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Toward a Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection of Transsexuals

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TOWARD A PLAIN MEANING APPROACH TO ANALYZING
TITLE VII: EMPLOYMENT DISCRIMINATION PROTECTION OF
TRANSSEXUALS

KEVIN SCHWIN*

I.	INTRODUCTION	645
II.	WHO ARE TRANSSEXUALS AND HOW DO THEY DIFFER FROM OTHER TRANSGENDERED INDIVIDUALS?.....	646
III.	LEGISLATIVE APPROACHES TO THE PROTECTION OF TRANSSEXUALS AND OTHER TRANSGENDERED INDIVIDUALS.....	648
IV.	SO WHAT IF TRANSSEXUALS ARE PROTECTED UNDER TITLE VII?.....	649
V.	DOING AWAY WITH THE CONGRESSIONAL INTENT APPROACH IN ANALYZING WHETHER TITLE VII PROTECTS TRANSSEXUALS	657
	A. Holloway v. Arthur Andersen & Co.....	658
	B. Sommers v. Budget Marketing, Inc.....	659
	C. Ulane v. Eastern Airlines (<i>Ulane II</i>).....	659
VI.	THE SEX STEREOTYPING THEORY IS AN INAPPROPRIATE METHOD OF DETERMINING WHETHER TITLE VII PROTECTS TRANSSEXUALS	662
	A. Price Waterhouse v. Hopkins	662
	B. Schwenk v. Hartford.....	663
	C. Etsitty v. Utah Transit Authority	664
	D. Smith v. City of Salem.....	664
VII.	COURTS SHOULD ANALYZE WHETHER TITLE VII PROTECTS TRANSSEXUALS BY LOOKING TO THE PLAIN MEANING OF THE STATUTE	667
	A. Ulane v. Eastern Airlines (<i>Ulane I</i>).....	668
	B. Schroer v. Billington.....	668
	C. Etsitty v. Utah Transit Authority	669
VIII.	CONCLUSION.....	669

I. INTRODUCTION

Does “because of sex” include “because of transsexualism”? Such a simple question, but such a complicated answer. The answer is so complicated that federal

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courts have been unable to find even one cut and dried way to analyze the issue. Instead, the cases directly on point have resulted in at least three doctrinal approaches to resolving the question.¹ The first approach is what this author calls the “congressional intent” analysis.² The next approach is what this author calls the “sex stereotyping” analysis.³ Lastly, there is the “plain meaning” analysis.⁴ Not only are courts inconsistent in how they analyze these cases, but courts are also inconsistent in reaching conclusions under certain consistent approaches.⁵ The purpose of this Article is two-fold. First, this Article will discuss whether transsexuals should be protected at all from employment discrimination, and if so, whether protection should be accomplished through legislative or judicial means. Then, the Article will discuss each of the aforementioned approaches and advocate for a logical and consistent manner in which courts should decide cases under Title VII where a transsexual plaintiff alleges discrimination because of sex.

Part I discusses both the factual and legal distinctions between “transsexuals,” “transgendered,” and “inter-sexed” individuals. Part II discusses various legislative approaches to protection of transsexuals and other transgendered individuals. Part III discusses the ramifications of holding that Title VII protects transsexuals from employment discrimination and concludes that federal law should protect transsexuals from employment discrimination. Part IV discusses the “congressional intent” approach and concludes that courts should abandon the use of this approach in the context of deciding whether Title VII protects transsexuals. Part V discusses the “sex stereotyping” approach and concludes that this approach is not well-suited for deciding whether transsexuals are members of a “protected class” under Title VII. Part VI discusses the “plain meaning” approach and concludes that this approach is the most appropriate way to resolve whether Title VII protects transsexuals. The conclusion advocates for the use of the “plain meaning” approach in analyzing cases involving transsexuals.

II. WHO ARE TRANSSEXUALS AND HOW DO THEY DIFFER FROM OTHER TRANSGENDERED INDIVIDUALS?

No federal court has espoused a legal definition of the word “transsexual” in anything but *dicta*.⁶ The medical profession defines transsexuals as individuals who “[experience] great discomfort regarding their actual anatomic gender” and “who are committed to altering their physical appearance through cosmetics, hormones, and,

¹ See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Ulane v. E. Airlines, Inc.* 742 F.2d 1081 (7th Cir. 1984); *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

² See, e.g., *Ulane*, 742 F.2d 1081.

³ See, e.g., *Barnes*, 401 F.3d 729.

⁴ See, e.g., *Schroer*, 424 F. Supp. 2d 203.

⁵ Compare *id.*, at 212 (holding that transsexuals are protected by Title VII under a “plain meaning” analysis), with *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that transsexuals are not protected by Title VII under a “plain meaning” analysis).

⁶ See, e.g., *Ulane*, 742 F.2d at 1083 n.3 (defining “transsexualism” as “a condition that exists when a physiologically normal person . . . experiences discomfort or discontent about nature’s choice of his or her particular sex and prefers to be the other sex”).

in some cases, surgery.”⁷ Transsexuals do not identify themselves as being members of the sex that they were assigned at birth,⁸ whereas transvestites are content with the sex they were assigned at birth, but dress as people of the opposite sex for sexual arousal.⁹ One study, however, reveals that the distinction between transsexuals and transvestites is not so clear.¹⁰ The study notes that, “trans people have complex gender identities, often moving from one ‘trans’ category into another over time.”¹¹ The term “transgendered” is used as an umbrella term to describe anybody whose dress and/or behavior can be interpreted as transgressing gender roles.¹² This includes transsexuals, transvestites, and other categories of people whose dress and/or behavior do not conform to gender roles.¹³

Intersexed individuals, on the other hand, are not necessarily transgendered people. Intersexed individuals are a category of people whose sex at birth is ambiguous for one of two reasons: (1) the sexual organ can be classified as either an abnormally small penis or a large clitoris;¹⁴ or (2) they are chromosomally of one sex but they develop genitalia of the opposite sex because of a genetic mutation.¹⁵ Intersexed individuals may also have gender identity issues, thereby making them transgendered as well.¹⁶ However, the two categories are separate and distinct.¹⁷ This Article will not further discuss issues involving intersexed individuals.

