U.S.C. § 13981 (2000). The United States Supreme Court in *United States v. Morgan*, 529 U.S. 598 (2000), held that Congress did not have the authority to enact this provision.

¹⁴⁴Violence Against Women Act, Pub. Law 103-322, 108 Stat. 1796 (1994).

¹⁴⁵204 F.3d at 1200-02.

¹⁴⁶*Id.* at 1202.

¹⁴⁷The court concluded that the conduct of the prison guard was covered by the Act, but addressed 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 transsexuality.” *See id.* at 1204-05.

claims under Title VII under a sex stereotyping theory have generally held that a sex discrimination claim cannot be made out based of a claim of discrimination for being transsexual or transgendered. For example, the district court in *Creed v. Family Express Corp.*¹⁴⁸ 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. The *Creed* court concluded that while transsexuals can state a claim of sex stereotyping if their assertion that they were discriminated against for 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.¹⁴⁹

A few courts, however, have concluded—some only temporarily—that discrimination on the basis of transsexuality 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, Ohio*,¹⁵⁰ 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. The court reasoned:

¹⁴⁸101 Fair Empl. Prac. Cases (BNA) 609 (N.D. Ind. 2007).

¹⁴⁹*Id.* at 611.

¹⁵⁰369 F.3d 912 (6th Cir. 2004), *opinion withdrawn*, 2004 U.S. App. LEXIS 15574 (6th Cir. 2004).

By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned to 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 classifications of a person as belonging to one sex or the other) coincide. This is the essence of sex stereotyping.¹⁵¹

In the new opinion issued after this one was withdrawn, this paragraph was simply deleted, as was another sentence indicating that the court found the plaintiff’s claim of discrimination “because of his identification as a transsexual” to be actionable under Title VII.¹⁵² 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 opinions involves a court suggesting—but not quite holding—that transsexuals individuals as transsexuals are protected by Title VII and then backing away from that suggestion. In *Schroer v. Billington*,¹⁵³ on consideration of the employer’s initial motion to dismiss, the United

¹⁵¹*Id.* at 921-22 (emphasis in original).

¹⁵²*Compare id.* at 918, 921-922 with 378 F.3d at 571, 575.

¹⁵³424 F. Supp. 2d 203 (D. D.C. 2006).

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 transsexuality. The court noted that courts holding that discrimination based on transsexuality was not protected by Title VII had relied on the decision of the United States Court of Appeals for the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.*,¹⁵⁴ which had concluded that transsexuals are not protected under Title VII, rejecting the district court decision to the contrary. The district court in *Schroer* suggested that it might be time to revisit the decision of the district court in *Ulane*¹⁵⁵ that “discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of . . . sex.’”¹⁵⁶ 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.¹⁵⁷ The *Schroer* court reasoned that this “straightforward” way of dealing with transsexuality 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 each other, and in turn, with social, psychological, and legal conceptions of gender.”¹⁵⁸ The court indicated, however, that this decision could not be made on the pleadings, citing the need for a factual

¹⁵⁴742 F.2d 1081 (7th Cir. 1984).

¹⁵⁵*Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821 (N.D. Ill. 1983).

¹⁵⁶424 F. Supp. 2d at 212 (citing 581 F. Supp. at 825).

¹⁵⁷424 F. Supp. 2d at 212-13.

¹⁵⁸*Id.*

record to be compiled that reflected the scientific basis of sexual identity and gender dysphoria.¹⁵⁹

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 transsexuals individuals because they are transsexual constituted discrimination based on sex.¹⁶⁰ The court again declined to decide this issue, this time because the court concluded that the employer's motion to dismiss the Title VII claims could not be granted because the plaintiff had adequately made out a claim of sex discrimination based on sex stereotyping.¹⁶¹ The court did note that the testimony of the defendant's expert—to the effect that sex was determined medically 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.¹⁶² However, the court also cast doubt on whether discrimination on the basis of transsexuality should be recognized as sex discrimination as a legal matter, based on recent legislative action in Congress concerning gender identity. 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

¹⁵⁹*Id.* at 213.

¹⁶⁰524 F. Supp. 2d at 61-62.

¹⁶¹*Id.* at 63.

¹⁶²*Id.* The court did note 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.” *Id.* at 61.

