Sex Stereotyping *Per Se*: Transgender Employees and Title VII

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INTRODUCTION

Gender stereotypes are a central part of our experience. Conformance with a coherent gender presentation, where clothing and presentation match up with body parts and secondary sex characteristics, can be a significant element of how we define another being as human.[1] Gender norms are so powerful and pervasive that when someone dares to transgress them openly, destabilizing the presumed synchronicity of sex and gender, that person will almost inevitably face some kind of punishment, with consequences ranging from mere social hostility to discrimination in employment and housing to outright violence.

The outlook might appear bleak for those who do not conform to gender stereotypes. However, this Comment examines one area in which transgender[2] Americans have made rare progress in recent years: federal employment discrimination law. Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "because of . . . sex."[3] Although gay and lesbian employees who experience discrimination have attempted to bring Title VII claims for years, based in part on the theory that discrimination based on sexual orientation is *per se* "sex discrimination," such claims were and are still regularly denied by

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1. *See, e.g.*, Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150 (2005) (examining various theories of the "normal" to show how powerful gender norms, including those articulated in court decisions, sometimes operate to exclude transgender people from the very category of humans).

2. I use the word "transgender" as an umbrella term that includes transsexuals, cross-dressers, and anyone else whose gender identity or expression is significantly non-traditional.

3. 42 U.S.C. § 2000e-2(a) (2000).

courts.[4] Early claims brought by transgender plaintiffs under Title VII were also consistently denied, largely because transsexuality was presumed to be synonymous with, or at least analogous to, homosexuality. However, following the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, which embraced a "sex-stereotyping" theory of the wrong of sex discrimination,[5] a growing number of federal courts have decided discrimination cases in favor of transgender plaintiffs.[6] These cases recognize, at least implicitly, that discrimination against transgender or gender-nonconforming employees is *per se* a form of sex-stereotyping discrimination and therefore prohibited by Title VII. As the Ninth Circuit noted in *Schwenk v. Hartford*, the justifications advanced in the older cases for excluding transgender employees from Title VII's sex discrimination protections have "been overruled by the logic and language of *Price Waterhouse*."[7]

Thus far, the Sixth Circuit Court of Appeals is the highest court to address the direct issue of Title VII's application to transgender plaintiffs since *Price Waterhouse* was decided. In the past two years, the Sixth Circuit has decided two discrimination cases in favor of transgender plaintiffs. In 2004, in *Smith v. City of Salem*, the court held that a transsexual firefighter had stated a valid sex discrimination claim under Title VII.[8] The following year, the Sixth Circuit reaffirmed the *Smith* holding in a discrimination suit brought by a transgender police officer, repeating its view that Title VII covers discrimination against transgender employees for their failure to conform to gender stereotypes.[9] Other lower federal courts have been split on the direct question of whether the *Price Waterhouse* gender-stereotyping theory can apply to claims brought by transgender employees, but a solid majority of the decisions have found, like the Sixth Circuit, that such claims are valid under Title VII.

This Comment will explore the history of transgender employees' claims of sex discrimination and outline the current state of the law. My contention is that discrimination against a transgender employee due to her or his transgender status constitutes a valid sex discrimination claim under the *Price Waterhouse* gender-stereotyping theory. Discrimination against someone for being transgender is discrimination based on that person's non-conformity with gender stereotypes. This is true whether the

4. *See* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 471 (2004) (noting that, "to date, no federal court has allowed recovery under a sexual orientation discrimination theory", and that "[t]his trend . . . is unlikely to change any time soon").

5. 490 U.S. 228 (1989).

6. *See infra* Part IV.

7. 204 F.3d 1187, 1201 (9th Cir. 2000).

8. 378 F.3d 566 (6th Cir. 2004).

9. Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005), *reh'g denied*, Nos. 03-4110/04-3320, 2005 U.S. App. LEXIS 11041 (6th Cir. June 8, 2005), *cert. denied*, 126 S. Ct. 624 (2005).

individual is viewed by the employer or the court as a man who is insufficiently masculine, a woman who is insufficiently feminine, or someone who falls in between those seemingly binary categories. Although the federal courts, led by the Sixth Circuit, have begun to recognize the validity of transgender employees' Title VII sex discrimination claims, they have not fully explored the logical possibilities opened up by the gender-stereotyping theory. For the most part, the courts have moved only tentatively toward recognizing the ways in which individual transgender employees have experienced discrimination due to their failure to conform to particular gender stereotypes. I argue that it is both morally and logically necessary for the courts to explicitly affirm the categorical rule that any discrimination against a transgender person is *per se* sex discrimination.

Part I describes the theoretical framework on which this Comment is based. Part II discusses the legal landscape prior to the *Price Waterhouse* decision, including the early cases brought by transgender employees under Title VII. Part III discusses the landmark *Price Waterhouse* decision and its theory of gender stereotyping. Part IV discusses the post-*Price Waterhouse* cases involving transgender plaintiffs. Part V takes another look at the gender-stereotyping theory, considering more of its nuances and implications, and responding to criticisms of that approach.

I
THEORETICAL FRAMEWORK

Although the Supreme Court has yet to address the question of whether transgender people who face employment discrimination can claim the protections of Title VII's sex discrimination provisions, I posit that the answer is simple: they can. I reach this conclusion by harmonizing the existing case law and adding some helpful insights from contemporary gender theory to extend these decisions to their logical conclusion. As the next sections of this Comment will show, the "logic and language"[10] of the Supreme Court's own Title VII precedents mandate this outcome.

This Part will outline the theoretical basis for the argument that the prohibition of "sex discrimination" logically and inextricably includes a prohibition against discrimination based on gender stereotypes. The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior. Therefore, the courts should read a law like Title VII that prohibits "sex discrimination" to prohibit discrimination against transgender individuals.

To begin with, it is impossible to make a clean distinction between the categories of "sex" and "gender," tnat is, the physical and the social aspects of gendered identity. Theorists like Judith Butler and Katherine Franke

10. Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000) (referring to *Price Waterhouse*).

have argued that any notion of physical "sex" is always already gendered through a *cultural* process that imbues the physical with meaning.[11] As Franke writes, "the body can no longer be seen as a biological given which emits its own meaning. It must be understood instead as an ensemble of potentialities which are given meaning only in society."[12] In other words, gender stereotypes play a central role in the very process of differentiating "men" from "women." In that process, "bodies end up meaning less . . . than the roles, clothing, myths, and stereotypes that transform a vagina into a *she*."[13]

In essence, all "sex" discrimination is really "gender" discrimination. There is almost never any reason to conceive of sex discrimination as based solely in physical differences between men and women.[14] Early (pre-*Price Waterhouse*) decisions such as *Ulane v. Eastern Airlines*[15] and *Holloway v. Arthur Andersen*[16] describe the scope of Title VII's sex discrimination provisions as limited to the traditional meaning of sex—across-the-board discrimination against the biological categories of males and females. Such discrimination might include, for instance, hiring only men as lawyers or only women as secretaries. However, Franke points out that this "simply fails to describe correctly what takes place when a person is discriminated against because of her sex."[17] The only concrete differences one could tentatively point to in order to distinguish all "biological men" from all "biological women" would be, for instance, chromosomes or genitalia.[18] Yet it is extremely implausible that most employers who discriminate against women do so because of a view that a Y chromosome, or a penis, is required to do a certain kind of work.[19] Most other physical differences between the sexes, such as strength, are imperfectly correlated with sex. Indeed, studies have shown more significant differences among members of the same sex than between men and women as groups.[20]

Therefore, it is more sensible to describe most discrimination based on "sex" as in fact discrimination based on gender stereotypes. For

11. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 39-40 (1995) [hereinafter Franke, *Central Mistake*]; JUDITH BUTLER, GENDER TROUBLE (1990); JUDITH BUTLER, BODIES THAT MATTER (1993) [hereinafter BUTLER, BODIES THAT MATTER]; JUDITH LORBER, PARADOXES OF GENDER (1994).

12. Franke, *Central Mistake*, *supra* note 11, at 71 (quoting JEFFREY WEEKS, SEXUALITY AND ITS DISCONTENTS 122-23 (1985)).

13. *Id.* at 39-40.

14. *See id.* at 36.

15. 742 F.2d 1081 (7th Cir. 1984).

16. 566 F.2d 659 (9th Cir. 1977).

17. Franke, *Central Mistake*, *supra* note 11, at 36.

18. Even these differences, however, are still contingent, as genitalia and chromosomes do not always match.

19. See *id.*

20. *See* sources cited *infra* note 144.

example, when an employer demonstrates a preference for hiring male employees, the discrimination presumably is not based upon concrete distinctions between the respective capacities of people with ovaries and people with testes, but based upon stereotypes about women's abilities or interests. When an employer institutes a family leave plan that is more generous to women, the discrimination is not based on any biological mandate that mothers (and not fathers) should spend time with new children, but based on stereotypes about the respective caretaking responsibilities of men and women.[21] When an employer discriminates in favor of masculine men and feminine women, and against feminine men or masculine women, the discrimination is based on stereotypes about appropriate correlations between gender, appearance and behavior.

Courts have attempted to distinguish between permissible and impermissible sex discrimination[22]—hence the mere "intermediate" scrutiny granted to sex-based distinctions under the federal constitution's Equal Protection Clause, which presumes that some sex-based distinctions will survive the constitutional filter.[23] However, the line between permissible and impermissible distinctions has been unclear and largely unprincipled.[24] Although the U.S. Supreme Court declared that gender stereotypes are an impermissible basis for distinguishing between employees, a Ninth Circuit court in 2006 approved workplace grooming and appearance standards—hardly based in biology—that differentiate between men and women.[25]

One possible explanation for the distinction between lawful and unlawful sex discrimination may be the view that certain stereotypes and social norms are simply so widespread and uncontroversial that a court will not read a law like Title VII to exclude them.[26] However, Franke criticizes

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21. *See, e.g.*, Nevada Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731-32 n.5 (2003) (finding that "state discrimination in the provision of [family leave] benefits is based on the . . . gender stereotype: that women's family duties trump those of the workplace").

22. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (although "[t]here are both real and fictional differenees between women and men. . . . employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females").

23. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

24. *See* Franke, *Central Mistake*, *supra* note 11, at 75-80.

25. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that it is a violation of Title VII to discriminate against a female accountant because of her failure to wear jewelry and makeup) *with* Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc) (approving a casino's rule requiring female bartenders to wear makeup). For further discussion of related cases, see Franke, *Central Mistake*, *supra* note 11, at 75-80. *See also* Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 92-99 (2006) (analyzing the distinction in outcome between *Jespersen* and cases upholding the rights of transgender individuals to wear the clothing of their preferred gender) [hereinafter Levi, *Clothes Don't Make the Man*].

26. *See* Levi, *Clothes Don't Make the Man*, *supra* note 25, at 93 (describing the scholarship of Anthony Appiah, who argues that "normative stereotypes" are "unobjectionable" and constitute a zone of permissible gender-based discrimination because they are widely favored).

the idea "that employers [or] courts . . . can, or should, distinguish in any principled manner between impermissible cultural stereotypes and permissible commonly accepted social norms."[27] She notes that decisions that affirm discrimination based upon such norms, "perpetuating the notion that men are naturally masculine and women are naturally feminine," are difficult to reconcile with "a legislative mandate intended 'to strike at the entire spectrum of disparate treatment of men and women' resulting from sex stereotypes."[28]

Transgender people live on the front lines of this high-stakes theoretical debate. A system that permits discrimination based on only the most commonly accepted gender stereotypes would still exclude them, since the stereotypes that, for instance, biological men must not dress as women, take female hormones, or adopt feminine names, are fairly well established.[29] However, a system that prohibits *all* discrimination rooted in gender stereotypes would equally proscribe discrimination against a man who wears makeup, a woman who chooses not to wear makeup, and a woman who desires a job in a typically male-dominated field. In each of those cases, the discrimination stems from the employer's stereotyped notions of sex-appropriate behavior.

To correct for the logical incoherence of the old view, and provide justice for a broader class of discrimination victims, the Supreme Court should firmly embrace the new vision of sex discrimination, based on its decision in *Price Waterhouse*, that is grounded on the impermissibility of gender stereotyping.[30] Civil rights law "must abandon its reliance upon a biological definition of sexual identity and sex discrimination and instead should adopt a more behavioral or performative conception of sex," which would define impermissible sex discrimination to include compelled conformance with gender stereotypes.[31] *Price Waterhouse* clearly opens the door for such a view of Title VII. While its impact is lessened by the apparent continued vitality of cases that uphold discrimination based on "permissible" gender stereotypes in the form of grooming and dress codes,[32] the recent cases allowing Title VII transgender claims are steadily pushing sex discrimination jurisprudence in the direction of greater inclusion. This progress makes room for all forms of stereotype-defying behavior and appearance to find protection under Title VII's mantle.

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27. Franke, *Central Mistake*, *supra* note 11, at 78.

28. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).

29. *See id.* at 35 (arguing that the pre-*Price Waterhouse* transgender cases demonstrate "the notion that there is a right way to do one's sex in accordance with commonly accepted social norms that coercively harmonize inside (biological sex) and outside (gender) in such a way that maleness collapses into masculinity and femaleness into femininity").

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

31. Franke, *Central Mistake*, *supra* note 11, at 8.

32. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc).

II
BEFORE *PRICE WATERHOUSE*

The first cases brought by transgender plaintiffs claiming sex discrimination protection under Title VII uniformly held that federal law offered no such protection. It was not until the Supreme Court decided *Price Waterhouse v. Hopkins*[33] in 1989 that the tide began to shift for transgender plaintiffs. The early transgender cases shared a set of common themes and arguments, including emphasis on the lack of legislative history of Title VII and the consequent need to rely on the "plain meaning" of the word "sex" in the statute. The cases also built on one another, with the later cases emphasizing the judicial unanimity in this area as a reason for declining to extend the protection of Title VII to transgender individuals.

Voyles v. Ralph K. Davies Medical Center[34] appears to have been the first federal case to address the issue of whether Title VII's sex discrimination provisions protect transsexual employees from discrimination. The plaintiff employee informed her supervisor that she intended to undergo "sex conversion surgery."[35] As a result, she was fired soon afterwards.[36] The analysis of the federal district court focused exclusively on legislative intent:

> [E]ven the most cursory examination of the legislative history surrounding passage of Title VII reveals that Congress' paramount, if not sole, purpose in banning employment practices predicated upon an individual's sex was to prohibit conduct which, had the victim been a member of the opposite sex, would not have otherwise occurred. Situations involving transsexuals, homosexuals or bi-sexuals were simply not considered.[37]

The court further noted that Congress had recently introduced, but failed to pass, several bills that would have added sexual orientation to the list of prohibited bases of discrimination. Therefore, the court concluded that "in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism, [since] only recently has it attempted to include conduct within the reach of Title VII which is even remotely applicable to the complained-of activity here."[38] The court held that the transgender plaintiff had no cause of action under Title VII.[39]

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33. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
34. 403 F. Supp. 456 (N.D. Cal. 1975).
35. *Id.* at 456.
36. *Id.*
37. *Id.* at 457.
38. *Id.*
39. *Id.*

The first federal court of appeals to decide this issue was the Ninth Circuit, in 1977. The plaintiff in *Holloway v. Arthur Andersen* had worked for the defendant company for five years when she informed her supervisor that she was preparing for sex-reassignment surgery.[40] Several months later she was fired, soon after her personnel records were changed, at her request, to reflect her new, traditionally feminine name.[41]

The court characterized the question before it as "whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."[42] Its analysis followed *Voyles* closely, focusing on the intent of Congress and the failure of Congress to enact legislation including homosexuality within Title VII. It concluded that the statute must be given its "plain meaning," which means the "traditional meaning" of the term "sex."[43] According to the court, the "manifest purpose" of Title VII was "to ensure that men and women are treated equally."[44] Since Title VII could not be read to include protection for transgender employees, the court dismissed the complaint for failure to state a claim.[45] The court did allow that a transsexual plaintiff would have a valid Title VII claim if he or she experienced discrimination because of his or her sex as male or female.[46]

The Eighth Circuit was the next federal appellate court to consider this question, in *Sommers v. Budget Marketing, Inc.*[47] This case was slightly different from the previous cases in that the male-to-female transsexual employee was hired by the defendant company as a woman and then fired for "misrepresent[ing] herself as an anatomical female."[48] However, the court applied the same analysis as the prior cases, finding that it must ascribe the "plain meaning" to the term "sex" in Title VII absent evidence that Congress intended otherwise, and finding that "the legislative history does not show any intention to include transsexualism in Title VII."[49] It therefore affirmed the district court's grant of summary judgment to the employer.[50]

Ulane v. Eastern Airlines, Inc., decided in 1984 by the Seventh Circuit, was the last federal circuit court decision before *Smith* to address the question of Title VII's applicability to transgender employees.[51] This

40. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 661 (9th Cir. 1977).
41. *Id.* at 661.
42. *Id.*
43. *Id.* at 662, 663.
44. *Id.* at 663.
45. *Id.* at 664.
46. *Holloway*, 566 F.2d at 664.
47. 667 F.2d 748 (8th Cir. 1982).
48. *Id.* at 748.
49. *Id.* at 750.
50. *Id.*
51. 742 F.2d 1081 (7th Cir. 1984).

decision is the longest of all the pre-*Price Waterhouse* transgender cases, and the court seemed to struggle the most with the issue. That may have been because this was a rare case in which the circuit court was faced with reversing a district court ruling in *favor* of the transgender plaintiff. The court stated the issue quite tentatively when it wrote, for instance, "Even though Title VII is a remedial statute, and even though some may define 'sex' in such a way as to mean an individual's sexual identity, our responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex."[52] The court recognized that the maxims of statutory construction requiring, on the one hand, that words be given their plain meaning, and on the other, that remedial statutes be liberally construed, are in tension in this type of case.[53] However, the court concluded that it was required to give the word "sex" in Title VII its "plain meaning," which would apply only to discrimination "against women because they are women and against men because they are men."[54] To find a statutory basis for plaintiff's claim would, in the court's view, "far exceed[] mere statutory interpretation."[55]

For all its lengthy explanations of why precedent and maxims of construction tied its hands and prevented it from awarding relief to the plaintiff, the court also used language that betrayed its suspicion and prejudice toward transsexuals in general:

> Ulane is entitled to any personal belief about her sexual identity she desires. . . . 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. . . . [I]f Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.[56]

Since the court viewed Ulane as essentially an impostor, merely masquerading as female, it was understandably hesitant to find sanction for her deception in federal law.[57]

These cases share a number of themes. First, the courts uniformly apply a "plain meaning" analysis to the interpretation of the word "sex" in Title VII. Second, they attach great weight to the several failed attempts to enact federal legislation extending antidiscrimination protection to gays and lesbians. Third, the cases emphasize the lack of legislative history

52. *Id.* at 1084.
53. *Id.* at 1086.
54. *Id.* at 1085.
55. *Id.* at 1086.
56. *Id.* at 1087.
57. *See* Lloyd, *supra* note 1, at 160-65.

behind Title VII's sex discrimination provision.[58] These reasons are ultimately unpersuasive.

Each of the courts appeared to rely, either implicitly or explicitly, on the canon of statutory interpretation that calls on courts to interpret words according to their ordinary meaning unless they are otherwise defined.[59] The analysis of the Seventh Circuit in *Ulane* is representative:

> The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men . . . . [This] is not synonymous with a prohibition against discrimination based on an individual's sexual identity disorder or discontent with the sex into which they were born.[60]

As discussed earlier however, even a brief analytic inquiry into the meaning of the biologically based category of "sex" will lead to the conclusion that it always includes and depends upon its amorphous, socially based twin, "gender."[61] Furthermore, numerous courts in the 1970s and 80s had already extended Title VII to cover sexual harassment[62] and "disparate impact"[63] cases that were arguably quite attenuated from the prototypical sex discrimination cases that the *Holloway*, *Sommers*, and *Ulane* courts seemed to view as the only legitimate focus of Title VII. Thus, it is not at all clear that the proper interpretation of Title VII's reference to "sex" requires a strict focus on biology-based discrimination—particularly in light of the competing canon of interpretation which calls for "remedial" statutes, such as nondiscrimination statutes, to be broadly construed.[64]

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58. That common myth is belied by the complex political history that preceded the introduction of sex discrimination legislation in Congress, from the first proposal of the ERA in 1923 to the passage of Title VII in 1963. *See, e.g.*, Franke, *Central Mistake*, *supra* note 11, at 14-24; Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997). Furthermore, the lack of legislative history concerning the precise meaning of the word "sex" in Title VII should not logically mandate an interpretation limited to the narrowest sense of the term.

