Transgendered Plaintiffs in Title VII Suits: Why the *Schroer v. Billington* Approach Makes Sense

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Courts should interpret Title VII of the Civil Rights Act[1] (Title VII or the Act) to prohibit discrimination against transgender people because this type of behavior is discrimination based on the plain meaning of the word "sex." This paper will discuss why transgender victims of sex discrimination have been excluded from Title VII's protections, and why they should be protected by the Act as it is currently written. The first part of this paper will discuss what it means to be transgender and transsexual, including how gender and sex relate. It will also discuss our society's binary view of gender and the legal no-man's land this view creates for transsexual and transgender people.[2] Part II will look closely at Title VII—who is protected under the word sex and how Title VII has been expanded over the past 45 years to protect groups other than women. Part III will discuss the U.S. Supreme Court's decision in *Price Waterhouse v. Hopkins* and why it was so important to transgender plaintiffs. In the last part of the paper, I will discuss *Schroer v. Billington*, a case brought by a

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[1] 42 U.S.C. § 2000e-1 (2006).

[2] Intersex people face many of the same legal issues transgender and transsexual people face, but this paper will not address those issues. For a more in-depth discussion of the similarities of these communities and the problems facing the intersex community in particular, see Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265 (1999).

transgender woman against the Library of Congress (the Library) in federal court in the District of Columbia. The two-pronged analysis laid out by the *Schroer* Court is the best analysis for intentional discrimination claims brought by transgender people under Title VII and should be followed by other courts in the future.

Title VII was passed in 1964 as part of the Civil Rights Act in order to eradicate discrimination against minorities in the workplace. It prohibits employers from discriminating on the basis of race, sex, color, national origin, and religion.[3] Over the years, courts have expanded Title VII's definition of sex and the types of discrimination that are covered by the Act. For example, Title VII protects women[4] as well as men;[5] forbids sexual harassment, whether it is caused by someone of the opposite sex[6] or the same sex;[7] and it prohibits gender stereotyping.[8] However, courts have been almost unanimous in their reluctance to include transgender or transsexual people in Title VII's protections.

Some courts have found that a transsexual or transgender plaintiff is *per se* not covered by Title VII, regardless of the circumstances.[9] These courts have primarily argued that the traditional definition of sex only includes males and females, not transgender people.[10] They have denied relief to transgender plaintiffs based on the fact that they are not part of a protected class,[11] finding that they were discriminated against either because of their change of sex,[12] or their transgender status, or based on their mental illness.[13] In effect, these courts have stated that transgender people have no sex. Courts have stressed the lack of express legislative intent to protect transgender people, interpreting the statute in a narrow way.

This paper will discuss three reasons that transgender people should be

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[3] 42 U.S.C. § 2000e-2 (2006).

[4] § 2000e-2.

[5] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

[6] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[7] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[8] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[9] *See, e.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) (denying recovery to a transgender plaintiff based on a lack of congressional intent to include transsexuals within Title VII's protections).

[10] *Id.*

[11] *Id.*

[12] *See, e.g.*, Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081 (7th Cir. 1984) (finding that Eastern fired Ulane because of her change of sex and not because of her sex).

[13] Gender Identity Disorder [hereinafter GID]—and its predecessor Transsexualism—is considered a mental illness. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS – TEXT REVISION 576 (4th ed. 2000) [hereinafter DSM-IV-TR].

included in Title VII as it is currently worded. First, when an employer discriminates against a current or potential employee because the employer thinks of this person as an anatomical male who is inappropriately dressed in women's clothes, the employer is discriminating based on gender stereotypes, which is prohibited by Title VII. Second, transgender people are discriminated against because of their sex based on the ordinary meaning of the word sex. While a transgender person may not qualify as traditionally male or female, when an employer fires him/her because he/she is transgender, the employer has impermissibly taken sex into account when making an employment decision. A person who is discriminated against because she has changed her sex is similar to a person who is discriminated against because she converted to a different religion.[14] Courts would not deny a religious convert protection under Title VII,[15] and courts should likewise not deny transgender plaintiffs recovery because they have changed their sex. Third, the definition of sex necessarily evolves along with society's medical and social understanding of the term. The legal definition should also evolve with the medical understanding of the term. For example, as new religions are formed, they are placed into the existing societal definition of religion and offered all of the protections "traditional" religions like Christianity and Islam are afforded.[16] Gender identity is currently understood to be medically part of sex and should be protected by the current language of the statute.

I. OUR SOCIETY AND ITS PERCEPTIONS OF GENDER

Courts have struggled with the meaning of the words transgender, transsexual, transvestite and homosexual.[17] This section of the paper will first explain the difference between sex and gender and whether gender is an important component of sex. It will then go on to discuss the difference

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[14] *See* Schroer v. Billington, 577 F. Supp. 2d 293, 306–307 (D.D.C. 2008).

[15] *See generally* Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994) (requiring an employer to accommodate the religious beliefs of a Seventh Day Adventist employee who had formerly been non-religious); Abraham v. Diagnostic Ctr. Hosp. Corp. of Texas, 138 F. Supp. 2d 809 (S.D. Tex. 2001) (holding that the plaintiff, a recent religious convert, had submitted enough evidence to establish a prima facie case of discrimination based on his religion).

[16] *See generally* United States v. Myers, 906 F. Supp. 1494(D. Wyo. 1995). *Myers* has a lengthy discussion about what is considered a religion for First Amendment purposes. The Court surveyed pertinent case law and concluded that there are certain factors that help determine what constitutes a new religion, but they are flexible and change as new religions develop. The Court ultimately found that the defendant's claim of being a Reverend in the Church of Marijuana did not entitle him to First Amendment protections because the Church of Marijuana lacked fundamental beliefs about anything other than the peace marijuana brings. *Id.* at 1502.

[17] *See, e.g.*, *Ulane II*, 742 F.2d 1085 (reasoning that denying rights to transsexuals is based in the plain meaning of the text in Title VII and upon consideration of Congress's failure to amend the law's treatment of homosexuals despite several attempts).

the between the terms "transsexual" and "transgender." Finally, the section will look at two competing views of sex: one where sex is binary and the other where people's sex exists on a continuum. Our society has primarily chosen the binary view of sex.