Representatives addressed only sexual orientation. 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.¹⁶³

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 44 years earlier. In addition, as the district court in *Schroer* recognized in its earlier decision, the unanimous Supreme Court in *Oncala v. Sundowner Offshore Services, Inc.*¹⁶⁴ pronounced that “statutory provisions often go beyond the principle evil to cover reasonably comparable evils, and it is ultimately the provisions

¹⁶³*Id.* at 63-64. 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 but, if enacted, would be a separate statute. See text accompanying notes 34 to 43, *supra*, for a discussion of that statute and the issue of gender identity. The term “*mirabile dictu*,” not previously known by this author, is defined in the WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 907 (Second College ed. 1986) as “wonderful to tell.” The ENCARTA® WORLD ENGLISH DICTIONARY (North American ed. 2007), available at <http://encarta.msn.com/dictionary> (last visited June 26, 2008), defines “*mirabile dictu*” as an “expression of wonder: used to introduce the announcement of something the speaker, genuinely or ironically, considers to be amazing.”

¹⁶⁴523 U.S. 75 (1998).

of our laws rather than the principle concerns of our legislators by which we are governed.”¹⁶⁵ 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 decision that 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 v. Eastern Airlines, Inc.*,¹⁶⁶ a decision, as indicated above, that was later reversed by the Seventh Circuit. 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.¹⁶⁷ 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. 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.” The court indicated that it was

¹⁶⁵*Id.* at 79.

¹⁶⁶581 F. Supp. 821 (N.D. Ill. 1983).

¹⁶⁷See description of the facts in district court’s consideration of the parties’ motions for summary judgment. *Ulane v. Eastern Airlines, Inc.*, No. 81 C 4411, 1983 U.S. Dist. LEXIS 17407 (N.D. Ill. 1983).

not free to disregard “that plain language.”¹⁶⁸ The court reasoned:

I do not see how it can be said here, assuming for purposes of this 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.¹⁶⁹

¹⁶⁸No. 81 C 4411, 1982 U.S. Dist. LEXIS 13049 (N.D. Ill. 1982).

¹⁶⁹*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 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. Eastern Airlines, Inc.*, 581 F. Supp. 821, 838-39 (N.D. Ill. 1983).

The court's analysis, rendered some time before the Supreme Court's decision in *Price Waterhouse* and the subsequent amendment of Title VII by § 107(a) of the Civil Rights Act of 1991,¹⁷⁰ appears to have accurately predicted both the broadening of the meaning of the term "sex" that occurred in the Supreme 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.¹⁷¹ The court also rejected several of the justifications provided by the employer in its letter terminating the plaintiff's employment as sufficient to rebut the plaintiff's prima facie case of sex discrimination, including the contention of the employer 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. The court indicated that the assertion that "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."¹⁷²

¹⁷⁰Civil 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), to provide 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."

¹⁷¹No. 81 C 4411, 1983 U.S. Dist. LEXIS 17407, * 5 (N.D. Ill. 1983).

¹⁷²*Id.* at * 5.

The final reported decision of the *Ulane* district court was its order, including findings of fact and conclusion 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.¹⁷³

The court acknowledged that Congress had not thought about the issue of whether the word “sex” included transsexuals, but that the court was required to interpret the language used by Congress. The court concluded 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.¹⁷⁴

Although the district court in *Ulane* found the literal language of Title VII and the failure of

¹⁷³*Ulane v. Eastern Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).

¹⁷⁴*Id.* at 825.

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. The court of appeals found the plain language of the statute to mean that it is unlawful to discriminate against woman 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 which they were born.”¹⁷⁵ The court found the lack of legislative history on the meaning of the word “sex” to “strongly reinforce[]” this interpretation.¹⁷⁶

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.”¹⁷⁷ 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.” But the court of appeals seemed almost dismissive of the efforts of the district court to educate itself about transsexuality before deciding whether

¹⁷⁵*Id.* at 1085.

¹⁷⁶*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.”

¹⁷⁷*Id.*

discrimination on that basis was motivated, at least in part, by sex. The court of appeals indicated that “[w]e 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.”¹⁷⁸

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 United States Supreme Court dictates that “it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which we are governed,”¹⁷⁹—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. 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.”

¹⁷⁸*Id.* 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.*

¹⁷⁹*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).