Interestingly, the medical profession uses the term “transsexualism” as an informal synonym for “gender identity disorder” or GID.¹⁸ The standard medical procedure for treating GID is referred to as “triadic therapy,” and it consists of: (1)

⁷ WebMD, *Gender Identity Disorder*, <http://www.webmd.com/sex/gender-identity-disorder> (last visited Sept. 5, 2009).

⁸ *See id.*

⁹ *Ulane*, 742 F.2d at 1083 n.3.

¹⁰ *See* STEPHEN WHITTLE, LEWIS TURNER & MARYAM AL-ALAMI, EQUALITIES REVIEW, ENGENDERED PENALTIES: TRANSGENDERED AND TRANSSEXUAL PEOPLE’S EXPERIENCES OF INEQUALITY AND DISCRIMINATION 14 (2007), <http://www.pfc.org.uk/files/EngenderedPenalties.pdf>.

¹¹ *Id.*

¹² *See* Richard Ekins & Dave King, *Blending Genders: Contributions to the Emerging Field of Transgender Studies*, 1 INT’L J. TRANSGENDERISM 1, 1 (1997), available at <http://www.symposion.com/ijt/ijtc0101.htm>.

¹³ *See id.*

¹⁴ *See* Jennifer Rellis, “Please Write ‘E’ in This Box” *Toward Self-Identification and Recognition of a Third Gender: Approaches in the United States and India*, 14 MICH. J GENDER & L. 223, 226 (2008).

¹⁵ *See id.*; *see also*, NAT’L ORG. FOR RARE DISORDERS, INC., REPORT: ANDROGEN INSENSITIVITY SYNDROME, PARTIAL (2005), available at <http://www.webmd.com/sexual-conditions/androgen-insensitivity-syndrome-partial>.

¹⁶ *See* Rellis, *supra* note 14, at 226-27.

¹⁷ *See id.*

¹⁸ *See* *The Harry Benjamin Int’l Gender Dysphoria Ass’n, Standards of Care for Gender Identity Disorders*, (6th ed. 2001) at 2, <http://www.wpath.org/Documents2/socv6.pdf>.

real-life experience living as a person of the self-identified sex; (2) hormone therapy; and (3) surgery to change genitalia and other sex characteristics.¹⁹ This protocol of medical treatment for transsexuals is malleable, however, and according to the medical profession, not all people with GID “need or want all three elements of triadic therapy.”²⁰

In order to state a claim as a “transsexual” under Title VII, courts seem to require more than a mere diagnosis of “gender identity disorder.”²¹ In fact, in every reported Title VII case involving a transsexual plaintiff, the plaintiff not only had GID, but also underwent (or sought to undergo) sex reassignment surgery.²² Also, in many cases, the court required substantial medical evidence regarding GID.²³

III. LEGISLATIVE APPROACHES TO THE PROTECTION OF TRANSSEXUALS AND OTHER TRANSGENDERED INDIVIDUALS

Numerous states, counties, and municipalities have enacted legislation that either explicitly declares that employment discrimination on the basis of “gender identity” is forbidden,²⁴ or that protects transsexuals and other transgendered individuals under a prohibition of discrimination because of “sex”²⁵ or because of “sexual orientation.”²⁶ Other state law protected classes that include transsexuals are “gender,” “transgender status,” and “affectional preference.”²⁷ All in all, thirteen states, the District of Columbia, and 108 localities have enacted legislation explicitly protecting transsexuals and other transgendered individuals from employment

¹⁹ *Id.* at 3.

²⁰ *Id.*

²¹ *See, e.g.,* *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006) (requiring the plaintiff to develop a more thorough factual record that “reflects the scientific basis of sexual identity in general, and gender dysphoria in particular”). For an argument that legal protections of transgender people are too narrow because courts tend only to protect plaintiffs who have had or seek to have sex reassignment surgery and, even in such cases, make it overly burdensome for the plaintiff to prove a case by requiring a plethora of medical evidence, see 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, 271-73 (2005).

²² *See, e.g.,* *Schroer*, 424 F. Supp. 2d at 213.

²³ *See, e.g., id.*

²⁴ *See, e.g.,* N.M. STAT. § 28-1-7(A) (2007); R.I. GEN. LAWS § 28-5-7(1)(I) (2007); N.J. STAT. ANN. § 10-5-12(a) (West 2007).

²⁵ *See, e.g.,* CAL. GOV'T CODE § 12926(p) (West 2007); CAL. PENAL CODE § 422.56(c) (West 2009).

²⁶ *See, e.g.,* MINN. STAT. § 363A.08(2) (2007); 775 ILL. COMP. STAT. § 5/1-103(O-1) (2008).