A. The Difference Between Gender and Sex

Courts have often conflated the terms sex and gender, treating them as if they are synonyms.[18] However, they are not. Sex is "either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures."[19] Sex is made up of a number of different factors. According to some medical experts, gender is one of those factors. Gender is defined as "the cultural or attitudinal qualities that are characteristic of a particular sex."[20] Therefore, gender is socially constructed. For most people, their sex is easy to define—the analysis does not go further than considering that men look like typical men and have XY chromosomes and women look like typical women and have XX chromosomes. This is the current legal perspective on sex, and courts and legislatures have, for the most part, been reluctant to change this view. For some people, their sex is not so simple.[21]

The experts in *Schroer* had an informative debate on the definition of sex. This paper will frame its discussion around the perspectives presented by Dr. Bockting, for Ms. Schroer, and by Dr. Schmidt, for the Library. According to Dr. Bockting of the University of Minnesota Medical School, a person's sex is made up of four different components.[22] The four components of sex are: (1) natal sex, or the sex that is apparent at birth; (2) gender identity, or a person's self perception of their sex; (3) social sex role, or the characteristics that are perceived by society to belong to one sex or the other; and (4) sexual orientation or attraction. Other experts

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[18] *See, e.g.*, Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (using the words sex and gender interchangeably throughout the opinion).

[19] MERRIAM-WEBSTER DICTIONARY, online version, *available at* http://www.merriam-webster.com/dictionary/sex. *See also* Greenberg, *supra* note 2, at 271 (explaining that while sex is in theory biologically based, it often depends on social constructs of the roles of men and women as well).

[20] Greenberg, *supra* note 2, at 274.

[21] Estimates for the number of intersex and transgender people in the country suffer from a lack of information. One estimate puts intersex people between 0.1 and 1 percent of the current U.S. population, meaning they constitute between 300,000-3,000,000 people. Greenberg, *supra* note 2, at 267–68 n.7–9. Estimates for transgender people are even more difficult to obtain but have been estimated at 120,000-600,000 people. Lynn Conway, *How Frequently Does Transsexualism Occur?* (December 17, 2002), http://ai.eecs.umich.edu/people/ conway/TS/TSprevalence.html. (last visited April 2, 2010).

[22] Expert Report of Walter O. Bockting, Ph.D., Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (No. 05CV01090).

have found that there are eight components that make up a person's sex, three of which are included in Dr. Bockting's list.[23] These eight factors are:

> (1) genetic or chromosomal sex, meaning XX or XY;
> (2) gonadal sex or reproductive sex glands such as testes or ovaries;
> (3) internal morphologic sex such as a prostate with seminal vesicles or a vagina with a uterus;
> (4) external morphologic sex or the outer genitalia;
> (5) hormonal sex, meaning either androgens or estrogens dominate;
> (6) phenotypic sex or secondary sexual features such as breasts or facial hair;
> (7) gender of rearing or assigned sex; and
> (8) sexual or gender identity.[24]

For most people, all of these factors line up with each other and point to one sex or the other. In intersex people and transgender people, these factors do not all point to the same sex.

The defendants' expert, Dr. Schmidt, did not agree that gender identity is one of the factors that determine a person's sex.[25] Dr. Schmidt insisted that all parts of a person's sex have a biological explanation or etiology. Because there is no such etiology for gender identity, Dr. Schmidt believes gender identity is part of a person's sexuality and not their sex.[26] The legal definition of sex has remained stagnant as a result of the disagreement within the medical community and the reluctance of Congress to become involved in a cultural issue that is so sensitive.[27]

Regardless of the differing scientific definitions, the law should protect a person's gender and gender identity. The gender a person outwardly presents plays a significant role in that person's experiences in the world. Should it matter whether gender identity is medically part of sex? When a transgender person meets someone for the first time, the new person perceives him/her as being a member of the gender he/she presents, regardless of his/her biological sex at birth. When remedial statutes are applied to racial groups, people are protected based on their outward racial

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[23] Greenberg, *supra* note 2, at 278–83.

[24] *Id.*

[25] Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

[26] *Id.*

[27] *See* Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U. L. REV. COLLOQUY 209, 212 (2008).

appearance and not their ancestral make up.[28] Similarly, the law should protect a person's perceived gender because that determines how people are treated, regardless of whether it conforms to their medically determined sex.

Determining a person's sex is complicated. Transgender and transsexual people have a gender identity that does not match with their other sex features. There are a number of legal problems that face both transgender and transsexual people stemming from their lack of clearly defined sex. It is important to point out the different permutations that sex can have and how they are currently ignored by our legal framework.

One part of a person's sex is their gender. While this may not be scientifically agreed upon by all medical professionals, it is certainly true on a sociological level. Because most people interact with one another on a day-to-day basis based on a person's gender, it is the person's gender that should be the basis for legal protections.

B. Terminology: Transgender or Transsexual?

These two terms are often used interchangeably in the Lesbian, Gay, Bisexual, and Transgender (LGBT) community. The term transgender has developed into an umbrella term that encapsulates anyone who does not conform to society's gender norms.[29] This can include transsexuals, transvestites or cross-dressers, and people who identify as gender queer. According to the Meriam-Webster Dictionary, the term transgender means: "of, relating to, or being a person (as a transsexual or transvestite) who identifies with or expresses a gender identity that differs from the one which corresponds to the person's sex at birth."[30] The term has expanded to include anyone who does not identify as either male or female in our society's binary view of gender, including those that identify as part of a gender continuum.[31]

The term Gender Identity Disorder (GID) has a very precise psychological meaning as defined by the Diagnostic and Statistical Manual (DSM-IV) published by the American Psychiatric Association. According

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[28] Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 613 (1987) (holding that discrimination based on race does not require the racial differences to be genetic or physiognomic). *But cf.* Falero Santiago v. Stryker Corp., 10 F. Supp. 2d 93, 96 (D.P.R. 1998) (finding that a dark skinned, Puerto Rican Title VII plaintiff has shown that his replacement is not in his protected class if the replacement is a white Puerto Rican).

[29] *The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version*, 13(1) J. PSYCHOL. & HUM. SEXUALITY 1, 6 (2001) [hereinafter *Standards of Care*].

[30] MERRIAM WEBSTER ONLINE DICTIONARY, online version, *available at* http://www.merriam-webster.com /dictionary/transgender.

[31] *Standards of Care*, *supra* note 29, at 6.

to the DSM-IV, a person with GID is someone with "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex."[32] This is "accompanied by [a] persistent discomfort with one's assigned sex . . . or a sense of inappropriateness in the gender role of that sex."[33] The term transsexual is no longer used in the DSM-IV; it has been replaced with Gender Identity Disorder.

There is a unique place in the law for these men and women. In most states, they are legally permitted to change their names and birth certificates to have them conform with their new gender identity.[34] This allows transsexual people to have gender conforming documents such as a license and a passport. However, in the eyes of most courts,[35] they are still considered to be the sex they were born into.