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,¹⁸⁰ which may have been the concept sought to be captured by Congress in enacting the statute. Another source 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, including 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.¹⁸¹ Similarly, Webster’s Seventh New Collegiate Dictionary,

¹⁸⁰The Supreme Court has previously looked to dictionaries in determining the meaning of race in interpreting 42 U.S.C. § 1981 (2000). In *St. Francis College v. Al-Khazraji*, 481 U.S. 604 (1987), the unanimous Court looked to the definition of “race” in dictionaries from the 1860’s and 1870’s, 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.” *Id.* at 610-13.

¹⁸¹WEBSTER’S THIRD WORLD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 2081 (G. & C. Merriam Co. 1961). The word “transsexual” is not found in the

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.”¹⁸² 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.”¹⁸³ 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 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.”

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.

¹⁸² WEBSTER’S SEVENTH NEW COLLEGIATE DICTIONARY 795 (G. & C. Merriam Co. 1965). The word “gender” is defined to mean “sex,” as well as given its 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.

¹⁸³ THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1307 (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.

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*,¹⁸⁴ 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 Discrimination¹⁸⁵ based on her claim that she was terminated because of her external transformation from male to female. Although recognizing that Title VII’s prohibition against sex discrimination had not been interpreted to prohibit discrimination on the basis of transsexuality,¹⁸⁶ the court indicated that it disagreed with the rationale of decisions finding that discrimination on the basis of transsexuality was not discrimination on the basis of sex, finding them to use too constricted a view of sex discrimination.¹⁸⁷ The court reasoned:

A generation ago, when Judge Handler served in the Appellate Division, he found that “[t]he evidence and authority which we have examined, however, shows 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 Judge Handler that “sex”

¹⁸⁴342 N.J. Super. 501, 777 A.2d 365 (2001).

¹⁸⁵N.J. STAT. ANN. §§ 10:5-1 to 10:5-49 (2002). The prohibition of sex discrimination was added to the statute in 1970. N.J. Laws 1970, c. 80, § 8 (effective June 2, 1970). *See also* N.J. STAT. ANN. § 10:5-3, Historical note (1976 ed.) (superceded). 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.

¹⁸⁶The court did note, however, that the Supreme Court’s decision in *Price Waterhouse* “signaled a possible change in the federal approach to gender dysphoria.” 342 N.J. Super. at 512, 777 A.2d at 371.

¹⁸⁷342 N.J. Super. at 513, 777 A.2d at 372.

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 and gender.¹⁸⁸

The court, finding “incomprehensible” an interpretation of the statute that condones discrimination against men and women who seek to change their anatomical sex, concluded that “sex discrimination under the LAD includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.”¹⁸⁹

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*.¹⁹⁰ In that case, the court, lacking either a clear definition of the term “sex” or relevant legislative history, had to decide whether Article 1(1) of European Union Council Directive 76/207/EEC, which provided that “there shall be no discrimination whatsoever on the grounds of sex,”¹⁹¹ should be interpreted to prohibit discrimination in employment on the basis of transsexuality. The plaintiff was a transsexual woman who was given notice of dismissal when she indicated that she intended to undergo gender reassignment. The court concluded that the provision prohibiting discrimination on the basis of sex “cannot be confined simply to discrimination based on the fact that

¹⁸⁸342 N.J. Super. at 373, 777 A.2d at 515 (citations omitted).

¹⁸⁹342 N.J. Super. at 373, 777 A.2d at 515.

¹⁹⁰Case C-13/94, [1996] E.C.R. I-2159, 2 C.M.L.R. 247 (April 30, 1996).

¹⁹¹Council Directive 1976/207.

a person is of one sex or the other sex” but instead applied to discrimination arising from the gender reassignment of the plaintiff.¹⁹² 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 transsexuality be held to be discrimination on the basis of “sex”:

The objection is taken too much for granted, and has been raised on several occasion 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 unfavorably, 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 certain: P. would not have been dismissed if she had remained a man.

So how can it be claimed that discrimination on the basis of sex is not involved? How can it be denied that the cause of discrimination was precisely, and solely, sex? To my mind, when unfavourable treatment of a transsexual is related to (or rather is caused by sex), there is discrimination by reason of sex or on grounds of sex, if that is preferred.¹⁹³

¹⁹²[1996] E.C.R. I-2159, 2 C.M.L.R. 247 (decision).