²⁷ For a complete list of all the states, counties, and municipalities that have legislation explicitly protecting transsexuals from employment discrimination and other forms of discrimination, see Transgender Law and Policy Ins., *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, http://www.thetaskforce.org/downloads/reports/fact_sheets/TI_antidisc_laws_7_08.pdf (last visited Sept. 6, 2009).

discrimination.²⁸ Still other states, counties, and municipalities have enacted legislation or executive orders that protect transsexuals and other transgendered individuals who are public employees from employment discrimination.²⁹

What explains this trend towards legislative protection of transsexuals and other transgendered individuals from employment discrimination? The answer lies in the rationale behind anti-discrimination laws in general. The goal of employment discrimination law in general is to achieve equal employment opportunities for everybody.³⁰ The law seeks to have employment decisions based solely on merit (i.e., the quality of an individual's work performance), rather than on immutable characteristics such as race, skin color, sex, disability, age, etcetera.³¹ Some of the criticism surrounding the protection of transsexuals from workplace discrimination is based on an unfortunately common misconception that transsexualism is a choice and therefore not an immutable characteristic deserving protected class status.³² However, various medical studies "suggest that [transsexualism] may be caused by genetic (chromosomal) abnormalities, hormone imbalances during fetal and childhood development, defects in normal human bonding and child rearing, or a combination of these factors,"³³ meaning that transsexualism *is* immutable.³⁴ After all, why would anybody *voluntarily* subject themselves to all the negative consequences that transsexuals often face, such as high unemployment, low wages, homelessness, lack of health care, and criminal victimization?³⁵

IV. SO WHAT IF TRANSEXUALS ARE PROTECTED UNDER TITLE VII?

Generally, Title VII represents a legislative compromise between the sometimes adverse interests of employers and employees.³⁶ This section seeks to compile the

²⁸ See *id.* at 4.

²⁹ See *id.* at 5.

³⁰ See Julie C. Suk, *Discrimination at Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 77 (2007).

³¹ See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 8, 13, 19-20 (2000).

³² For example, in a conversation I had with a fellow student about this article, the student argued that transgendered people do not deserve protection from employment discrimination because one chooses to be transgendered.

³³ WebMD, *supra* note 7.

³⁴ See Hazel Glenn Beh, *Sex, Sexual Pleasure, and Reproduction: Health Insurers Don't Want You to Do Those Nasty Things*, 13 WIS. WOMEN'S L.J. 119, 150 (1998).

³⁵ For statistical data regarding income, health insurance, housing, employment, and abuse rates for transgendered people, see S.F. Dep't of Pub. Health, *The Transgender Community Health Project* (1999), available at <http://www.transgenderlaw.org/resources/transfact-sheet.pdf>.

³⁶ See generally, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (referring to a "balance between employee rights and employer prerogatives"), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166, 105 Stat. 1071; *McDaniel v. Essex Int'l, Inc.*, 571 F.2d 338, 344 (6th Cir. 1978) ("In enacting section 701(j) Congress explicitly required a balancing between the religious needs of the individual and the legitimate business needs of an employer.").

available empirical data regarding unemployment rates of, wage rates of, discrimination rates against, and harassment rates against transsexuals and other transgendered people (representing the interests of employees), along with economic studies regarding workplace efficiency (representing the interests of employers), and balance the pros and cons of holding that transsexuals are protected under Title VII. While the author concludes that it is in the best interests of society to protect transsexuals under federal law, the author urges the reader to reach his or her own conclusions based on the information available.

This section also addresses whether a legislative or judicial approach is better suited to protect transsexuals from employment discrimination. The author concludes that a legislative approach is most appropriate, but any protection will do. Lastly, this section discusses the more difficult question of whether anti-discrimination law can adequately protect the interests of transsexuals. The author's conclusion on this point is skeptical, but hopeful.

Transsexual employees merely seek equal employment opportunities and equal protection under the law.³⁷ Yet, the available evidence shows a lack of equality for transsexuals in the workplace. About one in every 18,000 to one in every 30,000 people are male to female (MTF) transsexuals.³⁸ About one in every 54,000 to one in every 100,000 people are female to male (FTM) transsexuals.³⁹ Not much empirical work has been done in the area of employment of transsexuals; however, "available studies provide strong evidence that 'harassment and other forms of discrimination in the workplace, from recruitment to promotion, is endemic when it comes to transsexual people.'"⁴⁰ In one survey, 37% of transsexuals said that they had been demoted or fired for being transsexual.⁴¹ Another study found a 42% unemployment rate for transsexuals.⁴² In 1999, the median monthly income for transsexuals in San Francisco was \$744 for MTF transsexuals and \$1,100 for FTM transsexuals.⁴³ In the United Kingdom, where transsexuals are protected from employment discrimination, 22% of transsexuals, after completing sex reassignment surgery, reported that their employers forced them to use the bathroom for people of their sex assigned at birth.⁴⁴ Thirty-eight percent of transsexuals in the United Kingdom reported experiencing harassment at work near the time of sex reassignment surgery, while 6% of transsexuals reported physical abuse at work.⁴⁵

³⁷ See generally, Vade, *supra* note 21.

³⁸ See JSI Research and Training Inst., Inc., *Access to Health Care for Transgendered Persons in Greater Boston*, at 3 (2000), available at <http://www.globthealth.org/documents/transaccessstudy.pdf>.

³⁹ See *id.*

⁴⁰ See WHITTLE, TURNER & AL-ALAMI, *supra* note 10, at 22 (quoting Stephen Whittle, *Employment Discrimination and Transsexual People*, (2000), http://www.pfc.org.uk/files/Employment.Discrimination_and_Transsexual_People.pdf).

⁴¹ See *id.* at 23.

⁴² See *id.*

⁴³ See S.F. Dep't of Pub. Health, *supra* note 35.

⁴⁴ See WHITTLE, TURNER & AL-ALAMI, *supra* note 10, at 35.

⁴⁵ *Id.* at 23.

Most alarmingly, one study concludes that “[t]he overall socio-economic discrimination experienced by trans people, as a result of poor pay, job loss or low income support has been strongly linked with experiencing a transgender-related violent incident.”⁴⁶ Therefore, protecting transsexuals from employment discrimination may not only decrease unemployment and workplace harassment, but may also reduce the incidence of hate crimes.