59. *See, e.g.*, WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 819-20 (3d ed. 2001) ("Typically, courts will assume that the legislature uses words in their ordinary sense: What would these words convey to the 'ordinary' or 'reasonable' reader?").

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

61. *See supra* Part I.

62. *See, e.g.*, Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (establishing that Title VII prohibits sexual harassment in employment).

63. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971) (establishing that disparate impact claims are cognizable under Title VII).

64. *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998) ("[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But . . . it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); ESKRIDGE ET AL., *supra* note 59, at 848.

The courts also uniformly emphasized that federal legislation to prohibit employment discrimination based on sexual orientation has been proposed and rejected a number of times. This type of analysis is fairly well accepted as an aid to statutory interpretation.[65] However, the argument fails here for the simple reason that the subject of the proposed legislation—discrimination against gays and lesbians as such—is quite different from the plaintiffs' view that Title VII protects gender-nonconforming individuals from discrimination. The right claimed by transgender plaintiffs is both broader and narrower than the rejected protection for homosexuals: broader because many people who are not gay are perceived as gender nonconforming, and narrower because many gay people would *not* be perceived as gender nonconforming.[66]

Francisco Valdes has pointed out that in contemporary American culture, sex, gender, and sexual orientation are routinely and inaccurately confused and seen as co-extensive and synonymous.[67] Under that "conflation," sex is seen "as the determinant of gender, . . . gender as the *social* dimensions of sex, and . . . sexual orientation as the *sexual* dimensions of gender."[68] For instance, a person designated "male" by anatomy is presumed to have a masculine gender identity and to be attracted to women. Since all three gendered elements of identity are thus intertwined, "there is no such thing as discrimination 'based' only on any single" one of them.[69]

Because of the close relationship between those categories, Valdes has noted that many courts classify discrimination that is in fact based on perceived gender nonconformity as discrimination based on sexual

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65. *See, e.g.*, ESKRIDGE ET AL., *supra* note 59, at 980-81, 1022; FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 147 (2000) (declining to interpret the federal Food & Drug Act as granting the FDA jurisdiction to regulate tobacco, in part because "Congress considered and rejected several proposals to give the FDA the authority to regulate tobacco").

66. It is possible to construct a convincing argument that all discrimination based on sexual orientation is really discrimination based on a gay person's failure to conform to the gender stereotype that women should date men and men should date women. *See, e.g.*, Kramer, *supra* note 4; Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994). Although logically and morally persuasive, this argument is not likely to win in the courts anytime soon, because of the near unanimity of the federal courts that have considered the issue that protection against gender stereotyping under Title VII cannot be used to "bootstrap" protection for gay and lesbian employees. *See, e.g.*, Vickers v. Fairfield Med. Center, 453 F.3d 757, 763 (6th Cir. 2006) (sex-stereotyping claims only viable "where gender non-conformance is demonstrable through the plaintiff's appearance or behavior"); Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) ("Like other courts, we have . . . recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'"); Bibby v. Phila. Coca-Cola Bottling Co., 260 F.3d 257, 264-65 (3d Cir. 2001); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000).

67. Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 5-6 (1995).

68. *Id.* at 19.

69. *Id.* at 17.

orientation; such courts use sexual orientation as a "loophole" to allow a broad range of gender-based discrimination to slip through the protections of laws like Title VII.[70] That clearly happened in the early transgender cases: the courts demonstrated a real confusion about the distinctions between gender nonconformity, sexual orientation, and transgenderism. They considered transsexuality interchangeable with homosexuality for purposes of ascribing preclusive effect to Congress's attempt-and-failure to pass legislation protecting gays and lesbians. Applying the fairly well-established anti-"bootstrapping" rule disallowing claims of sexual orientation under Title VII,[71] the courts held that claims brought by transgender individuals must be similarly barred.

The response to this analytic move should be fairly obvious. It is inaccurate to conflate sexual orientation with gender nonconformity, and such semantic sloppiness has no place in the law, particularly if the effect is to narrow the scope of a remedial statute like Title VII. Relying on subsequent legislative action or inaction is already somewhat questionable as a guide to statutory meaning.[72] When combined with the very weak semantic argument that legislators intended proposed legislation about "sexual orientation" to include transsexuals, the post-enactment legislative history does not provide a convincing basis for excluding transgender people from the protection of Title VII's prohibition on sex discrimination.

III
THE PRICE WATERHOUSE BREAKTHROUGH

The evolution of Title VII jurisprudence with regard to transgender employees took a dramatic turn with the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*.[73] That case did not involve a transgender plaintiff, but rather a female employee who was denied a promotion because of her unfeminine appearance and behavior.[74] The Court held that evidence of sex stereotyping is "legal[ly] relevan[t]" in the context of Title VII, and that "[i]n 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."[75]

A. Development of the Gender-Stereotyping Theory

Although *Price Waterhouse* is frequently cited as the case in which the Court first recognized a "gender-stereotyping" theory of sex

70. *See id.* at 23-24.
71. *See* sources cited *supra* note 66.
72. *See* ESKRIDGE ET AL., *supra* note 59, at 980-81.
73. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).
74. *See id.* at 233.
75. *Id.* at 250.

discrimination, it was preceded by a string of Supreme Court and lower federal court cases that suggested that discrimination based on stereotyping was prohibited under Title VII.[76] The Court noted as early as 1978 that "[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."[77]

Mary Anne Case describes the history of sex-stereotyping jurisprudence as occurring in three stages. In the first stage, courts gradually prohibited categorical legal exclusions based on the supposed abilities or inclinations of most members of one sex, such as laws reflecting the assumption that wives are economically dependent on their husbands.[78] In the second stage, courts began prohibiting employers from making adverse employment decisions based upon an assumption that individual members of one sex conform to a certain stereotype.[79] In one such case, a police department failed to hire a particular woman because the hiring officers apparently viewed her femaleness as incompatible with required qualities such as "aggressiveness."[80] Case writes that "it was only the hiring officers' stereotyped views of women, not anything they observed in [the applicant] herself, that led them to find her wanting—looking at her through the lenses of gender, they saw only what they were expecting to see."[81] Such assumptions, though less harmful than categorical or legal exclusions that affect a sweeping class of people, would henceforth be barred as sex discrimination.

The third stage, epitomized by *Price Waterhouse*, included cases in which an individual plaintiff was penalized by an employer for *nonconformity* with a gender stercotype (rather than, as in the second stage, perceived *conformity* with a stereotype).[82] The history of these cases leading up to *Price Waterhouse* is uncertain: although the Supreme Court in that case spoke authoritatively about the presumed pre-existence of a gender-stereotyping theory of sex discrimination in Title VII jurisprudence, it did not cite any other opinions that involved analogous facts.[83] A few

76. *See* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 36-39 (1995).

77. Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978) (quoting Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1198 (7th Cir. 1971)).

78. *See* Case, *supra* note 76, at 36-39; *see also, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (finding that a law granting different benefits to men and women based on the stereotype that husbands were breadwinners and wives were dependents was unconstitutional sex discrimination under the federal Equal Protection Clause).

79. Case, *supra* note 76, at 39-41. *See, e.g.*, Thorne v. City of El Segundo, 726 F.2d 459 (9th Cir. 1983) (holding that refusing to hire a woman as a police officer due to sex-stereotyped perceptions of her abilities is discrimination under Title VII).

80. *Thorne*, 726 F.2d at 462.

81. Case, *supra* note 76, at 40.

82. *Id.* at 41.

83. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250-51 (1989).

federal courts, particularly the Ninth Circuit, appear to have developed a gender-stereotyping theory of Title VII during the 1980s in cases analogous to *Price Waterhouse*.[84] However, many lower court cases had gone the other direction.[85] For instance, the Fifth Circuit held in 1978 that a man who was denied a job because he was perceived as effeminate had no claim to Title VII protection.[86] Similarly, gender-based workplace dress and grooming codes were (and still are) regularly upheld.[87] The doctrine was anything but clear at the time Ann Hopkins's case was heard by the Supreme Court.

B. The Price Waterhouse *Revolution*

Interestingly, in *Price Waterhouse*, neither the plurality,[88] nor the concurrences,[89] nor the dissent[90] perceived the question of whether gender stereotyping constitutes a valid theory of sex discrimination as the main issue at stake. The "real" issue in the case concerned burden-shifting and the standard of proof required in Title VII cases.[91] However, the plurality spent a significant portion of its discussion focusing on the facts of Hopkins' case, finding that she had been a victim of sex discrimination based on gender stereotyping and affirming the validity of her claim under Title VII. Since neither the concurrences nor the dissent challenged the plurality's acceptance of the underlying sex discrimination claim, the entire Court implicitly legitimized the gender-stereotyping theory of sex discrimination.

Ann Hopkins had been an extremely successful senior manager at the accounting firm of Price Waterhouse.[92] She had worked at the firm for five

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84. *See, e.g.*, Fadhl v. City and County of San Francisco, 741 F.2d 1163 (9th Cir. 1984), *aff'd in part after remand*, 804 F.2d 1097 (9th Cir. 1986); *Thorne*, 726 F.2d at 468; EEOC v. FLC & Bros. Rebel, Inc., 663 F. Supp. 864 (W.D. Va. 1987). The preceding cases were all cited in an amicus brief in *Price Waterhouse* submitted by a number of feminist legal organizations. Brief of Amici Curiae for Respondent, NOW Legal Defense and Educ. Fund et al. at *30 n.24, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

85. *See* Franke, *Central Mistake*, *supra* note 11, at 75-80.

86. Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978).