¹⁹³[1996] E.C.R. I-2159, 2 C.M.L.R. 247 (opinion of Mr. Giuseppe Tesauo).

The Advocate General also noted that discrimination against women is generally not based on their physical characteristics but the image that society has of women. 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 transsexuality and sex discrimination against women. The Advocate General 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.”¹⁹⁴ Finally, the Advocate General argued that extending protection to transsexuality 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 the body and mind into harmony.”¹⁹⁵

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

¹⁹⁴[1996] E.C.R. I-2159, 2 C.M.L.R. 247 (opinion of Mr. Giuseppe Tesauero).

¹⁹⁵[1996] E.C.R. I-2159, 2 C.M.L.R. 247 (opinion of Mr. Giuseppe Tesauero).

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.¹⁹⁶ It appears that gender identity, or psychological 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 had indicated his belief that transsexual and transgendered persons are “intersexed in their brains.”¹⁹⁷

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.¹⁹⁸ Other studies indicate that gender identity may have a biological component and have demonstrated that the brain components of transsexual persons are more like those whose gender they share than those who

¹⁹⁶See “Of Gender and Genitals: The Use and Abuse of the Modern Intersexual,” in ANNE FAUSTO-STERLING, *SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY* 3-77 (2000), for a discussion of determinates of the assignment of gender 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.

¹⁹⁷Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: “How Does One Know if One is Male or Female?”*, 55 *SEX ROLES* 589, 591-92, 597 n. 14 (2006).

¹⁹⁸See Alexa Albert and Judith Porter, *Children’s Gender-Role Stereotypes: A Sociological Investigation of Psychological Models*, 3 *SOCIOLOGICAL FORUM* 184, 186-90 (Spring 1988); Marsha Weinraub, Lynda Pritchard Clemens, Alan Sockloff, Teresa Ethridge, Edward Gracely, and Barbara Myers, *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 DEVELOPMENT* 1493, 1493, 1499, 1501 (August 1984); Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: “How Does One Know if One is Male or Female?”*, 55 *SEX ROLES* 589, 591 n.4 (2006).

have genitals that are like theirs.¹⁹⁹ 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. Employers do not generally require tests of or have access to information about chromosomes before making employment decisions. Nor do employers conduct examinations of internal or external genitalia before engaging in sex discrimination.²⁰⁰ Instead, employers make assumptions and decisions about sex based on an employee’s gender presentation or, perhaps, secondary sex characteristics. However, depending on the progress of 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

¹⁹⁹Milton Diamond, *Biased-Interaction Theory of Psychosexual Development: “How Does One Know if One is Male or Female?”*, 55 *SEX ROLES* 589, 593 (2006).

²⁰⁰It is true that one 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 segregated 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 another transsexual employee to provide proof as to the state of their genitals. See *Kastl v. Maricopa County Community College District*, 2004 U.S. Dist. LEXIS 29825, * 10-12 (D. Ar. 2004) (court refused to grant employer’s motion to dismiss plaintiff’s Title VII sex discrimination claim).

secondary sex characteristics, not based on their chromosomes, internal sex organs, or genitals.

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 the statute at the time of its enactment, an amendment to the 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 1978,²⁰¹ 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, and related medical conditions.”²⁰² 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. Indeed, the employment discrimination against pregnant women that the statute was intended to address is likely as often based on the societal and cultural expectations of pregnant women rather than the physical aspects of pregnancy.²⁰³

²⁰¹Pregnancy Discrimination Act of 1978, 95 P.L. 555, 92 Stat. 2076 (October 31, 1978).

²⁰²42 U.S.C. § 2000e (k) (2000).

²⁰³For 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 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.

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 protection from discrimination 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,²⁰⁴ classifications that might, like sex, be narrowly interpreted to apply only to 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 only to 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 properly is also 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

H. REP. NO. 95-948, at 3, *as reprinted in* 1978 U.S.C.C.A.N. 4749, 4751. The House Report also made clear that the bill represented a clarification of Congress’ original intent as to the meaning of the term “sex” rather than a change in the meaning of the statute. *Id.*, 1978 U.S.C.C.A.N. at 4752.