Employers, on the other hand, are mainly interested in making money.⁴⁷ Most employers, especially those in highly competitive markets, seek to increase profits either through cutting costs, increasing revenues, or a combination of the two. As for cutting costs, many law and economics scholars argue that employment decisions are structured so as to reduce or eliminate transaction costs.⁴⁸ These scholars conclude that transaction costs are reduced, and many employers operate most efficiently, through homogeneity in the workforce.⁴⁹ In fact, scholar Richard Epstein, argues that “part of the problem with antidiscrimination law is that it compromises workplace efficiency by preventing employers from establishing homogeneous workplace cultures.”⁵⁰ Other scholars contend that “[n]either antidiscrimination law nor the affirmative pursuit of diversity operates as a meaningful barrier to, or substantially undermines the incentives for employers to achieve, workplace homogeneity,”⁵¹ because employers can achieve a diverse, yet homogenous, workforce by employing only those minority group members who have assimilated into the mainstream of society.⁵²

In the case of transsexuals and other transgendered people, assimilation is nearly impossible because of strong American cultural barriers to assimilation.⁵³ If transsexuals cannot assimilate, then they will be more likely to disrupt workplace homogeneity, and thus will reduce workplace efficiency.⁵⁴ Perhaps the best example supporting the proposition that transsexuals cannot assimilate is the phenomenon of “transphobia.” Transphobia is the widespread belief that one’s doctor-assigned sex at birth is one’s *true* sex and that transgendered people are “frauds against truth, or people who deceive others,” because their self-identified sex does not conform to the

⁴⁶ *Id.*

⁴⁷ See *The Good Company: A Survey of Corporate Social Responsibility*, ECONOMIST, Jan. 22, 2005, at 3, available at http://www.economist.com/displaystory.cfm?story_id=3555212.

⁴⁸ See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory: Crossroads, Directions, and a New Critical Race Theory*, 112 YALE L.J. 1757, 1788 (2003) (reviewing FRANCISO VALDES, JEROME MCCRISTAL CULP & ANGELA P. HARRIS, *CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY* (2002)) (“Cumulatively, this body of work advances a standard economic argument about transaction costs: Employment decisions will be structured to reduce them.”).

⁴⁹ See *id.* at 1789-90, 1793.

⁵⁰ *Id.* at 1790.

⁵¹ *Id.* at 1791.

⁵² See generally *id.* at 1793 (describing assimilation as “palatability”).

⁵³ See Rellis, *supra* note 14, at 224.

⁵⁴ See Carbado & Gulati, *supra* note 48, at 1789-93.

doctor-assigned “truth.”⁵⁵ Nowhere does transphobia manifest itself in the workplace more than in cases involving a dilemma over which bathroom the transsexual may use.⁵⁶ Indeed, numerous employers have legitimate concerns that workplace productivity and employee morale will suffer because of a controversy over what bathroom transsexuals use.⁵⁷ Therefore, protection of transsexuals and other transgendered people from employment discrimination may be bad for the economy.

If transsexuals are protected by Title VII, then the employer may be caught in a “catch 22,” having to choose whether to allow a transsexual to potentially disrupt the productivity and morale of co-workers by using a certain bathroom, or whether to discharge the transsexual employee and risk a lawsuit. However, the cases on point unanimously hold that employers are not liable under Title VII for firing a pre-operation transsexual for using the “wrong” bathroom.⁵⁸ Moreover, it is conceivable that an employer may avoid liability in such a case through the application of a bona fide occupational qualification (BFOQ) defense.⁵⁹ Although the BFOQ defense is very narrow,⁶⁰ at least one court has held that an employer successfully asserted a BFOQ defense in a case against a female janitor where the job entailed cleaning mens bathrooms.⁶¹ Therefore, it seems logical to extend this defense to employers who require transsexuals who have yet to officially undergo sexual reassignment surgery to use the bathroom of the sex assigned at birth.

The benefits of a reduction in unemployment, workplace harassment, and the incidence of hate crimes far outweigh the increased transaction costs and reduced workforce efficiency that may result from protecting transsexuals from employment discrimination. As one venerable attorney once told me, “Slavery is good for the economy!”⁶² But that does not justify its legal sanctioning. Additionally, since transsexuals comprise a relatively minute percentage of the overall population,⁶³ the potential aggregate economic impact of protecting transsexuals from employment discrimination should be negligible. More importantly, one need only look at the

⁵⁵ See Vade, *supra* note 21, at 287-88.

⁵⁶ See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 998 (N.D. Ohio 2003).

⁵⁷ See *Johnson*, 337 F. Supp. 2d at 998 (referring to “allegations . . . that Plaintiff had been using both the men’s and women’s restrooms at the meat-packing plant”).

⁵⁸ See *Etsitty*, 502 F.3d at 1219, 1228; *Johnson*, 337 F. Supp. 2d at 998, 1000.

⁵⁹ See 42 U.S.C. § 2000e-2(e) (2006) (“[I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . .”).

⁶⁰ See *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977).

⁶¹ See *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1423 (N.D. Ill. 1984).

⁶² This statement was made, in sarcastic criticism of arguments that certain laws are bad for the economy, by Jeff Boyd, member of the Ohio Association for Justice.

⁶³ *JSI Research and Training Inst., Inc.*, *supra* note 38, at 3.

sometimes horrific facts of hate crime cases involving transsexuals to realize that the law should protect such individuals from discrimination.⁶⁴

So, what is the best means (i.e., legislative or judicial) to protect transsexuals and other transgendered people from employment discrimination? Federal legislation is the most appropriate way to protect transsexuals and other transgendered people from employment discrimination. This conclusion is based on a combination of factors such as: (1) the likelihood that Congress will pass legislation protecting transsexuals from employment discrimination compared to the likelihood that the Supreme Court will hold that Title VII protects transsexuals; (2) the fact that legislative protection of transsexuals would be broader and more inclusive of transgendered people who are not transsexuals than judicial protection under Title VII; and (3) the unique problems presented by transsexuals in the workplace that may arise, such as health insurance coverage of sexual reassignment surgery, which make legislative protection particularly appropriate.