C. The Negative Effects of a Binary View of Gender

Generally speaking, as the medical and psychological community's understanding of gender and sex have expanded to include more than male and female, the law has not changed with it. Many of the courts who have dealt with this issue have left it up to Congress or their state legislature to change the laws to protect transgender people.[36] Part of the reason courts are reluctant to change the meaning of gender is our society's binary view of the sexes.[37]

There have been many societies across the world and throughout history that have had a non-binary view of gender. The most famous of these are the Berdaches of Native American societies. In over 150 Native North American societies, there were people who lived outside of their biological gender roles. The Berdaches belonged to what could be considered a third gender. Tribal life in Native American cultures was sharply divided based on gender. Berdaches were allowed to fully

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[32] DSM-IV-TR, *supra* note 13, at 576.

[33] *Id.* at 535–37.

[34] *See* Stephanie Markowitz, *Change of Sex Designation on Transsexuals' Birth Certificates: Public Policy and Equal Protection*, 14 CARDOZO J.L. & GENDER 705, 715 (2008).

[35] The exceptions are few. *See, e.g.*, the New Jersey case, M.T. v. J.T., 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976), and the California case, Vecchione v. Vecchione, No. 95D003769, (Orange County, Cal. 1996) (unpublished), *cited in* Markowitz, *supra* note 34, at 714.

[36] *E.g.*, Kantaras v. Kantaras, 884 So. 2d 155, 161 (Fla. Dist. Ct. App. 2004) (determining that whether or not the definition of male and female should change was a matter of public policy for the legislature); Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081, 1086 (7th Cir. 1984) (finding that only Congress can broaden the meaning of sex to include transsexual people).

[37] Most courts that have defined sex as it relates to transgender people under Title VII have referred to the "traditional" view of gender and their reluctance to disturb it. *See, e.g.*, *Ulane II*, 742 F.2d at 1086.

participate in the tribe and live in the gender role opposite of their sex.[38]

Some feminist theorists have suggested that instead of creating a third gender category, gender should be viewed as existing on a continuum.[39] Under this vision, the binary view of gender is eliminated. Those whose gender identity conforms entirely with their sex at birth are on the ends of the continuum, while transgender people and other people who are not stereotypically of one gender or another are in the middle. Binary views of gender are arbitrary, according to sexual continuists.[40] Genitals have just as much to do with determining sex as gender identity, and neither one should trump the other. It is important to point out that by definition, transsexualism includes a binary view of gender. A man who has a gender identity of female and changes his genitalia and outward appearance to become female rejects the idea that his gender exists on a continuum.

Neither the creation of a third sex category, nor the implementation of a sexual continuum, is likely to happen in American law or our society in the near future. Therefore it is imperative that legislatures and courts create a system of legal protections for transgender people in our society. It is now accepted that GID is a medical condition that requires a particular course of treatment and not a random decision made by an individual to live a non-sex conforming lifestyle.[41] Courts have become more sympathetic to transgender people than they were in the 1970s and 80s.[42] Public opinion has been slow to change. Legal protections for transgender people are perceived to be unpopular enough that transgender people were removed from the Employment Non-Discrimination Act to prevent a vote against the legislation.[43] In order for transgender people to be legally protected under the law, courts must assume their role as the protector of politically powerless minorities[44] and interpret to include transgender people.

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[38] *See* Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled "Other"*, 48 HASTINGS L.J. 1223, 1242 (1997). Kogan also discusses the Hijras of India and the Kwolu-aatmuol of New Guinea. *Id.* at 1243–1244.

[39] *Id.* at 1229 n.24.

[40] *Id.* at 1238.

[41] *See Standards of Care*, *supra* note 29, at 2.

[42] *E.g.*, Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081, 1087 (7th Cir. 1984) ("But even if one believes that a woman can be so easily created from what remains of a man . . .").

[43] David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, November 8, 2007, *available at* http://www.nytimes.com/2007/11/08/washington/08employ.html.

[44] United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938).

II. TITLE VII

Title VII was passed as part of the Civil Rights Act of 1964 in order to stop certain types of discrimination in the workplace.[45] Title VII was revolutionary in its approach. It authorized the Equal Employment Opportunity Commission (EEOC) to bring suits on behalf of employees.[46] For the first time, employees were given a right of action against private employers and free counsel in order to pursue violations of their civil rights in an administrative or federal court.[47] Title VII prohibits negative employment action[48] against an employee based on race, gender, color, religion, and national origin.[49] This section will first discuss the different claims that can be made under Title VII. Then it will discuss the evolution that Title VII has undergone overtime, based on congressional amendment and court decisions and why these shifts are important to transgender plaintiffs.

A. How to Pursue a Title VII claim

Title VII gives plaintiffs two ways to pursue a claim of employment discrimination. The first is by alleging that an employer has a facially neutral policy that has a disparate impact on a protected class of people.[50] The second way plaintiffs can demonstrate that they have been discriminated against is by showing that they have been subject to disparate treatment, which, in essence, is intentional discrimination.[51] Suits brought by transgender people are generally brought under a disparate treatment theory.[52]

In order to establish a prima facie case of disparate treatment,[53] a plaintiff must show that he or she (1) is a member of a protected class; (2) demonstrated a desire to keep or obtain a job and was qualified for the job or promotion; (3) despite these qualifications, the plaintiff was rejected;

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[45] Taxman v. Bd. of Educ. of Twp. of Piscataway, 91 F.3d 1547, 1557 (3d Cir. 1996) (noting that Title VII had two goals, one of which was to end workplace discrimination).

[46] 42 U.S.C. § 2000e-4 (g) (2006).

[47] 42 U.S.C. § 2000e-5 (b) (2006).

[48] A negative employment action includes: dismissal, failure to hire, or refusal to promote someone.

[49] 42 U.S.C. § 2000e-2 (a) (2006).

[50] *See generally* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988).

[51] *See id.* at 985–86 (explaining the evidentiary standards for claims alleging disparate treatment); *see also* Teamsters v. United States, 431 U.S. 324, 335, n.15 (1977).

[52] As will be discussed further in Section III, *infra*, most suits brought by transgender plaintiffs rely on the gender stereotyping language in *Price Waterhouse v. Hopkins*, which is a Title VII claim based on disparate treatment. Schroer v. Billington, 577 F.Supp.2d 293, 304 (D.D.C. 2008).