87. *See, e.g.*, Carroll v. Talman Fed. Savs. & Loan Assoc., 604 F.2d 1028 (7th Cir. 1979), *cert. denied*, 445 U.S. 929 (1980); Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388 (W.D. Mo. 1979). Sex-based workplace grooming and dress codes continue to be upheld today in spite of *Price Waterhouse*. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104 (9th Cir. 2006) (en banc); Bedker v. Domino's Pizza, 491 N.W.2d 275 (Mich. Ct. App. 1992).

88. *Price Waterhouse*, 490 U.S. at 228.

89. *Id.* at 258 (White, J., concurring); *id.* at 261 (O'Connor, J., concurring).

90. *Id.* at 279 (Kennedy and Scalia, J.J., and Rehnquist, C.J., dissenting).

91. *See id.* at 232 (plurality opinion) ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives.").

92. *Id.* at 233-34.

years when her name was put forward as a candidate for partnership.[93] The partners in Hopkins's office prepared a statement in support of her candidacy that highlighted her success at securing a $25 million government contract for the firm, calling it "an outstanding performance" that Hopkins accomplished "virtually at the partner level."[94] The district court found that "none of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts" for the firm.[95]

Hopkins was the only woman among the eighty-eight candidates for partnership that year.[96] Forty-seven of those candidates were accepted for partnership.[97] Twenty, including Hopkins, were "held" for reconsideration the next year.[98] The reasons many partners gave for opposing Hopkins's partnership included her perceived aggressiveness and unsatisfactory "inter-personal skills."[99] Various partners described Hopkins as "macho," "overcompensat[ing] for being a woman," and needing "a course at charm school."[100] And in the "*coup de grace*," the man who conveyed to Hopkins the reasons behind her failure to make partner advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[101] The district court found, and the Supreme Court agreed, that the record contained strong evidence that Hopkins was not promoted in part because she did not conform to stereotypes associated with her sex.[102]

The Court held that "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."[103] The Court specifically noted the "catch 22" in which this kind of sex stereotyping places women: "out of a job if they behave aggressively and out of a job if they do not."[104] It then asserted, "Title VII lifts women out of this bind."[105] The Court reached this conclusion in a roundabout way, as if it were obvious, merely remarking that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[106] As offhand as this statement sounds, and as quietly as it was

93. *Id.* at 233.
94. *Price Waterhouse*, 490 U.S. at 233.
95. *Id.* at 234 (quoting Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1112 (D.D.C. 1985)).
96. *Id.* at 233.
97. *Id.*
98. *Id.*
99. *Id.* at 234-35.
100. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1117 (D.D.C. 1985).
101. *Price Waterhouse*, 490 U.S. at 234-35 (quoting *Price Waterhouse*, 618 F. Supp. at 1117).
102. *Id.* at 255-56.
103. *Id.* at 250.
104. *Id.* at 251.
105. *Id.*
106. *Price Waterhouse*, 490 U.S. at 255.

accepted by the concurrences and dissent, this was the first time the Supreme Court gave its imprimatur to a theory of sex discrimination that includes discrimination based on an individual's perceived failure to conform to gender stereotypes.

C Reaffirming Title VII's Broad Sweep—Oncale

The Supreme Court reaffirmed the broad sweep of Title VII's sex discrimination provisions one more time after Price Waterhouse in another case involving a non-transgender plaintiff. Though that decision did not reference *Price Waterhouse*, both cases fit together nicely as examples of the Court's more recent views on the protection Title VII provides for gender-nonconforming individuals. *Oncale v. Sundowner Offshore Services, Inc.*, decided in 1998, was a unanimous decision authored by Justice Scalia.[107] The Court reversed the circuit court to find that a male employee who was repeatedly subjected to sex-related harassment and threats of rape from male co-workers had stated a valid claim under Title VII.[108]

The Court used a number of rhetorical techniques to justify its broad reading of Title VII to cover same-sex sexual harassment. The decision noted that previous Supreme Court cases held that Title VII's language "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment."[109] It also noted that Title VII's sex discrimination provisions protect men and women equally.[110] Then, in language that would prove especially valuable for transgender plaintiffs seeking to overturn older cases like *Ulane*, the Court asserted:

> [M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.[111]

This language stands in clear opposition to the older transgender cases, which relied on a cramped, "plain meaning" approach to interpreting the language of Title VII, applying the law's protections to only those "evils"

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107. 523 U.S. 75 (1998).

108. *Id.* at 82. The district court found, and the Fifth Circuit agreed, that "Mr. Oncale, a male, has no cause of action under Title VII for harassment by male co-workers." Oncale v. Sundowner Offshore Servs., Inc., 83 F.3d 118, 119 (5th Cir. 1996) (quoting Oncale v. Sundowner Offshore Servs., Inc., No. 94-1483, 1995 WL 133349, at *2 (E.D. La. Mar. 24, 1995)).

109. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (quoting Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)).

110. *Id.*

111. *Id.*

that Congress likely had in mind when it passed the Civil Rights Act of 1964.[112]

IV
RECENT TRANSGENDER CASES

A handful of federal courts have decided discrimination cases involving transgender plaintiffs in the years since *Price Waterhouse* and *Oncale*. Following *Oncale*'s encouragement to view Title VII's sex discrimination provision expansively, the lower federal courts began to acknowledge the merit of discrimination claims by transgender plaintiffs. The majority of these cases have been decided in favor of the transgender plaintiffs, relying on *Price Waterhouse*'s explicit endorsement of a gender-stereotyping theory of sex discrimination. However, a few federal district courts have refused to follow suit.

A. Cases Applying the Price Waterhouse *Gender-Stereotyping Theory*

Schwenk v. Hartford[113] was the first federal circuit court decision involving a transgender plaintiff after *Price Waterhouse*. The case involved a male-to-female transsexual prisoner who was sexually assaulted by a prison guard. She sued under the Gender Motivated Violence Act (GMVA), which prohibits "crime[s] of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."[114]

The defendant argued that Schwenk's claim should be dismissed because the law protects only women and Schwenk was really a man. Moreover, even if the statute applied to men, Hartford claimed that it would not protect Schwenk because the statute did not cover violence against transsexuals.[115] With regard to the first claim, the Ninth Circuit found that the legislative history showed a clear intent that the law's protections would apply equally to men and women, and particularly to men who are the victims of rape in prison.[116]

With regard to the defendant's claim that violence against transsexuals-as-transsexuals should not be covered under the Act, the court first examined older cases such as *Ulane*[117] and *Holloway*[118] that supported the defendant's position.[119] It agreed that in those cases, the courts denied relief to transsexuals claiming sex discrimination under a gender-

112. *See supra* Part II.
113. 204 F.3d 1187 (9th Cir. 2000).
114. 42 U.S.C. § 13981(d)(1) (2000).
115. Schwenk v. Hartford, 204 F.3d 1187, 1199-1200 (9th Cir. 2000).
116. *Id.* at 1200.
117. 742 F.2d 1081 (7th Cir. 1984).
118. 566 F.2d 659 (9th Cir. 1977).
119. *Schwenk*, 204 F.3d at 1201.

stereotyping theory.[120] However, the court swiftly and resoundingly rejected those precedents:

> The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. . . . [U]nder *Price Waterhouse*, "sex" under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.[121]

Because the GMVA parallels Title VII's protections, the court found that Schwenk's case constituted a valid claim under the GMVA.[122]

Similarly, in *Rosa v. Park West Bank & Trust Co.*, the First Circuit found that a transgender woman[123] who was denied a credit application had stated a valid claim under the Equal Credit Opportunity Act (ECOA).[124] The plaintiff went into the Park West Bank dressed in "a blousey top" with stockings[125] to request a loan application.[126] The bank employee she spoke with asked to see identification.[127] Rosa gave her three pieces of photo identification, one of which depicted Rosa dressed in traditionally masculine clothing.[128] The bank employee refused to give Rosa a loan application or process her request until Rosa "went home and changed" into men's clothing.[129]

Rosa brought suit against the bank under ECOA, and the Court looked to Title VII case law to interpret ECOA's definition of sex discrimination.[130] The federal district court found that no impermissible discrimination had occurred because, in its view, the bank discriminated against Rosa merely because of her style of dress, which is not a protected category under ECOA or Title VII.[131]

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120. *Id.*

121. *Id.* at 1201-02.

122. *Id.* at 1202-03.

123. The court refers to Rosa using the masculine pronoun. However, since Rosa identifies as female, I will use the feminine pronoun when referring to her. *See* Katherine M. Franke, Rosa v. Park West Bank*: Do Clothes Really Make The Man?*, 7 MICH. J. GENDER & L. 141, 143 n.1 (2001) [hereinafter Franke, *Rosa* Article].

124. 214 F.3d 213 (1st Cir. 2000); 15 U.S.C. §§ 1691-1691f (2006).

125. Franke, *Rosa* Article, *supra* note 123, at 143.

126. *Rosa*, 214 F.3d at 214.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.* at 215.

131. Rosa v. Park West Bank & Trust Co., Civ. Action No. 99-30085-FHF, 1-2 (D. Mass. Oct. 18, 1999) (order granting bank's motion to dismiss Rosa's Equal Credit Opportunity Act claim), rev'd, 214 F.3d 213 (1st Cir. 2000), quoted in Franke, *Rosa* Article, *supra* note 123, at 144 [hereinafter Rosa, Bench Order].

> [T]he issue in this case is not his sex, but rather how he chose to dress when applying for a loan. Because the Act does not prohibit discrimination based on the manner in which someone dresses, Park West's requirement that Rosa change his clothes does not give rise to claims of illegal discrimination.[132]

However, the First Circuit reversed, holding that Rosa had in fact stated a valid claim under *Price Waterhouse*:[133]

> It is reasonable to infer that [the bank employee] told Rosa to go home and change because she thought that Rosa's attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application.[134]

The appeals court therefore denied the defendant's motion to dismiss and remanded the case to the district court.[135]

In 2004, the Sixth Circuit became the first federal circuit court after *Price Waterhouse* to address directly the question of whether a transgender plaintiff could bring a Title VII sex discrimination case relying on the gender-stereotyping theory.[136] Jimmie Smith, born a biological male, worked as a lieutenant fire fighter in the Salem, Ohio Fire Department.[137] She worked there for seven years without incident until she was diagnosed with Gender Identity Disorder (GID).[138] After her diagnosis, Smith began to dress and behave more femininely at work, in accordance with the standard medical protocols for transsexuals.[139] Her co-workers questioned her about her changed appearance and made comments indicating that they considered her manner and appearance insufficiently masculine.[140]

Smith contacted her immediate supervisor and informed him about her diagnosis of GID, the treatment protocol that requires dressing and appearing as a woman, and her eventual plans to undergo sex-reassignment surgery.[141] The supervisor immediately informed the Fire Chief, against

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132. *Id.*

133. *Rosa*, 214 F.3d at 216.