As far as the likelihood that Congress will pass legislation protecting transsexuals from employment discrimination goes, it probably will not happen anytime soon. Perhaps the best chance transsexuals have for federal legislative protection from employment discrimination is inclusion in the proposed Employment Non-Discrimination Act (ENDA).⁶⁵ ENDA, as it was originally drafted, would have protected gay, lesbian, bisexual, and transsexual (GLBT) people from discrimination in employment.⁶⁶ However, before the House of Representatives voted on the bill, provisions for “gender identity and expression” were removed from the language of the bill out of concerns that “including transgender workers in the legislation would cause it to fail in the full House.”⁶⁷ The bill, in its amended form, passed through the House by a vote of 235 to 184.⁶⁸ Some of the Democratic supporters of the bill in the House of Representatives voted against it because it did not include protections for transsexuals.⁶⁹ Some Republicans also argued that transsexuals should be included in the legislation, presumably so that the bill would fail.⁷⁰ Within forty-eight hours of the House’s removal of language that would protect transsexuals from the bill, GLBT activists united and started a grassroots campaign to pass only the original version of the bill.⁷¹ Most Democratic leaders, however, believe that passing

⁶⁴ See generally Vade, *supra* note 21, at 256, 290 n.7 (discussing the beating, asphyxiation, and murder of a transsexual named Gwen Araujo).

⁶⁵ See Shannon Price Minter, *Banding Together*, ADVOCATE.COM Oct. 17, 2007, http://advocate.com/exclusive_detail_ektid49796.asp (discussing Representative Tammy Baldwin’s belief that there are sufficient congressional supporters of transsexuals’ rights to pass a bill that would include a ban on discrimination because of gender identity).

⁶⁶ See *id.*

⁶⁷ See Jesse J. Holland, *Bill to Protect GLB Workers Advances Without the T*, ADVOCATE.COM Oct. 19, 2007, http://advocate.com/news_detail_ektid49855.asp.

⁶⁸ See David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, A1.

⁶⁹ Holland, *supra* note 67.

⁷⁰ See Herszenhorn, *supra* note 68.

⁷¹ See Minter, *supra* note 65.

a bill that protects only gay, lesbian, and bisexuals from employment discrimination “will lay the foundation for passing [a bill that would protect transsexuals] in the future.”⁷² Comments such as this, along with the growing trend of enacting legislation in states and localities around the country, give transsexuals some hope that one day Congress will protect them from employment discrimination. As of September 2009, the current status of the bill includes language that would protect individuals on the basis of sexual orientation and gender identity.⁷³ However, considering that some members of Congress have been trying to pass legislation that would protect homosexuals from employment discrimination for the past thirty-three years⁷⁴ and have still failed to do so, it appears that legislative protection of more politically controversial groups, such as transsexuals and other transgendered people, may not happen for many years to come.

With the current composition of the Supreme Court, it seems more likely that the Court will protect transsexuals under Title VII than that Congress will do so. The deciding vote would be that of Justice Kennedy, since the rest of the Court is split, with four generally conservative members (Scalia, Alito, Thomas, and Roberts) and four generally liberal members (Stevens, Breyer, Ginsburg, and Sotomayor). In *Lawrence v. Texas*, a 2003 case holding that it is unconstitutional to criminalize homosexuality, Justice Kennedy wrote the majority opinion.⁷⁵ Although holding that Title VII protects transsexuals has very little to do with holding that it is unconstitutional to criminalize homosexuality, the *Lawrence* opinion, at a bare minimum, shows that Justice Kennedy is somewhat sympathetic to the plight of gays, and presumably, to that of transsexuals as well. This means that the best shot transsexuals have for federal protection from employment discrimination is through judicial means. However, it is still a long shot given the fact that Justice Kennedy also joined in the majority opinion of *Boy Scouts of America v. Dale*, holding that, to the extent that a New Jersey law prohibited the Boy Scouts from discriminating against homosexuals in their membership, the law was unconstitutional because it violated the Boy Scouts’ First Amendment freedom of association.⁷⁶

Legislative protection of transsexuals would likely be broader and more inclusive of other transgendered people than judicial protection under Title VII. While Title VII certainly can be interpreted as protecting transsexuals from employment discrimination,⁷⁷ it would be improper for a court to make “transsexual” into a separate and independent protected class under Title VII without a legislative amendment to the statute.⁷⁸ Therefore, in all cases under Title VII involving transsexuals, the proper inquiry would still be whether the plaintiff was discriminated against because of sex. As such, it would remain a question of fact for

⁷² See Holland, *supra* note 67 (quoting California Democrat George Miller).

⁷³ See HRC, *Employment Non-Discrimination Act*, http://www.hrc.org/laws_and_elections/enda.asp (last visited Sept. 17, 2009).

⁷⁴ See Herszenhorn, *supra* note 68.

⁷⁵ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁷⁶ See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000).

⁷⁷ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006).