[53] *See generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

and (4) after rejecting the plaintiff, the employer continued to seek someone to fill the position.[54] The burden then shifts to the employer to articulate a non-discriminatory reason for denying the plaintiff the job or promotion.[55] If the employer adequately does this, the burden shifts back to the employee to show that the employer's stated reason is a pretext for discrimination based on the plaintiff's membership in a protected class.[56] If an employee can show that the decision was based in part on her belonging to a protected class, then the employer has violated the statute.[57] As with all remedial statutes, Title VII should be construed broadly.[58]

B. The Meaning of "Sex" in Title VII

To determine the meaning of sex in Title VII courts have often looked at the legislative history. When originally introduced, Title VII only protected employees based on their race. A southern senator introduced an amendment to add sex into the bill the day before the vote in an effort to kill enthusiasm for the bill as a whole.[59] The ploy failed, and Title VII passed with protections based on race and sex. The lack of legislative history regarding the meaning of the word sex has been used by most courts to limit the meaning of the word to what courts consider its "traditional" meaning.[60]

The Supreme Court and Congress have gradually broadened the scope of the term sex over time to include men,[61] pregnant women,[62] sexual harassment,[63] same-sex sexual harassment,[64] and gender stereotyping.[65]

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[54] *Id.* at 802.

[55] *Id.* at 802–03.

[56] *Id.* at 804–05.

[57] 42 U.S.C. § 2000e-2 (2006).

[58] Griggs v. Duke Power Co., 401 U.S. 424, 429–36 (1971) (finding that Title VII should be construed broadly to reach the goal of equal employment opportunity).

[59] Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977); Ulane v. Eastern Airlines, Inc. (*Ulane I*), 581 F. Supp. 821, 822 (N.D. Ill. 1984).

[60] *See e.g.* Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081, 1085 (7th Cir. 1984) ("The dearth of legislative history on section 2000e-2(a)(1) strongly reinforces the view that that section means nothing more than its plain language implies."); Sommers v. Budget Marketing, Inc., 667 F.2d 748, 750 (8th Cir. 1982) (using the "plain meaning" of the term 'sex' because the legislative history did not indicate it should be considered otherwise).

[61] Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983).

[62] 42 U.S.C. § 2000e(k) (2006). The Pregnancy Discrimination Act was passed in 1978 as a direct response to the Supreme Court's decision in *General Electric Co. v. Gilbert*, which held that it was not sex discrimination for an employer's insurance company to deny coverage for pregnancy. 429 U.S. 125, 126 (1976).

[63] Meritor Sav. Bank, FSB v. Vinson, 477 U.S 57, 57 (1986).

[64] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998).

[65] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The Court broadened the scope of Title VII most recently in *Oncale v. Sundowner Offshore Services, Inc.*[66] In *Oncale*, a male employee was verbally harassed, subjected to sexually related humiliation and threatened with rape by his male supervisors.[67] Oncale quit and sued for sexual harassment. The Supreme Court held that if an employee can show that a supervisor of the same sex has harassed him and that it created a hostile working environment, he can sue regardless of the sex or sexual orientation of the aggressor.[68] This case is particularly noteworthy for Justice Scalia's gloss on the task of interpreting Title VII's meanings:

> [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.*[69]

This statement has been relied on by courts that have used Title VII to protect transgender people.[70] Justice Scalia's point was that courts can only interpret the words in the statute and the goals stated in that statute. What the legislators did or did not intend, said or did not say, during their deliberations are irrelevant once they have crafted a text and passed it into law.

The holding in *Oncale* has helped homosexual plaintiffs by preventing courts from assuming that they are automatically precluded from Title VII's protections. The judicial approach taken in *Oncale* was similar to that taken in *Price Waterhouse*. In both cases, the Court encountered problems that were not the type of discrimination that legislators envisioned when they passed Title VII, and the Court used existing law and logic to extend it to cover a situation the Court thought should be included.

III. *PRICE WATERHOUSE* AND ITS EFFECT ON TRANSGENDER PLAINTIFFS

The Supreme Court's decision in *Price Waterhouse v. Hopkins* was groundbreaking not only for transgender people, but for lesbian and gay

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[66] 523 U.S. 75 (1998).

[67] *Id.* at 77.

[68] *Id.* at 80.

[69] *Id.* at 79 (emphasis added).

[70] *See* Schroer v. Billington, 577 F. Supp. 2d 293, 307–08 (D.D.C. 2008).

people as well. This section of the paper will analyze the *Price Waterhouse* decision and briefly discuss its ramifications for transgender plaintiffs. Specifically, it will discuss how this decision laid the groundwork for other decisions where courts focused on gender instead of sex and took expanding views of what "sex" encompasses. Next, it will look at a number of cases with transgender plaintiffs from before and after the decision in *Price Waterhouse* to illustrate the difference in the courts' approaches.

A. Price Waterhouse's Reasoning

Ann Hopkins sued the accounting firm Price Waterhouse Cooper when it denied her a position as a partner.[71] Price Waterhouse had 662 partners at the time and selected new partners each year based on recommendations from the current partners.[72] At the time, only seven of Price Waterhouse's 662 partners were female.[73] The lower court found that no other candidates for partner that year could compare with Hopkins' level of success.[74] Hopkins bid for partnership was "doomed" by the reviewing partners' comments on her performance.[75] The comments ranged from calling her overly aggressive or macho to suggesting she take a course at charm school or wear makeup.[76] The partners also commented that Hopkins yelled at the staff and was sometimes too demanding of them.[77]

The Supreme Court broadened the reach of Title VII in two ways when it decided this case in favor of Ann Hopkins. The first is that the words "because of" in the statute[78] do not indicate a requirement of but-for causation.[79] Instead the Court held that the question is "whether gender was a factor in the employment decision *at the moment it was made*."[80] In effect, the Court prohibited employer decisions that are based on both non-discriminatory and discriminatory criteria, but in order to prevail in a Title

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[71] Price Waterhouse v. Hopkins, 490 U.S. 228, 233 (1989).

[72] *Id.*

[73] *Id.*

[74] Price Waterhouse v. Hopkins, 618 F. Supp. 1109, 1112 (D.D.C. 1985).

[75] *Price Waterhouse*, 490 U.S. at 234.

[76] *Id.* at 235.

[77] *Id.* at 234–35.

[78] *See* 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of . . . sex.").

[79] *Price Waterhouse*, 490 U.S. at 240–41.

[80] *Id.* at 241.

VII claim, the discriminatory reason must be a substantial reason.[81]

The second way the Court broadened Title VII was by acknowledging a cause of action based on a broad definition of gender stereotyping.[82] The Court recognized that the reviewing partners would not have made the same comments or final decision had they been reviewing a male candidate.[83] Had Hopkins been a man, she would not have been criticized for her "macho" behavior, aggressiveness, or appearance.[84] The Court decided that Price Waterhouse could be found liable for making an employment decision based on stereotypes about how women should act.[85]

Justice Brennan used the words sex and gender interchangeably throughout the opinion, finding discrimination based on both against the law.[86] Justice Brennan took a less binary view of gender and held that it is prohibited by Title VII to discriminate against a person for not fitting perfectly at one end of the gender continuum or the other.