134. *Id.* at 215.

135. *Id.* at 216.

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

137. *Id.* at 568. The Sixth Circuit's opinion refers to Smith with male pronouns, but I will refer to Smith with feminine pronouns in recognition of her feminine gender identity. Note that whether a male-to-female transsexual plaintiff is described as a man who is discriminated against for failing to meet stereotypes of masculinity or instead as a woman who is discriminated against for failing to meet stereotypes of femininity (e.g. by having male body parts) could potentially make some difference in the success of the plaintiff's claims.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

Smith's explicit request.[142] The executive body of the City of Salem then held a meeting to discuss Smith's situation and examine its options for terminating her employment.[143] One participant, Henry Willard, phoned Smith afterwards to tell her about the meeting and the plan to fire her.[144] Willard described the city's efforts as a "witch hunt."[145] Smith immediately contacted an attorney and obtained a right-to-sue letter from the EEOC.[146] The Fire Department subsequently suspended Smith for twenty-four hours for a supposed policy violation.[147] When her suspension was upheld after a hearing, Smith brought suit in federal district court alleging sex discrimination under Title VII.[148] The district court granted the defendants a judgment on the pleadings because "Title VII does not prohibit discrimination based on an individual's transsexualism."[149]

On appeal, the Sixth Circuit reversed, holding that Smith had made out a *prima facie* case of sex discrimination under Title VII.[150] It explained that the district court incorrectly relied on *Ulane* and its predecessors, which the appellate court viewed as no longer good law:

> [I]n the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). . . . [M]ale-to-female transsexuals . . . —as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection.[151]

However, the court declared that *Ulane* and its brethren had been "eviscerated by *Price Waterhouse*,"[152] which made clear that Title VII's ban on discrimination based on "sex" equally prohibits discrimination based on gender.[153]

The court noted *Price Waterhouse*'s holding that discrimination against female employees who fail to appear or behave femininely constitutes discrimination based on sex, because the employee's sex is a but-for cause of the discrimination.[154] Remarkably, the court then

142. *Smith*, 378 F.3d at 568.
143. *Id.*
144. *Id.* at 569.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Smith*, 378 F.3d at 569.
149. *Id.* at 571.
150. *Id.* at 570.
151. *Id.* at 573.
152. *Id.*
153. *See id.* at 572.
154. *Smith*, 378 F.3d at 574.

concluded, "It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."[155]

In this case, Smith's complaint asserted that the executive meetings to force her out and the twenty-four-hour suspension all occurred soon after she began to appear more femininely at work and informed her supervisor about the reason for her changed appearance.[156] The court found that Smith's claim that this discrimination was due to her "failure to conform to sex stereotypes by expressing less masculine, and more feminine mannerisms and appearance" unmistakably constituted a cognizable claim of sex discrimination.[157]

The appeals court also took issue with the district court's holding that Smith's claim was really one of discrimination based on "transsexualism" rather than discrimination based on sex or gender stereotyping.[158] According to the district court, Smith's sex discrimination claim appeared disingenuous, merely "invok[ing] the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping,'" when Smith's claim "is, in reality, based upon his transsexuality."[159] The Sixth Circuit acknowledged that a few other courts have similarly found that discrimination against, for instance, males who behave femininely or dress in women's clothing, is "of a different and somehow more permissible kind" than the discrimination at issue in *Price Waterhouse*.[160] "[T]hese courts superimpose classifications such as 'transsexual' on a plaintiff, and then legitimize discrimination based on the plaintiff's gender nonconformity by formalizing the non-conformity into an ostensibly unprotected classification."[161] This same pattern is seen in the cases described in Part II *supra* that discuss the perceived need to guard against "bootstrapping" of discrimination claims by categories of individuals that Congress never meant to include in Title VII, such as gays or transsexuals.[162]

However, the Sixth Circuit criticized such a theoretical move as inconsistent with *Price Waterhouse* and Title VII.[163] It noted that neither authority makes "protection against sex stereotyping conditional or . . . exclude[s] Title VII coverage for non sex-stereotypical behavior

155. *Id.*
156. *Id.* at 572.
157. *Id.*
158. *Id.* at 574-75.
159. Brief for Appellant at 11, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (quoting unpublished trial court order, pp. 6-7) (on file with author) [hereinafter Smith Brief].
160. *See* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).
161. *Id.*
162. *See* cases cited *supra* note 66.
163. *See Smith*, 378 F.3d at 574-75.

simply because the person is a transsexual."[164] Therefore, "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."[165]

In fact, the court went even further, and came close to asserting a general presumption that employees who are discriminated against for being transsexual have *per se* been discriminated against on the basis of sex: "[D]iscrimination against a plaintiff who is transsexual—*and therefore fails to act and/or identify with his or her gender*—is no different from Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[166] The word "therefore" in the intermediate clause indicates the court's view, and indeed the logical fact, that transsexuals *by definition* violate gender norms, and therefore deserve Title VII protection under *Price Waterhouse*.

This point was made even more strongly in the plaintiff's brief to the Sixth Circuit. The only way an employer can know about an employee's transsexuality—a necessary precondition for discrimination based on that employee's transsexuality—is if the transsexual person violates some gender stereotype, either through his or her appearance or behavior, or by confessing cross-gender identification.[167] "Quite simply, transsexualism is undetectable absent contra-gender or gender-variant behavior of some kind."[168] Therefore, discrimination against transsexuals as such should be understood as *per se* sex discrimination.

The *Smith* decision marks a turning-point in the jurisprudence of Title VII transgender cases. Although not mandatory authority outside of the Sixth Circuit, other courts addressing the issue for the first time will have to take into account the most recent circuit court decision on the question—not outmoded, pre-*Price Waterhouse* decisions like *Ulane* and *Holloway*, but a contemporary statement from the fairly conservative Sixth Circuit Court of Appeals. Courts looking to extend protection to transgender and gender-nonconforming employees can hang their hat on this opinion; courts seeking to disclaim any such rights for transgender employees will be obligated to explain their departure from the Sixth Circuit's decision.

The Sixth Circuit itself followed up on *Smith* with a similar decision less than a year later. In *Barnes v. City of Cincinnati*, the plaintiff was a police officer whose superiors thwarted his attempt to become a sergeant due to his feminine appearance and behavior.[169] The court identified Barnes as "male-to-female transsexual who was living as a male while on duty but

164. *See id.*
165. *Id.* at 575.
166. *Id.* (emphasis added).
167. *See* Smith Brief, *supra* note 159, at 23.
168. *Id.*
169. 401 F.3d 729 (6th Cir. 2005).

often lived as a woman off duty."[170] Barnes "had a French manicure, had arched eyebrows and came to work with makeup or lipstick on his face on some occasions."[171] In language uncannily reminiscent of *Price Waterhouse*, the plaintiff was counseled that "he did not appear to be 'masculine,' and that he needed to stop wearing makeup and act more masculine" in order to be promoted.[172]

The circuit court made easy work of the lower court's decision, applying the analysis it used in *Smith*. In response to the defendant's argument that Barnes was not a member of any "protected class," the court wrote that employees, including transsexuals, who are discriminated against based on their gender nonconformity have experienced prohibited sex discrimination.[173] "Following the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes."[174]

Although no other federal court of appeals has squarely taken up this issue post-*Price Waterhouse*, subsequent cases from district courts around the country reveal a strong trend in favor of finding protection for transgender plaintiffs under Title VII, following the lead of the Sixth Circuit. In 2005, a Tennessee district court, citing *Smith* and *Price Waterhouse*, denied an employer's motion to dismiss the Title VII "sex stereotyping discrimination" claims of two apparently gay employees who were harassed by their supervisor because of their non-conformity with masculine stereotypes of appearance and behavior.[175] In another case

170. *Id.* at 733.

171. *Id.* at 734.

172. *Id.* at 735.

173. *Id.* at 737.

174. *Id.* In this decision, the Sixth Cireuit also followed up on its remarkably progressive holding in *Smith* that the transgender city-employee plaintiff had stated a valid sex discrimination claim under the Equal Protection Clause of the United States Constitution. *See* Smith v. City of Salem, 378 F.3d 566, 576-77 (6th Cir. 2004). In *Barnes*, the court noted that a plaintiff making an equal protection claim must "allege that a defendant has intentionally discriminated against him or her because the individual is part of a vulnerable minority elass of protected individuals." 401 F.3d at 739 (citing Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 256 (1977)). Citing *Smith*, the court rejected the defendant's argument that "Barnes did not have standing to bring an equal protection claim based on his status as a transsexual," because "Barnes is a member of a protected class—whether as a man or a woman." *Id.* (citing *Smith*, 378 F.3d at 575 and *Arlington Heights*, 429 U.S. at 256).