⁷⁸ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007).

the jury to determine whether the transsexual plaintiff in any given case was discriminated against because of sex.⁷⁹ The jury would have to decide whether the employer discriminated against the transsexual plaintiff because the plaintiff changed from one sex to another sex (presumably making it discrimination because of sex) or whether the employer discriminated against the transsexual plaintiff because of some other reason, such as disruption of the workforce.⁸⁰ In the usual case, the real discrimination lies in the inconsistent perceptions between the employer, society, and the transsexual employee.⁸¹ Most employers view MTF transsexuals as men, while the MTF transsexual views herself as a woman, even if no sexual reassignment surgery has been undertaken.⁸² Generally, employers find this *difference in perception* of the employee's sex to be troubling, not the employee's sex per se.⁸³ The difference in perception is troubling because it may disrupt the workforce by interfering with workplace homogeneity.⁸⁴ Employment discrimination law focuses on the subjective intent of the employer.⁸⁵ Employers may not discriminate "because of sex."⁸⁶ But Title VII does not prohibit discrimination because of incompatible perceptions that may cause a disruption in the workforce.⁸⁷ This means that absent any direct evidence of discrimination because of sex (e.g., a statement by the employer that the plaintiff was fired because he was a man who wanted to become a woman), the transsexual plaintiff would find it very difficult to prove a case under Title VII's burden shifting approach.⁸⁸

On the other hand, through a broad prohibition against discrimination because of "gender identity or expression," legislation could address the fine distinction between discrimination because of transsexualism and discrimination because of incompatible perceptions, so that an employer could no longer hide behind the

⁷⁹ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting).

⁸⁰ *Id.* ("[The plaintiff] says she was fired for having become female under controversial circumstances. The employer says these circumstances are disconcerting to other employees . . . Plaintiff says that how she became female is not her employer's business Those are questions [for a trier of fact].").

⁸¹ See *Holloway*, 566 F.2d at 661 n.1 (noting that the typical controversy over transsexualism stems from a difference in perception between society's view of the transsexual's sex and the transsexual's own view of his or her sex).

⁸² See generally *Holloway*, 566 F.2d at 661 n.1.

⁸³ See *supra* notes 47-54 and accompanying text.

⁸⁴ See *supra* notes 47-54 and accompanying text.

⁸⁵ See *Fogleman v. Mercy Hosp., Inc.*, 283 F.3d 561, 571 (3rd Cir. 2002) ("[Discriminat[ion]] refers to the practice of making a decision based on a certain criterion, and therefore focuses on the decisionmaker's subjective intent.") (brackets in original).

⁸⁶ See 42 U.S.C. § 2000e-2(a)(1) (2006).

⁸⁷ See, e.g., *Holloway*, 566 F.2d at 661-64; *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1219 (10th Cir. 2007); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 998 (N.D. Ohio 2003).

⁸⁸ See, e.g., *Holloway*, 566 F.2d at 661-64; *Etsitty*, 502 F.3d at 1219; *Johnson*, 337 F. Supp. 2d at 998.

argument that the employee was not fired because of transsexualism, but rather because of the effect or potential effect that the employee's transsexualism may have on the workforce. Legislation could also extend protection to other transgendered people, not just transsexuals. Therefore, it would be better for Congress to enact legislation specifically protecting transsexuals and other transgendered people from employment discrimination because such legislation would be broader and more inclusive than judicial protection under Title VII.

In addition, the legislature is better suited than the court to make important policy decisions that are peculiar to protection of transsexuals from employment discrimination. For instance, who is a "transsexual"? Courts that protect transsexuals under Title VII view transsexualism as a question of fact,⁸⁹ meaning that plaintiffs often must pay for medical evidence and expert testimony about the plaintiff's transsexualism in order to state a claim.⁹⁰ If Congress were to provide a definition of the term, or better yet, if Congress were merely to prohibit discrimination on the basis of "gender identity or expression," then, presumably, plaintiffs would not be chilled from bringing suit because of overly burdensome evidentiary requirements.⁹¹ In addition, such legislation may help to prevent transvestites and other transgendered people from attempting to pigeon-hole their way into the category of "transsexual" so that they may bring suit under Title VII according to case law that currently protects transsexuals but not other transgendered people.

Moreover, legislation is the most appropriate way to address the issue of employer health insurance coverage for sexual reassignment surgery. If Title VII protects transsexuals, then would it be discrimination because of sex for an employer to refuse to cover sex reassignment surgery or hormone therapy under its insurance plan?⁹² Would it matter whether the employer's insurance covers procedures such as mastectomies and hormone therapy for non-transsexual employees where those procedures are medically necessary?⁹³ If Title VII protects transsexuals, then these are issues that will inevitably have to be litigated, potentially resulting in different outcomes in different jurisdictions. These collateral issues are matters of policy that Congress is well suited to decide. This is just one more reason why it is more appropriate to protect transsexuals through legislative means.

Before moving on to the next section, it is important to address whether protecting transsexuals from employment discrimination will accomplish the goal of

⁸⁹ See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 211-212 (D.D.C. 2006).

⁹⁰ See *Vade*, *supra* note 21, at 271-273.

⁹¹ See *id.*

⁹² In *Davidson v. Aetna Life & Casualty Insurance Co.*, 420 N.Y.S.2d 450, 453 (N.Y. Sup. Ct. 1979), the court held that sex reassignment surgery for transsexuals is a medically necessary procedure, and the court refused to exclude the procedure from coverage under the employer's health insurance plan.

⁹³ See *Mario v. P & C Food Mkts., Inc.*, 313 F.3d 758, 767 (2d Cir. 2002) (holding that the transsexual employee's claim under Title VII failed where the employer denied medical insurance coverage of procedures involving the employee's treatment of gender dysphoria where the employee presented no evidence that the insurance plan covered procedures such as mastectomies for non-transsexual employees).

providing equal employment opportunities to transsexuals. Scholars writing on this topic tend to overlook “big picture” questions such as this. But the question merits serious consideration. Anytime judges or lawmakers contemplate expanding the law into previously uncharted waters, it is important to consider whether a change in the law will actually serve to change behavior.