This decision was groundbreaking for transgender employees who had been discriminated against. In the past, many transgender people—both Male-to-Female (MTF) and Female-to-Male (FTM)—had not been able to prove the first part of a disparate treatment claim—i.e. that they are part of a protected class. If they claimed they were transgender or transsexual, their cases were dismissed for lack of subject matter jurisdiction because they did not belong to a protected class. *Price Waterhouse* made it possible for a MTF, for example, to claim that she is a man and is being discriminated against because she wears makeup and has long hair and is not masculine enough. Or she could argue conversely that she is a woman, but does not fit into the stereotypical mold of a woman and was discriminated against based on her lack of conformity to gender norms. Whereas courtroom doors appeared permanently shut to transgender plaintiffs before this decision, they began to creep open after the decision.

B. Before Price Waterhouse: Why Ulane Was Wrong When it Was Decided and is More Wrong Now

Even though the Supreme Court has condemned sex-based stereotypes in the past,[87] *Price Waterhouse* had a more significant impact because it

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[81] *Id.* at 280 (Kennedy, J., dissenting).

[82] *Id.* at 250.

[83] *Id.* at 256, 258.

[84] *Id.* at 235, 251.

[85] *Id.* at 256.

[86] *See, e.g., id.* at 241 ("When, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was "because of" sex.").

[87] City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Ariz. Governing Comm. for Tax Deferred Annuity & Deferred Comp. Plans v. Norris, 463 U.S. 1073 (1983). *See*

dealt with a more insidious, subjective type of stereotype. Previous Title VII sex-stereotyping cases had dealt with statistical generalizations about how long the average woman lives compared to the average man.[88] For example, in *City of L.A. Dep't of Water & Power v. Manhart,* the city of Los Angeles was using actuarial tables to require women to pay more into pensions than men had to pay because the tables predicted that women would live longer.[89] *Price Waterhouse* dealt not with statistically based stereotyping, but rather with the kind of stereotyping Justice Stevens alluded to in dicta in *Manhart* in 1978.[90] *Price Waterhouse* had a more significant jurisprudential effect because it dealt with the more subtle or unconscious stereotyping that people of both genders experience all of the time.

Prior to *Price Waterhouse*, no transgender plaintiff had succeeded in a case brought under Title VII.[91] Pre-*Price Waterhouse* courts differed in their reasoning, but they all came to the same conclusion—that transgender people were not protected by the Act. Some courts found that transgender plaintiffs are neither male nor female and are therefore not a protected class.[92] Others held that the transgender plaintiff had not been discriminated against because of sex, but rather because of their change of sex or transsexualism.[93] The most well known of these cases is *Ulane v. Eastern Airlines, Inc.*,[94] which will serve as an example of pre-*Price Waterhouse* cases.

Karen Ulane became an airline pilot for Eastern Airlines (Eastern) in 1968, when she was known as Kenneth Ulane.[95] Ulane was an excellent pilot and served as a flight instructor for Eastern.[96] In 1979, Ulane was

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generally Joel William Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 215–16, (2007).

[88] *See, e.g., Manhart*, 435 U.S. at 705.

[89] *Id.*

[90] *Manhart*, 435 U.S. at 707 ("It is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less.") (internal citation omitted).

[91] *See* Wood v. C.G. Studios, Inc., 660 F. Supp. 176, 178 (E.D. Pa. 1987) (noting that every federal court that had considered whether a transgender person could recover under Title VII had determined that they could not).

[92] *E.g.*, Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977).

[93] *E.g.*, Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977).

[94] Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081 (7th Cir. 1984).

[95] *Id.* at 1082.

[96] *Id.* at 1082–83.

diagnosed as a transsexual[97] and began taking hormones.[98] She did not tell Eastern about her diagnosis, and in 1980, she had sex reassignment surgery and revised her birth certificate to indicate that she was a woman.[99] After her surgery, she was evaluated by the Federal Aviation Administration, who determined that she was fit to fly.[100] Eastern immediately fired Ulane when she returned to work.[101] Karen Ulane sued Eastern for discrimination based on her sex as a female and based on her transgender status.

Ulane won both of her claims at the district court level.[102] The trial court held that the word sex encompassed sexual identity and therefore included transgender people.[103] Ulane was a transsexual according to the Court, and her claim was analyzed under the Title VII burden shifting test.[104] Ulane presented a prima facie case of disparate treatment based on her termination by Eastern immediately after notifying them about her surgery.[105] The burden then shifted to Eastern to offer a non-discriminatory reason for firing Ulane.[106] Eastern offered five non-discriminatory reasons for Ulane's termination.[107] The district court rejected each of the five reasons and also analogized the disparate treatment of the plaintiff as compared to alcoholics, who were not fired if they failed to proactively disclose their disease and treatment to Eastern.[108] The Court found that Eastern had violated Title VII when it fired Ulane because she was protected as a transsexual.[109] The Court also found that Ulane was a woman, and Eastern had discriminated against her as a

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[97] *Id.* at 1083. GID did not yet exist as a diagnosis. It was first presented in the DSM-IV, which was published in 1994. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 535 (4th ed. 1994).

[98] Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081, 1083 (7th Cir. 1984).

[99] *Id.*

[100] *Id.*

[101] Ulane v. Eastern Airlines, Inc. (*Ulane I*), 581 F. Supp. 821, 827–28 (N.D. Ill. 1984).

[102] *Id.* at 839.

[103] *Id.* at 825.

[104] *Id.* at 837.

[105] *Id.* at 828.

[106] *Id.* at 828–34.

[107] Ulane v. Eastern Airlines, Inc. (*Ulane I*), 581 F. Supp. 821, 828–34 (N.D. Ill. 1984). The Judge discusses more than five in his oral decision, but a number of them can be grouped together. The five reasons were: (1) Eastern felt that Ulane would be a danger as a result of the hormones she was still taking; (2) surgery could not fix the underlying emotional problems Ulane had; (3) public knowledge of Ulane's presence in the cockpit would undermine their industry's effort to assure the public that flying is safe; (4) Eastern never would have hired Ulane had it known that she was contemplating this type of surgery; and (5) Ulane failed to divulge her medications and change in medical condition, which had the potential to endanger people. *Id.*

[108] *Id.*

[109] *Id.* at 837.

woman.[110]

The Seventh Circuit Court of Appeals reversed the lower court.[111] The three judge panel held that Title VII does not protect transgender people.[112] The Court based this holding on its interpretation of the word sex, which is worth detailing both for its acknowledged conflation of homosexuality and transsexuality as well as its use of statutory construction to avoid the matter before the court.[113]

The *Ulane* Court used the lack of legislative history regarding the meaning of the word sex in Title VII to mean that the only viable definition of sex is what its traditional meaning, as determined by the Court.[114] Absent congressional intent to the contrary, it would seem logical to interpret the word sex the same way race is interpreted, given the fact that sex was a late addition to the statute. Not a single court performed this type of analysis. If a court were to do this analysis, it would find that the definition of race was not a focus of the debates. There was no discussion of limiting protections to those who genetically fit into one particular race. Because there is no legislative history about the definition of either sex or race, courts should have relied on the plain meaning of the word, instead of a court constructed "traditional" meaning. The plain meaning would indicate that anyone fired because they had changed from one sex to the other was discriminated against based on their sex.