175. Rhea v. Dollar Tree Stores, Inc., 395 F. Supp. 2d 696, 699-700, 704-05 (W.D. Tenn. 2005). The court did, however, dismiss the plaintiffs' federal claims of discrimination based on sexual orientation, noting that sexual orientation claims are "not cognizable under Title VII." *Id.* at 701 n.4 (citing Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001)). *See also* Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005). In *Dawson*, the Second Circuit upheld a lower court decision in favor of the defendant employer in a case of alleged gender-stereotyping discrimination against a "lesbian female who does not conform to gender norms." *Id.* at 213. The court struggled with the question of how to categorize the plaintiff's Title VII claims, citing *Price Waterhouse* and *Smith* in acknowledging that "sex stereotyping [by an employer] based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 218 (quoting Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004)). However, the court appeared uncertain as to how to reconcile that rule with the

involving a plaintiff who was fired when she "announced [her] intention to transition from male to female," a Pennsylvania district court denied a defendant's motion to dismiss "on the basis that the Supreme Court has clearly stated [in *Price Waterhouse*] that Title VII requires that gender be irrelevant to employment decisions."[176] The court cited dicta from the Third Circuit's decision in *Bibby v. Philadelphia Coca-Cola Bottling Co.*, as well as the Sixth Circuit's decisions in *Smith* and *Barnes*, for the rule that "a plaintiff may be able to prove sex discrimination by demonstrating that, 'the harasser's conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.'"[177]

Finally, in *Sturchio v. Ridge*, a Washington state federal district court considered a case involving a transgender employee who transitioned from "Ron" to "Tracy" while working for the federal Border Patrol.[178] In ruling on the defendant's motion to dismiss, the court cited *Smith* and *Schwenk* and held that her complaint that she "is being harassed and discriminated against because her co-workers considered her as a biological male, and wanted her to act like one" constituted a valid claim under Title VII.[179] In the subsequent decision on the merits, the court stated that the relevant legal standard required the plaintiff to "show that Defendant's actions were motivated on account of Ron's failure to act or look as a male stereotypically would, or were motivated on account of Tracy's gender."[180] The court ultimately found that the plaintiff had failed to prove her case factually, since she had not demonstrated that her tense relationship with her co-workers was "gender-motivated, retaliatory, or constituted a hostile work environment."[181] However, it did so while making clear that sex-stereotyping was indeed a legitimate theory of sex discrimination under Title VII.[182]

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rule from the Second Circuit and other circuits that "a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'" *Id.* (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)). The court ultimately found refuge in tbe facts of the case: because nonconformity was the norm among employees at the salon, and the manager who fired the plaintiff was herself a pre-operative male-to-female transsexual, the court held that tbe plaintiff had failed to demonstrate that her termination was based on her "failure to conform her appearance to feminine stereotypes" or any other kind of discrimination. *Id.* at 214, 222-23.

176. *Id.* at *3 (eiting Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)).

177. *Id.* (quoting *Bibby*, 260 F.3d at 262).

178. No. CV-03-0025-RHW, 2005 U.S. Dist. LEXIS 37406, at *13-14 (E.D. Wash. June 23, 2005).

179. Sturchio v. Ridge, No. CV-03-0025-RHW, 2004 U.S. Dist. LEXIS 27345, at *4 (E.D. Wash. Dec. 20, 2004).

180. Sturchio v. Ridge, No. CV-03-0025-RHW, 2005 U.S. Dist. LEXIS 37406, at *38-39 (E.D. Wash. June 23, 2005).

181. *Id.* at *25 (citing Oncalc v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998), for the proposition that "Title VII is not 'a general civility code for the American workplace'").

182. *Id.* at *20, 38-39.

B. *Steps Backward: Cases Reaffirming* Ulane

Rejecting the recent trend in favor of transgender victims of discrimination, one federal district court in Louisiana granted summary judgment to an employer who fired an employee for cross-dressing outside of work.[183] *Oiler v. Winn Dixie* involved a married heterosexual cross-dresser, Peter Oiler, who had been employed as a truck driver for Winn-Dixie for twenty years.[184] Oiler only cross-dressed outside of work, "appear[ing] in public approximately one to three times per month wearing female clothing and accessories . . . adopt[ing] a female persona . . . [and] us[ing] the name 'Donna.'"[185] When Oiler told his supervisor about his cross-dressing, the supervisor immediately informed the company president that Oiler was transgender.[186] Shortly thereafter, Oiler was fired.[187] The company president and Oiler's supervisor explained that they were concerned that if Oiler were recognized by customers while cross-dressing, they might disapprove and take their business elsewhere.[188]

The district court's decision hewed closely to the example set by *Ulane* and its predecessors in holding that Title VII provides no protection to employees who are fired because they are transgender. The court discussed the history of Title VII's enactment, noting that in 1964, unlike today, "sexual identity and sexual orientation related issues remained shrouded in secrecy."[189] As with earlier cases, the court also noted Congress's refusal to add sexual orientation to the prohibited bases of discrimination in Title VII as evidence against interpreting the statute to protect transgender employees.[190]

The court did address Oiler's claim that, as in *Price Waterhouse*, his termination was the result of his failure to conform to gender stereotypes.[191] However, the court analogized transgenderism to sexual orientation to find that mere membership in such a category is insufficient to gain Title VII protection. Courts generally accept that Title VII does not provide protection against sexual orientation discrimination, in large part because of the numerous failed attempts Congress has made since the passage of Title VII to add an explicit provision to that effect.[192] For instance, a man fired for being gay cannot claim sex discrimination under Title VII unless he was fired at least in part because of his feminine appearance or

183. Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La., Sept. 16, 2002).
184. *Id.* at *4.
185. *Id.* at *6.
186. *Id.* at *7-8.
187. *Id.* at *9.
188. *Id.* at *9-10.
189. *Oiler*, 2002 U.S. Dist. LEXIS at *21.
190. *Id.* at *22.
191. *Id.* at *24.
192. *See* sources cited *supra* note 66.

behavior.[193] Therefore, not all gay men would be protected under Title VII, because "not all homosexual men are stereotypically feminine."[194] The court in Oiler saw such a bar as necessary to prevent the "bootstrapping" of sexual-orientation or gender-identity discrimination per se into Title VII, in contravention of the legislative intent.[195]

In this case, the court held that Oiler could not claim the protection of Title VII because he "was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee."[196] Rather, he was fired for public cross-dressing. It held that *Price Waterhouse* was inapplicable, because Ann Hopkins "may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona."[197] The court thus seemed to endorse the notion that *Price Waterhouse*'s gender-stereotyping theory could never apply to a transgender employee.

Oiler was decided two years before the Sixth Circuit's decision in *Smith*. Only one case decided after *Smith* has run counter to that decision's holding that discrimination against transgender employees constitutes impermissible sex-based discrimination under Title VII. In *Etsitty v. Utah Transit Authority*, a federal district court heard a case brought by a pre-operative male-to-female transsexual.[198] Etsitty was employed as a bus driver, and initially dressed as a man at work. She subsequently came out to her employer about her transsexuality and informed her supervisor that she would begin to present herself as a woman on the job.[199] Betty Shirley, the bus system's manager of operations, was worried mainly about whether Etsitty would use the men's or women's restroom.[200] Shirley "expressed concern about potential . . . liability [for the bus system] based on complaints that may result from Plaintiff using a female restroom," given that Etsitty still had male genitals.[201] Etsitty was apparently terminated because she expressed an intent to use women's restrooms. Shirley noted on the record of termination that Etsitty "was eligible for rehire after completion of 'his surgery (transformation),' when he no longer had male genitalia."[202]

The court began its analysis of Etsitty's Title VII claim with the rather incredible statement that "[e]very federal court that has dealt directly with

193. *Oiler*, 2002 U.S. Dist. LEXIS at *26-27.
194. *Id.* at *27 (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)).
195. See *id.*
196. *Id.* at *28.
197. *Id.* at *29.
198. No. 2:04CV616 DS, 2005 U.S. Dist. LEXIS 12634 (D. Utah June 24, 2005).
199. *Id.* at *2-3.
200. *Id.* at *3.
201. *Id.*
202. *Id.* at *5.

this issue has held that 'Title VII does not prohibit discrimination based on an individual's transsexualism'", quoting, of all things, an Ohio district court opinion from 2003 that the Sixth Circuit subsequently affirmed just months before its decision in *Smith*.[203] Like *Ulane*, *Holloway*, and *Oiler*, the *Etsitty* court relied on the unsuccessful attempts to amend Title VII to explicitly address discrimination based on sexual orientation as evidence that "Congress intended the phrase in Title VII prohibiting discrimination on the basis of sex to be narrowly interpreted."[204] The court did acknowledge that *Price Waterhouse* is in tension with—and *Smith* and *Barnes* are in outright conflict with—the holding of *Ulane* and *Holloway* that Title VII necessarily excludes transsexuals from protection.[205] However, the court disagreed with the Sixth Circuit's conclusion that, after *Price Waterhouse*, *Ulane* is no longer good law.[206] It declared that "[t]here is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman," refusing to characterize "such drastic action . . . as a mere failure to conform to stereotypes."[207]

Just as in *Oiler*,[208] the court here held that Etsitty had not shown that she was fired due to nonconformity with gender stereotypes: "Plaintiff admits that she was treated respectfully, and that she was never criticized or ridiculed for her appearance."[209] Rather, the bus system's concern about liability that could ensue from Etsitty's use of women's restrooms constituted a "legitimate non-discriminatory reason" for her dismissal.[210]

Both *Oiler* and *Etsitty* suggested that the transgender plaintiffs were fired for reasons that cannot be classified as sex discrimination. Those courts emphasized legislative history to find that "bootstrapping" of transgenderism or transvestism into Title VII is improper. *Etsitty* analogized transsexuality to homosexuality to argue that Congress's attempt and failure to pass legislation protecting gays and lesbians means "that Congress intended the phrase in Title VII prohibiting discrimination on the basis of sex to be narrowly interpreted."[211] *Oiler* noted that, over the twenty or more years that courts have been "struggling" with the question of whether to apply Title VII to sexual orientation or "sexual identity disorders," "Congress has had an open invitation to clarify its

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203. *Id.* at *7 (quoting Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff'd*, 98 Fed. Appx. 461 (6th Cir. May 18, 2004)).

204. *Etsitty*, 2005 U.S. Dist. LEXIS at *9.

205. *Id.* at *8, 10-12.

206. *Id.* at *12.

207. *Id.*

208. *See supra* notes 196-197 and accompanying text.

209. *Etsitty*, 2005 U.S. Dist. LEXIS at *16.