²⁰⁴42 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,” 42 U.S.C. § 2000e(j), it might be argued that the broader meaning of this term is statutorily required, unlike the term “sex.” 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. Equal Employment Opportunity Act of 1972, P.L. No. 92-261, 86 Stat. 103, § 2 (March 24, 1972). 118 CONG. REC. 705-731 (Jan. 21, 1972) (statement of Sen. Randolph, proposing amendment to add definition of religion to Title VII in order to provide by legislation what was originally intended by the Civil Rights Act but “clouded” by court decisions).

engaged in practices associated with that group?²⁰⁵ Does Title VII’s 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?²⁰⁶

In *Perkins v. Lake County Department of Utilities*,²⁰⁷ the district court considered the claim of the employer that the plaintiff could not make out a claim of racial discrimination based on his

²⁰⁵It 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* *Pitts v. Wild Adventurers, Inc.*, Civil Action No. 7:06-CV-62-HI, 2008 U.S. Dist. LEXIS 34119, * 15-19 (M.D. Ga. 2008) (upholding employer prohibition against dreadlocks and cornrows against challenge as racial discrimination because, even if hairstyles are worn predominately by African-Americans, “grooming codes are typically outside the scope of federal discrimination statutes because they do not discriminate on the basis of immutable characteristics”).

²⁰⁶The courts have generally held that discrimination based on a foreign accent is discrimination on the basis of national origin, subject only the bona fide occupational qualification defense. *See* *Gold v. Fed Ex Freight East, Inc.*, 487 F.3d 1001, 1008-09 (6th Cir. 2007) (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) (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, 268-71 (5th Cir. 1980) (while ability to speak a language other than English might be equated with national origin, a requirement that employees who can speak English do so on duty does not violate Title VII) *with* *Maldonado v. City of Altus*, 433 F.3d 1294, 1301-09 (10th Cir. 2006) (English-only rules subject to challenge under Title VI under disparate treatment and disparate impact theories), 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 (2007).

²⁰⁷860 F. Supp. 1262 (N.D. Ohio 1994).

status as a Native American because he was not in fact a Native American. 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. 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."²⁰⁸ The district court noted that the United States Supreme Court has recognized the problematic nature of racial classifications and that many scientists consider that racial classifications are "for the most part sociopolitical, rather than biological."²⁰⁹ The district court went on to find that that categorization of individuals into racial groups is largely a matter of perception and self identification, refusing to find that the fact that the plaintiff may have had less than 1/16th 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.²¹⁰

Similarly, in *Bennun v. Rutgers State University*,²¹¹ 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. 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. The district court

²⁰⁸*Id.* at 1271.

²⁰⁹*Id.* at 1272 (quoting *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987)).

²¹⁰*Id.* at 1272-77. 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 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.

²¹¹941 F.2d 154 (3d Cir. 1991).

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, adopted Spanish culture in his life, and spoke Spanish in his home. The court of appeals agreed with the district court's conclusion, holding that that 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."²¹² Accordingly, the court gave weight not only to historical facts and ancestry but the plaintiff's identity as a member of a particular national origin and possession of traits associated with that national origin.²¹³

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

²¹²*Id.* at 171-73.

²¹³*See also* Eriksen v. Allied Waste Systems, Inc., Case No. 06-13549, 2007 U.S. Dist. LEXIS 23909, * 8-19 (E.D. Mich. 2007) (in 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 state anti-discrimination statute, which, like Title VII, does not contain a definition of "national origin," court relied 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).

respect to the other classifications. 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.²¹⁴ 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.²¹⁵

But gender identity has been treated differently because sexual 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 non-conforming the behavior, the more discomfort and anger that is created. But these societal realities do not justify providing less protection to gender non-conformists 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 towards individuals because of traits associated with these protected classifications, so the prejudices that society holds towards gender non-conformists—including transsexual and transgendered individuals—should not be a justification for

²¹⁴See discussion of implications of “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 slaveholder’s children with their slaves and later as a way to keep the white race “pure,” in Lawrence Wright, *One Drop of Blood*, THE NEW YORKER 46, 48 (July 25, 1994).

²¹⁵See Juan F. Perea, *Buscando America: Why Integration and Equal Protection Fail to Protect Latinos*, 117 HARV. L. REV. 1420, 1426-33 (2004) (discussion of history of force 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) (discussion of “assimilationist bias” with respect to race and language and tendency of this bias to force groups protected by the anti-discrimination statutes to engage in compulsory assimilation).

denying them protection against what is, at its essence, discrimination on the basis of sex.

VI. 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 above, the term “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.