The goal of Title VII was to make it impermissible to take sex, race and other categories into consideration when making employment decisions. Instead, the *Ulane* Court attempted to divine congressional intent by looking at the subsequent legislative history of attempts to add sexual preference to Title VII.[115] This ignores the significant difference between sexual orientation and sex or sexual identity. The Court determined that since Congress had been presented with numerous opportunities to add sexual preference or orientation to Title VII and had

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[110] *Id.* at 839.

[111] The Court's opinion was tinged with disapproval of Ulane, stating the she is entitled to her "beliefs" about her sexual identity, despite the fact that Illinois issued her a revised birth certificate. It criticized this practice in the next sentence saying, "even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case." Ulane v. Eastern Airlines, Inc. (*Ulane II*), 742 F.2d 1081, 1087 (7th Cir. 1984).

[112] *Id.*

[113] *Id.* at 1084–86.

[114] *Id. See also* Daniel B. Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and its Interpretation*, 151 U. PA. L. REV. 1417, 1420 (2003) (discussing the use of legislative history by courts to "rationalize any point of view"). This article also has a lengthy discussion of the legislative battle to pass Title VII. Notably absent from the discussion, however, is any mention of how to define race.

[115] *Ulane II*, 742 F.2d at 1085–86.

chosen not to, then it intended a narrow definition of sex.[116] The Court took the leap to assume that a rejection of protections for homosexuals had some bearing on the definition of sex.[117]

Many other courts have relied on *Ulane* and its interpretation of Title VII despite its flawed reasoning.[118] These courts have acknowledged that homosexuals and transsexuals are different, yet they do not analyze *Ulane*'s statements about the relevance of the legislative history of employment protection for homosexuals and whether that should be pertinent to the statute's protection for transgender people.[119] The *Price Waterhouse* decision changed the law in such a way that transgender people have been able to win in court when they have successfully pleaded a sex-stereotyping case.[120]

Price Waterhouse has been so dramatic for transgender plaintiffs because it allows them to establish that they are a protected class, meeting the first criteria of a prima facie case.[121] In the past, this hurdle had often defeated plaintiffs and can still do so if plaintiffs fail to present a sex stereotyping claim. While being transgender no longer excludes a plaintiff from Title VII's coverage altogether, it still presents a significant challenge. Plaintiffs must prove that they were not discriminated against because they have undergone a change of sex, but rather because their employer sees them, for example, as a male who is not male enough.[122] In addition, proving step four of the prima facie case — that the plaintiff was treated different than others in his class—is still difficult for transgender

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[116] *Id.* at 1086.

[117] *Id.* at 1085–86. More recently there have been attempts to pass a transgender inclusive ENDA. These efforts will be discussed below in Part IV.

[118] *Ulane* was preceded by a number of cases including Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977) and Sommers v. Budget Mktg. Inc., 667 F.2d 748 (8th Cir. 1982). These cases relied on similar legislative history and statutory interpretation to come to the same result. The *Ulane* court relies on those precedents as do other courts after *Ulane*. This paper focuses on *Ulane* for two reasons: first, it is often cited in other cases; and second, since *Ulane* went to trial, the appeals court was able to review the entire trial record, whereas the *Holloway* case was dismissed for lack of subject matter jurisdiction.

[119] *See, e.g.*, Doe v. U.S. Postal Service, No. 84-3296, 1985 WL 9446 (D.D.C. June 12, 1985); Oiler v. Winn-Dixie Louisiana, Inc., No. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002); and Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, (N.D. Ohio 2003).

[120] *Compare* Higgins v. New Balance Athletic Shoe, Inc, 194 F.3d 252 (1st Cir. 1999) *with* Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001).

[121] *See, e.g.*, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (finding that the plaintiff was a male with GID, and therefore a member of a protected class); Myers v. Cuyahoga County, Ohio, 182 Fed. Appx. 510, 519 (6th Cir. 2006); Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005).

[122] *See* Grossman v. Bernards Township Bd. of Educ., No. 74-1904, 1975 WL 302, *3–4 (D.N.J. Sept. 10, 1975) *aff'd mem.*, 538 F.2d 319 (3d. Cir. 1975) (finding that a teacher who had undergone a sex-change operation was discriminated against because of the operation and not on account of being male or female).

plaintiffs.[123] While transgender people are no longer *per se* excluded from recovery, they face an uphill challenge in order to obtain relief from courts.

A number of courts have expressed that while they acknowledge that the discrimination experienced by the plaintiff was wrong, Title VII does not extend to discrimination based on someone being transgender or having undergone sex-altering surgery.[124] The Court in *Schroer* is the only court since the *Ulane* district court to disagree with that proposition.

IV. SCHROER V. BILLINGTON: THE RIGHT APPROACH

When an employer discriminates against an employee based on her transgender status, her employer discriminates against in her two ways: first, because of her sex—the employer has impermissibly taken sex into account in an employment decision—and second, based on her nonconformance with gender or sex stereotypes. This was the Court's ruling in *Schroer*. It is the most clear thinking and open minded approach a federal court has taken to a transgender plaintiff claiming employment discrimination. The analytical framework laid down in the case should be followed by other courts in order to allow transgender plaintiffs to recover, whether they have been discriminated against based on gender stereotypes or their status as a transgender person.

This section of the paper will detail Schroer's story and the legal reasoning in her case. Then it will analyze that reasoning and explain why it should be adopted by other courts. The final part of this paper will address the evolving definition of sex and the role courts should play in incorporating that definition into their decisions.

A. Schroer v. Billington

1. The Plaintiff's story

Diane Schroer ("Schroer") was born David Schroer.[125] Schroer had a successful 25 year career in the army as a U.S. Army Ranger and in the Special Forces.[126] Schroer retired as a Colonel after leading a classified unit that tracked international terrorists.[127] Schroer has briefed the Vice

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[123] *E.g.*, Myers v. Cuyahoga County, 182 Fed. Appx. 510, 519 (6th Cir. 2006) (finding that the plaintiff could not recover because she had not been able to show that the employer replaced her with a gender conforming person).