210. *Id.*

211. *Id.* at *9.

intentions."[212] In that court's view, Congress's failure to do so shows that "Congress did not intend Title VII to prohibit discrimination on the basis of a gender identity disorder."[213]

Since the Supreme Court has definitively stated that Title VII covers gender-stereotyping discrimination,[214] it is difficult to argue seriously that the statute should be interpreted to exclude from its coverage any gender-stereotyping discrimination that targets gay and transgender people merely because of the subsequent failure of Congress to enact new legislation explicitly protecting those groups. It seems unlikely that the Supreme Court would approve that exclusionary approach today, given the rise in prominence of the "new textualism" advocated by Justice Scalia. Scalia's philosophy minimizes the relevance of legislative intent in statutory interpretation.[215] If the words of the statute prohibit all gender stereotyping, then it matters little whether the enacting legislature or subsequent legislatures consciously intended that result, as Justice Scalia himself emphasized in *Oncale*.[216]

Interestingly, both the *Oiler* and *Etsitty* courts acknowledged that transgender individuals may be able to claim protection under a gender-stereotyping theory of Title VII "if they allege that they were discriminated against because they failed to conform to sex stereotypes (including stereotypical norms about dress and appearance)."[217] This is a definite change from the pre-*Price Waterhouse* decisions like *Ulane* and *Holloway*. Admitting that *Price Waterhouse* protects even gay and transgender employees from discrimination based on their failure to conform with gender stereotypes leaves the *Oiler* and *Etsitty* courts in an awkward position. With such a concession, only the weak argument based on subsequent legislative history remains to defend the conclusion that the gender stereotyping experienced by transgender victims of discrimination is not cognizable under Title VII.

The *Oiler* and *Etsitty* courts held, in essence, that proving discrimination based on transgender status is not sufficient to show (unlawful) discrimination based on gender stereotypes. The *Oiler* court contended that, in Title VII, "the phrase 'sex' has not been interpreted to

212. Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *31-32. (E.D. La., Sept. 16, 2002).

213. *Id.* at *32.

214. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

215. *See, e.g.*, ESKRIDGE ET AL., *supra* note 59, at 742-72; ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).

216. *See Oncale*, 523 U.S. at 79.

217. *Etsitty*, 2005 U.S. Dist. LEXIS at *10 (citing Smith v. City of Salem, 369 F.3d 912 (6th Cir. 2004)); *see also Oiler*, 2002 U.S. Dist. LEXIS at *28 (noting that the plaintiff "was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee").

include sexual identity or gender identity disorders."[218] That is generally true;[219] however, such an interpretation is not necessary to find that a transgender plaintiff was impermissibly discriminated against based on sex, which was all that Oiler argued to the court.[220] None of the plaintiffs in these cases argued that "sex" *means*, or includes, transgenderism (or homosexuality). Rather, the essence of the plaintiffs' arguments was that discrimination based on an individual's transgenderism is a subset of discrimination based on gender stereotypes, and discrimination based on gender stereotypes is a subset of discrimination based on sex. Therefore, discrimination against transgender people is always also sex discrimination.

V
EXPLORING THE BOUNDARIES OF THE GENDER STEREOTYPING THEORY

As the preceding discussion demonstrated, federal courts have come a long way since the pronouncements in the early transgender cases that Title VII only prohibits discrimination against "biological male[s] and biological female[s]."[221] The issue of discrimination against transgender employees cuts to the core of what a "gender stereotype" is. It may seem obvious today that the view that women cannot be police officers or that men cannot be nurses is a gender stereotype. However, the gender stereotypes that transgender individuals are perceived to violate may be much more difficult to understand as "stereotypes"—for instance, the stereotype that biological males should not wear women's clothing or that biological females should not adopt men's names and ask to be addressed with masculine pronouns. These particular stereotypes seem to run to the basic, transparent *meaning* of what it is to be a man or a woman. After all, something can't be a stereotype if it is the truth. In the eyes of many people, even today, it is simply incomprehensible that a person could violate such core loyalties as gender norms. According to conventional, contemporary American gender stereotypes, men inherently do not and must not wear dresses or makeup. Similarly, women do not and must not undergo hormone treatment and sex reassignment surgery to become men.

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218. *Oiler*, 2002 U.S. Dist. LEXIS at *30.

219. *But see* Schroer v. Billington, 424 F. Supp. 203, 204, 212-13 (D.D.C. 2006) (holding that male-to-female transsexual plaintiff who was terminated by the Library of Congress stated a valid Title VII claim because discrimination based on "sexual identity" is literally discrimination "because of . . . sex").

220. *See Oiler*, 2002 U.S. Dist. LEXIS at *17 ("[P]laintiff argues that Title VII prohibits employment discrimination on the basis of sexual stereotyping and that defendant's termination of him for his off-duty acts of cross-dressing and impersonating a woman is a form of forbidden sexual stereotyping.").

221. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).

Such violations of the standard gender order can be so incomprehensible that it can be difficult to understand that they are simply more dramatic examples of nonconformity with gender stereotypes.

However, it simply is *not* a biological, universal truth that men do not wear dresses, use makeup, or transform themselves into women. That being the case, we must come up with an explanation for how society should view gender nonconformists. Are they medical oddities who can only claim protection under laws prohibiting disability-based discrimination?[222] Are they freaks who have no claim to legal protection from the hurtful reactions of those who are uncomfortable with their boundary-crossing?[223] Either of these views cast transgender people as categorically different from the working women that Title VII was originally intended to protect, such that any claim by a transgender person of "sex discrimination" is incoherent and invalid. Early cases like *Ulane* and *Holloway*, as well as later decisions like *Oiler*, embraced this view.

However, discrimination against a person for acting "like" the other sex—*no matter what the reason*—is sex discrimination. As the Sixth Circuit wrote, *Price Waterhouse* tells us that "an employer who discriminates against women because . . . they do not wear dresses or makeup" commits sex discrimination; "[i]t follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination."[224] Conceptually, there is no sustainable analytic point of distinction between (1) a woman who wishes to become a police officer, in violation of the gender stereotype that women are not aggressive or tough; (2) a woman who acts assertively in the workplace and dresses in an unfeminine style, in violation of the gender stereotypes that dictate appropriate clothing and appearance standards for women; and (3) a woman who adopts a masculine name and begins taking testosterone in preparation for a sex change, in violation of the gender stereotype that people with female bodies should have a feminine gender identity and maintain their female physiology. If we concede that Title VII was enacted to protect women from being judged unfairly according to gender stereotypes, we must also agree that Title VII's protections should extend to transgender individuals who are discriminated against because of their perceived violation of gender norms. As the Supreme Court stated in *Price Waterhouse*, "we are beyond the day when an employer could evaluate employees by assuming or insisting that

222. *See, e.g.*, Levi, *Clothes Don't Make the Man*, *supra* note 25.

223. *See, e.g.*, *Oiler*, 2002 U.S. Dist. LEXIS at *28 (finding legally permissible plaintiff's termination "because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna'").

224. Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

they matched the stereotype associated with their group."[225] Insisting that every employee's gender identity or expression match his or her anatomical characteristics is discrimination based on sex.

In an amicus brief to the First Circuit in support of the plaintiff in *Rosa v. West Park Bank & Trust Co.*,[226] and an accompanying article,[227] Katherine Franke argued that the fate of all women who desire Title VII protection for conduct that may violate gender stereotypes is tied to the fate of transgender victims of discrimination:

> Rather than understand Rosa's experience as lying well beyond the bounds of laws relating to sex-stereotyping, she is better understood as a sort of canary in the sartorial coal mine: [s]he was simply the most visible victim of systemic gender norms that regulate all of us in the ways in which we coherently present ourselves to the world as "men" or "women."[228]

Although the lower court in *Rosa* had ruled that the discrimination faced by the plaintiff was merely based on the clothing she wore, rather than anything having to do with "sex stereotypes,"[229] Franke's analysis makes clear the fallacy in that claim.[230] Her brief argues that Rosa's claim should be understood instead as fitting squarely within the *Price Waterhouse* category of sex-stereotyping claims.[231] "For a man to be denied access to credit on the basis of traits that would have been welcome if found in a woman is sex discrimination, plain and simple."[232] In other words, Rosa's dressy, feminine attire would have been perfectly appropriate on a (non-transgender) female applicant, and, therefore, the bank could not legally deny credit to a male applicant on the basis of that same clothing.

Mary Anne Case has observed that traditionally feminine modes of appearance and behavior are systematically devalued in our culture, whether they are displayed by women or men.[233] She argues that, until the world is made safe for "men in dresses," women who display traditionally

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225. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).

226. Katherine M. Franke, Amicus Curiae Brief of NOW Legal Defense and Educational Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal, reprinted in 7 MICH. J. GENDER & L. 163 (2001) [hereinafter Franke, *Rosa* Amicus Curiae Brief].

227. Franke, *Rosa* Article, *supra* note 123. Franke viewed this brief as a "chance to translate my more theoretical writing on sex, gender, performance, identity and equality into an argument that courts would understand and accept." *Id.* at 145-46.

228. *Id.* at 144.

229. Rosa, Bench Order, *supra* note 145, at 1-2 ("[T]he issue in this case is not his sex, but rather how he chose to dress when applying for a loan. . . . [T]he Act does not prohibit discrimination based on the manner in which someone dresses"), *quoted in* Franke, *Rosa* Article, *supra* note 123, at 144.

230. Franke, *Rosa* Article, *supra* note 123, at 144-45.

231. Franke, *Rosa* Amicus Curiae Brief, *supra* note 226, at 164-66.

232. *Id.* at 170.

233. Case, *supra* note 76, at 33-36.

feminine traits will not receive the respect they deserve.[234] Similarly, Franke suggests that if Title VII and the ECOA did not cover discrimination based on gendered clothing, "a loan officer would be free to deny a loan to a woman because she looked too "frilly," on the assumption that women who dress in an extremely feminine manner most likely have not had experience managing financial matters."[235] In that case, "the loan officer would be making credit-worthiness determinations based on gendered stereotypes, the precise evil the ECOA was enacted to prevent."[236] Thus, the legal treatment of transgender people has very real implications for the protections available to non-transgender people.