Unfortunately, there is scant empirical data from the United States that addresses the effectiveness of laws that protect transsexuals from employment discrimination. This is likely because transsexualism is rare,⁹⁴ and it is difficult to compile statistically significant data when the sample size is so small. However, one study from England revealed some rather disappointing results.⁹⁵ The study concluded that “despite the recent legislation regarding transsexual people in employment, employers are either failing to prevent inequality and discrimination for trans employees, or [transsexuals] lack faith in their employer’s ability to . . . comply with employment protection legislation.”⁹⁶ Nevertheless, transsexuals should be afforded protection from employment discrimination. Change does not happen overnight; it was roughly one hundred years after the slaves were freed before the Supreme Court finally banned racial segregation. The author remains optimistic that federal protection of transsexuals from employment discrimination will one day achieve its goal of providing equal employment opportunities.

V. DOING AWAY WITH THE CONGRESSIONAL INTENT APPROACH IN ANALYZING WHETHER TITLE VII PROTECTS TRANSEXUALS

Before the Supreme Court’s holding in *Price Waterhouse v. Hopkins*,⁹⁷ federal appellate courts unanimously held that Title VII did not protect transsexuals from discrimination because of transsexualism. In a series of opinions in the late 1970s and early 1980s, the Seventh,⁹⁸ Eighth,⁹⁹ and Ninth¹⁰⁰ Circuits all held that when enacting Title VII, Congress intended only to protect women who were discriminated against because they were women and men who were discriminated against because they were men; nothing more.¹⁰¹ This part details these three opinions and concludes that the “congressional intent” approach to analyzing the issue of whether Title VII protects transsexuals is inappropriate, particularly in light of the utter lack of legislative history to support the conclusion that Congress did not intend for Title VII to protect transsexuals from employment discrimination.¹⁰²

⁹⁴ WebMD, *supra* note 7.

⁹⁵ See WHITTLE, TURNER & AL-ALAMI, *supra* note 10, at 33-40.

⁹⁶ *Id.* at 33.

⁹⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166, 105 Stat. 1071.

⁹⁸ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

⁹⁹ *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam).

¹⁰⁰ *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977).

¹⁰¹ *Ulane*, 742 F.2d at 1084; *Sommers*, 667 F.2d at 750; *Holloway*, 566 F.2d at 663-63.

¹⁰² See *Ulane*, 742 F.2d at 1085.

A. *Holloway v. Arthur Andersen & Co.*

In 1977, the Ninth Circuit became the first federal court of appeals to decide whether Title VII protects transsexuals from employment discrimination. In *Holloway*, the MTF plaintiff's employment was terminated shortly after she informed her supervisor that she was undergoing treatment in preparation for sex reassignment surgery.¹⁰³ The plaintiff claimed that "she was fired for having become female under controversial circumstances," in violation of Title VII.¹⁰⁴ The district court dismissed the claim for lack of subject matter jurisdiction.¹⁰⁵ On appeal, the Ninth Circuit affirmed.¹⁰⁶ With little explanation or reasoning, the court concluded that when enacting Title VII, "Congress had only the traditional notions of 'sex' in mind."¹⁰⁷ The court also noted that despite the "dearth" of legislative history surrounding the original enactment of Title VII, the legislative history surrounding subsequent amendments to the act evinced a congressional intent "to remedy the economic deprivation of women as a class."¹⁰⁸ In a desperate attempt to further support its conclusion, the court noted that subsequent attempts by Congress to amend Title VII to prohibit discrimination because of "sexual preference" had failed.¹⁰⁹ The court failed to explain how the subsequent amendments and attempted amendments were relevant to determining Congress's intent in 1964, when Title VII was originally enacted.

Judge Goodwin, in his dissent, made the following persuasive comments:

It seems to me irrelevant under Title VII whether the plaintiff was born female or was born ambiguous and chose to become female. The relevant fact is that she was, on the day she was fired, a purported female. She says she was fired for having become female under controversial circumstances. The employer says these circumstances are disconcerting to other employees. That may or may not be true. Plaintiff says that how she became female is not her employer's business. That may or may not be true. Those are questions that ought to be answered in court, in a trial; they should not be precluded by summary judgment or Rule 12 dismissal.¹¹⁰

As is always the case, where the plaintiff has presented sufficient evidence to cast doubt upon any legitimate, non-discriminatory reasons that the employer may have advanced for an adverse employment action, discrimination is a question of fact for the trier of fact to decide.¹¹¹ The only logical way to preclude a case with facts such

¹⁰³ *Holloway*, 566 F.2d at 661.

¹⁰⁴ *See id.* at 664 (Goodwin, J., dissenting).

¹⁰⁵ *Id.* at 661 (majority opinion).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 662.

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.* at 664 (Goodwin, J., dissenting).

¹¹¹ *See id.* (majority opinion).

as *Holloway* from going to trial would be to conclude that Congress intended to exclude transsexuals from protection under Title VII. However, there simply is no factual support for such a conclusion.

B. Sommers v. Budget Marketing, Inc.

In 1982, the Eighth Circuit became the second federal appellate court to decide whether Title VII protects transsexuals.¹¹² In *Sommers*, the pre-operative MTF transsexual plaintiff was fired from her job two days after being hired “because she misrepresented herself as an anatomical female when she applied for the job,” and such “misrepresentation led to a disruption of the company’s work routine in that a number of female employees indicated they would quit if Sommers were permitted to use the restroom facilities assigned to female personnel.”¹¹³ The district court granted summary judgment in favor of the defendants on the plaintiff’s claim.¹¹⁴ On appeal, the court affirmed.¹¹⁵ The Eighth Circuit concluded that “[b]ecause Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one’s transsexualism does not fall within the protective purview of [Title VII].”¹¹⁶ The court in *Sommers* also noted the congressional attempts and failures to amend Title VII to prohibit discrimination because of “sexual preference.”¹¹⁷ Confusingly, the court noted that, “Sommers’s claim is not one dealing with discrimination on the basis of sexual preference,” but then went on to say, “[n]evertheless, the fact that the proposals were defeated indicates that the word ‘sex’ in Title VII is to be given its traditional definition, rather than an expansive interpretation.”¹¹⁸ As in *Holloway*, the Eighth Circuit attempted to determine Congress’s intent in 1964 by interpreting subsequent congressional actions regarding a different protected class.¹¹⁹