[124] Hermaphrodites who undergo corrective surgery may not be covered either. *See* Wood v. C.G. Studios, Inc., 660 F. Supp. 176, 177–78 (E.D. Pa. 1987). In *Wood*, a hermaphroditic woman was fired when she underwent corrective surgery. The district court found the Title VII case law persuasive on the state law claim, and held that a hermaphrodite is not entitled to protection. *Id.*

[125] Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

[126] *Id.*

[127] *Id.*

President and won prestigious awards for her service in the Army.[128]

Schroer says that growing up, she was always aware that she did not feel like a boy on the inside.[129] Social norms and traditional parents kept her from ever mentioning that to the people around her.[130] She pursued a traditionally male path that she says kept her from having to think too much about not feeling like a man on the inside.[131] Shortly after leaving the army, Schroer was diagnosed with Gender Identity Disorder.[132] She began counseling and started following the Harry Benjamin International Gender Dysphoria Association protocols to begin her transition to a woman.[133]

Schroer applied to the Library in August 2004 to be a Specialist in Terrorism for the Congressional Research Service (CRS).[134] She applied as a male because she had not begun presenting as a woman and had not yet changed her name.[135] Schroer interviewed with three people at CRS including Charlotte Preece, the selecting official for the position.[136] Schroer was unanimously chosen by the selection committee from eighteen candidates.[137] Preece contacted Schroer to inform her of the committee's decision, and Schroer accepted the position.[138]

Shortly after accepting the job, Schroer asked Preece to have lunch with her.[139] At lunch, Schroer explained that she was transitioning to a woman and that she intended to start work as Diane, not David.[140] Schroer showed Preece pictures of herself dressed as Diane in order to help Preece understand that it would not be strange or unprofessional in any way.[141] Preece did not understand why Retired Colonel David Schroer, who had served in the Special Forces, would want to become a woman.[142] Schroer described what it means to be transgender and explained the process to

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[128] *Id.*

[129] Video: Schroer v. Billington *Case Profile*, ACLU, *available at* http://www.aclu.org/lgbt/transgender/ 24969res20050602.html.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).

[135] *Id.*

[136] *Id.*

[137] *Id.* at 296.

[138] *Id.*

[139] *Id.*

[140] Schroer v. Billington, 577 F. Supp. 2d 293, 296 (D.D.C. 2008).

[141] *Id.* at 297.

[142] *Id.* at 296.

Preece.[143]

First and foremost, Preece was shocked.[144] Preece was concerned about a number of issues that could arise from Schroer's change in sex. The primary concerns were Schroer's ability to get or maintain a security clearance and whether Schroer would have credibility, both with her contacts in the military and with members of Congress when she had to testify.[145] Preece thought that people would not believe that this woman, Diane Schroer, could have the experiences that were on her resume, and that this would affect Schroer's credibility.[146] Instead of exploring whether her concerns were valid—i.e. finding out from the Library's security clearance specialist whether Schroer would be eligible to continue holding her existing security clearance or contacting military references to find out if they were supportive—Preece decided to rescind the job offer.[147]

Schroer sued the Library on four counts of discrimination, alleging discrimination because of sex under Title VII both under a sex-stereotyping theory and because Schroer was now a woman.[148]

2. The Court's Reasoning

The case was heard by Judge Robertson in the District Court for the District of Columbia who found for Schroer on her Title VII claim. He held that Schroer was discriminated against, both based on her sex as a woman and under a sex stereotyping theory.[149] Since *Price Waterhouse*, only the Sixth Circuit had found that transgender or transsexual people can recover under a sex stereotyping claim.[150] Judge Robertson relied on the Sixth Circuit's precedent in his analysis.

According to the Sixth Circuit, Jimmie Smith was discriminated against by his[151] superiors in the fire department when he informed them that he was diagnosed with GID and would likely transition to a woman in the near future.[152] The Court found that Smith was protected as a man, and that the fire department fired him based on his failure to conform to stereotypes about men and masculinity. The Court held that *Price*

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[143] *Id.*

[144] *Id.*

[145] *Id.* at 297–98.

[146] Schroer v. Billington, 577 F. Supp. 2d 293, 298 (D.D.C. 2008).

[147] *Id.* at 299.

[148] *See* Amended Complaint at 1, Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (No. 105CV1090).

[149] *Schroer*, 577 F. Supp. 2d at 305–06.

[150] *See* Friedman, *supra* note 87, at 219 n.91.

[151] This article uses the male pronoun because the Court used the male pronoun as well.

[152] Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).

Waterhouse had "eviscerated" the logic and precedent of *Ulane* and other cases like it.[153] Just as an employer cannot discriminate against a woman because she does not wear makeup,[154] an employer may not discriminate against a man because he does.[155]

The *Schroer* court took the logic in *Smith* one step further. The court acknowledged that it is sometimes difficult to establish when an employer has discriminated based on transsexual status or because of gender stereotypes.[156] However, the Court concluded that it should not matter.

> Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.[157]

Gender stereotyping occurs when any of these situations present themselves, and the Court concluded that Schroer could recover under any of these theories of sex-stereotyping.[158]

The language in *Price Waterhouse* makes it clear that it is unacceptable to refuse to hire someone because they do not conform to gender stereotypes.[159] Whether Preece and the hiring committee found Schroer to be a man who would be dressing in women's clothes or a woman that appeared too masculine, it is the same illegal stereotyping at play. Employers cannot dictate that their employees follow certain gender stereotypes, unless they are a bona fide occupational qualification.[160]

In addition, Justice Brennan made it clear in *Price Waterhouse* that sex stereotyping was discrimination based both on sex and gender.[161] Based on this logic, once an employer is no longer permitted to discriminate based on gender, it should be impermissible to discriminate against transgender

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[153] *Id.* at 573.

[154] There is an exception to this in the 9th Circuit decision, *Jesperson v. Harrah's Operating Co., Inc.*, which found that Harrah's could require the women in the company to wear makeup. 444 F.3d 1104, 1106 (9th Cir. 2006). However, that case is inapposite here because the basis for the en banc ruling was that both men and women had physical grooming standards they had to meet, so the policy did not disparately impact one sex more than the other.

[155] *Smith*, 378 F.3d at 574.

[156] Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008).

[157] *Id.* at 305.

[158] *Id.* at 305–06.

[159] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989).

[160] 42 U.S.C. § 2000e-2(e) (2006).

[161] *Price Waterhouse*, 490 U.S. at 251.

people based on their nonconforming gender. Not conforming to the gender stereotypes of your birth sex—which is in essence the definition of being transgender—is therefore protected by Title VII. If an employee can prove that she was qualified for the job when she applied for it and was denied the job based on her nonconforming gender appearance, it is discrimination under *Price Waterhouse*.