Not all transgender people or transgender advocates support the use of the gender-stereotyping theory to attain legal protection for transgender people. Transgender-rights advocate Jennifer Levi has criticized this theory for giving short shrift to the centrality of gender identity for many transsexual individuals.[237] Levi cites Katherine Franke and Judith Butler as proponents of "the post-modern perspective that all gender is socially constructed and that there is nothing essential about gender identity."[238] She criticizes the "post-modern" view for leading to the logical conclusion that transsexuality does not exist—since under that view, she argues, masculinity could simply be re-imagined to include female body parts, and femininity could be re-imagined to include male body parts.[239]

An immediate response to this objection is that neither Franke nor Butler (nor I) have suggested that transsexualism is illegitimate or unreal. In fact, Butler expressly responded to such criticism in her book *Bodies That Matter*. To those who fear that a theory that both sex and gender are "socially constructed" presupposes a voluntary actor "who makes its gender through an instrumental action," she responds with the following: "[I]f gender is constructed, it is not necessarily constructed by an 'I' or a 'we' who stands before that construction in any spatial or temporal sense of 'before.' Indeed, it is unclear that there can be an 'I' or a 'we' who has not been submitted, subjected to gender."[240] In other words, awareness that society constructs culturally contingent archetypes of masculinity and femininity does not imply that individuals are thus able to invent their own notions of masculinity and femininity, free from those admittedly unnatural constraints. Rather, Butler recognizes that we are all intricately bound up in that system, our identities molded by it as we simultaneously and unconsciously help to sustain it.

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234. *Id.* at 7-8.
235. Franke, *Rosa* Amicus Curiae Brief, *supra* note 226, at 176.
236. *Id.*
237. Levi, *Clothes Don't Make the Man*, *supra* note 25, at 90.
238. *Id.* at 108.
239. *Id.*
240. BUTLER, BODIES THAT MATTER, *supra* note 11, at 7.

Under the theories of Butler, Franke, and even *Price Waterhouse*, gender stereotypes can be viewed, at their extreme, as constituting the very way we define sex—e.g., it is a "stereotype" that to be a "man" requires a masculine gender identity accompanied by male body parts. Embracing such a "stereotype" may be a crucial, driving force in the experience of a female-to-male transsexual. However, there is a difference between recognizing the instability of such correlations and the dangerous potential repercussions of putting too much weight on them and criticizing the self-image and goals of individuals. The theory that employment decisions based upon gender stereotypes are illegal does nothing to undermine the legitimacy of a transsexual person's gender identity or personal desire to undergo a physical transformation to conform more closely with such stereotypes. A theory or a theorist can simultaneously respect the deeply felt needs of most individuals to act in accordance with gender stereotypes, while also forbidding outsiders from mistreating anyone on the basis of perceived nonconformity with those stereotypes. In fact, Levi herself discovers that the two positions can be reconciled, with the insight that while the meanings ascribed to gender "may be socially constructed and responsive to social, political, and cultural pressures," at the same time "a given individual's gender identity remains impervious to change."[241]

Levi favors a legal strategy centered on a disability model of transsexuality that would permit transgender plaintiffs to claim protection under laws that prohibit discrimination based on real or perceived disability.[242] Her strategy would emphasize the immutability of an individual's core gender identity to make the case that transgenderism is a permanent, involuntary condition.[243] She asserts defensively that "a post-modern approach that seeks to disaggregate sex and gender" would reject Levi's disability as "essentialist."[244] While I would argue that the disability approach lacks the wide utility that Levi suggests, it is not because it is somehow analytically impure. The more serious limitation to Levi's disability model is that it privileges transsexual plaintiffs who seek medical intervention over any other employees who fall victim to gender stereotyping. A "real" male-to-female transsexual, on the one hand, may be able to point to a medical diagnosis of Gender Identity Disorder, or some other evidence of a core gender identity that requires her to express her feminine gender by wearing women's clothes and makeup to work.[245] An

241. Levi, *Clothes Don't Make the Man*, *supra* note 25, at 112.

242. *Id.* at 101-13.

243. *Id.*

244. *Id.* at 105 (citing Franke, *Central Mistake*, *supra* note 11).

245. *See id.* at 103, discussing *Doe ex rel Doe v. Yunits*, No. 001060A, 2000 WL 33162199, at *1 (Mass. Super. Ct. Oct. 11, 2000), in which "the plaintiff stated . . . that a treating therapist advised that it was medically and clinically necessary for the plaintiff to wear clothing consistent with her female gender identity."

occasional cross-dresser like the plaintiff in *Oiler*,[246] or a transgender person whose personal history, identity, appearance, or (lack of) desire for medical intervention somehow fall short of the archetypical "transsexual,"[247] may be left without protection if courts focus too strongly on the "essential gender identity" requirement.[248]

That is, under the *Price Waterhouse* theory, as elaborated in decisions like *Smith*, *any* individual—man or woman, straight or gay, transgender or non-transgender—can claim protection against being subjected to gender stereotypes of any kind. Under Levi's disability theory, however, to receive protection, an individual would have to demonstrate that the stereotype which the employer sought to enforce conflicted with an element of the employee's core gender identity. The Supreme Court did not require Ann Hopkins to make such a demonstration, and it would be inconsistent and unfair to require transgender or other gender-nonconforming plaintiffs to meet that standard.

CONCLUSION

It is probably indisputable that Congress did not intend to cover discrimination against transgender or cross-dressing employees as such when it enacted the sex discrimination provisions of Title VII.[249] However, the ringing language from *Oncale* serves as a reminder that the intent of Congress is not the end of the inquiry: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[250] In *Oncale*, the Supreme Court unanimously found that Title VII covers same-sex sexual harassment, even though the Congress that enacted Title VII did not have that type of harassment in mind. The situation of transgender employees is analogous: Congress likely did not consider that a prohibition of "sex" discrimination, which logically includes "gender" discrimination, would also include discrimination against employees, such as transgender or cross-dressing individuals, who radically challenge gender norms.

246. *See* Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *4 (E.D. La. Sept. 16, 2002).

247. *See generally* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005).

248. Interestingly, Levi has elsewhere supported a gender-stereotyping approach to obtaining nondiscrimination protection for transgender individuals. *See, e.g.*, Jennifer Levi, *Paving the Road: A Charles Hamilton Houston Approach to Securing Trans Rights*, 7 WM. & MARY J. WOMEN & L. 5 (2000); Jennifer L. Levi & Mary L. Bonauto, *Brief for the Plaintiff-Appellant Lucas Rosa, reprinted in* 7 MICH. J. GENDER & L. 147 (2001).

249. *See supra* Part II.

250. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

Nonetheless, such logically indistinguishable and "reasonably comparable evils" must be construed to be part of Title VII's prohibitions.

Paisley Currah, co-founder of the Transgender Law and Policy Institute, noted in a recent speech that merely pointing out a logical inconsistency is never sufficient to change the minds of judges or anyone else.[251] The law is not always founded on logic, and courts are not always willing to instigate change. The will of the public must be at least tipping in the direction of change before courts will begin to recognize that a previously disfavored group deserves protection under the logic of existing statutory or constitutional law.

Fortunately, signs exist that such a change is taking place in the area of transgender rights. Since 2001, at least seven states have enacted legislation explicitly protecting transgender people from employment discrimination.[252] Moreover, both of the nation's biggest advocacy organizations for the lesbian, gay, bisexual, and transgender community have declared they will refuse to support the proposed federal Employment Non-Discrimination Act, which would create limited non-discrimination protections for gay employees, unless the legislation is amended to also address discrimination based on gender identity and expression.[253] A steady stream of popular films in recent years has also brought the humanity and the plight of transgender people increasingly into the public consciousness.[254]

But even more dramatic are the changes that are occurring within the courts. Before *Price Waterhouse* was decided in 1989, every federal decision on this issue was based on the precedent of cases like *Voyles*, *Ulane*, and *Holloway*, and transgender employees who sought to rely on Title VII's sex discrimination protections were out of luck. Since *Price Waterhouse*, however, the tide has been turning slowly but surely. It is too soon to say whether cases like *Schwenk*, *Rosa*, and *Smith* represent a complete sea change in this area of the law. There are still occasional district court decisions like *Oiler* and *Etsitty* that have come out in the other direction, finding that *Ulane* and its ilk are still good law. The

251. Paisley Currah, Same Sex Marriage and Beyond, Mary K. Dunlap Memorial Lecture, Boalt Hall School of Law, University of California, Berkeley (Feb. 24, 2005).

252. Those states include California, Illinois, Maine, New Mexico, Rhode Island, and Washington. Those states include California, Illinois, Maine, New Jersey, New Mexico, Rhode Island, and Washington. *See* Transgender Law & Policy Institute, Non-Discrimination Laws That Include Gender Identity and Expression, http://www.transgenderlaw.org/ndlaws/index.htm (last visited March 5, 2007).

253. *See* Bonnie Miller Rubin, *Transgender Movement Emerging From Shadows*, CHI. TRIB., Apr. 3, 2006; *see also* Stefen Styrsky, *HRC Embraces Transgender Rights*, GAY CITY NEWS, Aug. 12-18, 2004. Note, of course, that if the legislation is not immediately successful, such a move could potentially undermine the suecess transgender plaintiffs have found in the courts, under the approach to legislative history embraced by decisions like *Ulane*, *Holloway*, *Oiler*, and *Etsitty*. *See supra* text accompanying notes 211-217.

254. *See, e.g.*, TRANSAMERICA (Belladonna Prod. 2005); NORMAL (Home Box Office 2003); BOYS DON'T CRY (Hart-Sharp Entm't 1999).

difference between cases that do or do not include transgender persons within the scope of Title VII does not seem to be based on any useful factual distinction, but rather on the geography and political valence of the deciding courts.[255] But *Smith* represents a meaningful landmark, as the first federal circuit court decision to reexamine the question that *Ulane* was believed to have conclusively settled in the pre-*Price Waterhouse* days: whether transgender individuals can find any protection under Title VII. If this trend continues, the gender-stereotyping theory may yet become the premier means of explaining the wrong of discrimination against transgender employees, and perhaps the premier tool for vindicating their rights as well.

255. *Compare, e.g.*, Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La..Sept. 16, 2002), *with* Schwenk v. Hartford, 204 F.3d 1187, 1201-02 (9th Cir. 2000).