The second part of the Court's opinion was more groundbreaking than the first. Whereas the District Court in *Ulane* found that Title VII applied to transsexuals because gender identity is a part of sex,[162] Judge Robertson held that the scientific components of sex were irrelevant to whether Title VII protected people based on their sexual identity.[163] While judges may decide the validity of one scientific theory over another all of the time, determining the components of sex in this case was unnecessary according to Judge Robertson.[164] Instead of pouring over the scientific evidence in this case (which pointed convincingly toward gender identity being one component of sex), the Court turned to simple statutory interpretation.[165]

When the language of the statute is clear, courts should not look further than the statute to interpret its meaning.[166] As was mentioned above in Part III, the *Ulane* Court and other courts strained to divine congressional intent from the statute, neglecting to interpret the word sex in its most basic form. Those courts determined that Congress had manifested an intention to interpret the word sex based on its "traditional" meaning, which was not its actual meaning. By imputing this traditional meaning on the word sex, those courts have held "that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers."[167]

Since Title VII has already been applied in ways that its framers could not have imagined,[168] it is unjust to twist the words of the statute in order to deny relief to those who are transgender despite the fact that an employer refuses to hire them literally because of their sex. Title VII demands that employers hire or promote employees based on factors other than their sex, religion, race, color, or national origin.[169] When an employee is punished because of one of those characteristics, whether it is the absence of one, the presence of one, or a shift in one, she is discriminated against. Schroer, for

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[162] Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821(*Ulane I*), 825 (N.D. Ill 1983).

[163] Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.* at 307 (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

[168] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

[169] 42 U.S.C. § 2000e-2(a) (2006).

example, was hired when she was a man, but as a woman, she was denied employment. Her offer was rescinded because her sex was taken into account in an employment decision. Under the plainest meaning of the statute, this is discrimination because of sex.

Judge Robertson made the following illustrative analogy between religion and gender: an employee converts from Christianity to Judaism and is fired by his employer.[170] The employer says that he has nothing against Jewish people or Christians but hates converts.[171] The employer could argue that the statute does not cover change in religion; however, he would likely fail.[172] Courts would not accept that the employer is permitted to discriminate based on convert status because it is discrimination based on the individual's religion and choice of religion. Likewise, in sex-based discrimination cases, courts cannot allow employers to claim that they are free of liability because they discriminated based on change of sex and not the employee's status as a male or female. When courts allow this type of argument to prevail, they ignore that sex is playing an impermissible role in the employer's decisions.

Finally, Judge Robertson criticized other courts' reliance on subsequent legislative histories regarding protections for homosexuals, and more recently, transgender people.[173] In the first place, Congress has never voted on protections for transgender people.[174] It is unreasonable to make assumptions based on Congress' failure to act because there could be multiple explanations for why Congress has not passed an amendment including transgender people. Judge Robertson posited that it could be due to a congressional wish for courts to simply interpret the statute as already written, with a literal interpretation of the word sex.[175] It could also be the result of the inferior protections these amendments provide for transgender people.[176] For example, they would not be able to bring disparate impact claims, and no affirmative action is offered as a remedial effort.[177] While it is also possible that the reason for this is that Congress does not want to include transgender people, the other possibilities demonstrate that it is equally likely that there is some other explanation. The point, however, is that it does not matter. When a statute is clear, courts must stick to the words in the statute.

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[170] Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

[171] *Id.*

[172] *Id.*

[173] *Id.* at 307–08.

[174] Hendricks, *supra* note 27, at 212 (2008).

[175] *Schroer*, 577 F. Supp. 2d at 308.

[176] *See* Hendricks, *supra* note 27, at 209.

[177] *Id.*

B. Evolving Definitions of Sex

While Judge Robertson argues that resolving the medical dispute about the definition of sex is irrelevant,[178] it constitutes a final reason that Title VII should already protect transgender people. American common law is full of cases where the definition of a key term in the law or constitution has changed and the meaning of the law has changed with it. One example of this is the Second Amendment's guarantee of the right to bear arms. The definition of "arms" has changed drastically over the centuries since that phrase was written. The writers of that amendment certainly did not contemplate handguns, let alone automatic or semi automatic weapons when they wrote the word "arms." Yet, the Supreme Court recently held in *D.C. v. Heller* that the right to bear arms includes handguns.[179] The word "arms" has evolved as the weaponry available has evolved. Similarly, the term sex must evolve as scientific understanding of what sex is evolves. The factors that were laid out above in Part I define sex. There are some medical experts that do not agree that gender identity is part of sex, but the number of experts who do agree continues to grow as scientific and psychological understanding grows.

As our society's perception of sex and understanding of transgender people evolves, courts should respond to this by broadening the statutory coverage. The medical community is often slow to come to a general consensus about issues that are as politically charged as this one.[180] This is a time when courts should weigh in, taking into consideration that remedial statutes should be construed broadly in order to protect a politically weak minority that is currently left out of Title VII's important protections.

CONCLUSION

Transgender people face immeasurable discrimination in this country, particularly in the employment context. The societal misunderstanding about GID and transgender people has led to blatant, condoned bigotry. We exist in a legal system that permits transgender people to legally change the sex on their birth certificates,[181] but then forces them to

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[178] Schroer v. Billington, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

[179] D.C. v. Heller, 128 S.Ct. 2783, 2821–22 (2008).

[180] The abortion debate has struggled in this regard as well. *See e.g.*, Carhart v. Ashcroft, 331 F. Supp. 2d 805, 973 (D. Neb. 2004) (noting the debate among scientists regarding late term abortions is partially based on religious or moral principles); Richmond Med. Ctr. for Women v. Gilmore, 55 F. Supp. 2d 441, 451 (E.D.Va. 1999) (noting that the defendant's medical expert was more focused on the political aspects of the abortion debate than the medical aspects).

[181] *See* Sources of Authority to Amend Sex Designation on Birth Certificates, LAMBDA LEGAL, http://www.lambdalegal.org/our-work/issues/rights-of-transgender-people/sources-of-authority-to-amend.html (last visited Jan. 28, 2010) (indicating that all but Tennessee, Ohio, and Idaho will issue new birth certificates to a person who changes her sex).

relinquish their civil rights in order to make this change. Before the Title VII was passed in 1964, it was permissible to discriminate against women and black people based on stereotypes about their ability or appropriate social roles. Title VII was drafted in order to create a workplace that is permeated by tolerance instead of discrimination, based on merit instead of bigotry. It has been expanded to cover more classifications and make it easier to sue employers who are discriminatory. Title VII included protections for employees based on their sex. Transgender people are currently being discriminated against because of their sex—either as a transgender person, a man, or a woman. Employers are currently permitted to consider a transgender person's sex when making employment decisions. Title VII already contains the requisite tools to remedy this discrimination, and courts should utilize them to protect transgender people from unlawful discrimination.