C. Ulane v. Eastern Airlines (Ulane II)

Until recently, the leading case in the realm of Title VII protection for transsexuals was the Seventh Circuit’s 1984 opinion in *Ulane v. Eastern Airlines (Ulane II)*. In *Ulane I*, the district court held that “the statutory word ‘sex’ literally and scientifically applies to transsexuals even if it does not apply to homosexuals or transvestites.”¹²⁰ *Ulane I* ordered reinstatement, back pay, and attorney’s fees to the MTF transsexual plaintiff.¹²¹ On appeal, the Seventh Circuit, in *Ulane II*, held that Title VII does not protect transsexuals because “Congress never considered nor

¹¹² See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam).

¹¹³ *Id.* at 748-49.

¹¹⁴ *Id.* at 749.

¹¹⁵ *Id.* at 750.

¹¹⁶ *Id.*

¹¹⁷ See *id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.*

¹²⁰ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

¹²¹ *Id.* at 1082.

intended that [Title VII] apply to anything other than the traditional concept of sex.”¹²² *Ulane II* was in accord with the two other federal courts of appeals that had decided the issue at the time: the Ninth Circuit,¹²³ and the Eighth Circuit.¹²⁴

Ulane II's reasoning is hardly persuasive. *Ulane II* starts with the premise that the court must “interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex.”¹²⁵ Next, the court notes that “[s]ex as a basis of discrimination was added as a floor amendment one day before the House approved Title VII, without prior hearing or debate.”¹²⁶ From this “total lack of legislative history supporting the sex amendment,”¹²⁷ the court somehow concludes that Congress *intended* to exclude transsexuals from protection under Title VII.¹²⁸

Holloway, *Sommers*, and *Ulane II* represent the problem with using a congressional intent approach to analyze whether Title VII protects transsexuals: the court must create something out of nothing. The sex amendment was originally proposed in order to defeat Title VII from passing in the House vote.¹²⁹ That is it—the only reason why Title VII now prohibits discrimination because of sex is because a Congressman hoped that by adding “sex” as a protected class, the legislation would fail. But, obviously, the statute passed with the term “sex” included. So, what did Congress mean by “sex” when it passed the statute? *Ulane II* concludes from “the circumstances of the amendment’s adoption” a “clear[] indicat[ion]” that Congress did not intend to protect transsexuals.¹³⁰ But the “circumstances of the amendment’s adoption” are anything but “clear.” If anything, the addition of the word “sex” shows that Congress in 1964 was willing to prohibit a broader range of discrimination than some of the individual Congressmen believed Congress would be willing to prohibit at the time.

Other jurists argue that Congress’s explicit exclusion of transsexuals from protection under the Americans with Disabilities Act and the Rehabilitation Act is evidence that Congress did not intend Title VII to protect transsexuals from employment discrimination.¹³¹ One law review note even opined that the fact that “Congress lumped transsexuality with pedophilia, exhibitionism, and voyeurism in both disability acts” is “strong evidence that Congress was unsympathetic, and even hostile, to the plight of transsexuals.”¹³² However, even assuming, *arguendo*, that

¹²² *Id.* at 1085.

¹²³ See *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977).

¹²⁴ See *Sommers*, 667 F.2d at 750.

¹²⁵ *Ulane*, 742 F.2d at 1084.

¹²⁶ *Id.* at 1085 (quoting *Holloway*, 566 F.2d at 662).

¹²⁷ *Id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ *Id.*

¹³¹ See, e.g., James G. O’Keefe, Note, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1119 (2007).

¹³² *Id.*

Congress was hostile to the plight of transsexuals when the Rehabilitation Act and the Americans with Disabilities Act were enacted, this bears little, if any, relevance on what Congress intended in 1964 when it enacted Title VII.¹³³ Moreover, express exclusion of protection of transsexuals from employment discrimination in subsequent Acts of Congress evinces the exact opposite: that Title VII protects transsexuals. Express exclusion from coverage under the disability statutes shows that Congress knew how to write legislation so that it would not be interpreted to protect classes of people that Congress did not intend to protect. Therefore, Congress's express exclusion of transsexuals in subsequent Acts, along with its failure to expressly exclude transsexuals from protection under Title VII, only *supports* the conclusion that transsexuals are protected by Title VII.¹³⁴

It is sometimes difficult to know exactly what one person means when he or she speaks, let alone an entire Congress. This is not to say that congressional intent is never relevant or even that congressional intent is not a compelling tool to use in statutory interpretation. However, where, as here, there is literally no legislative history to assist courts in their interpretation of the word "sex," one cannot condone a court purporting to "interpret" Title VII by looking to congressional intent, when in fact what the court is doing is making assumptions about what Congress intended, with absolutely no factual or evidentiary basis.¹³⁵

Moreover, even if Congress did not contemplate that the phrase "because of sex" may be interpreted to include "because of transsexualism," "Supreme Court decisions subsequent to *Ulane* . . . have applied Title VII in ways Congress could not have contemplated."¹³⁶ In *Oncale v. Sundowner Offshore Services, Inc.*,¹³⁷ Justice Scalia noted, "[S]tatutory prohibitions often go beyond the principal evil [that statutes are enacted to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our

¹³³ See, e.g., *Lee v. Madigan*, 358 U.S. 228, 236 (1959) (noting that the intent of a later Congress in deciding when to declare an end to a war is not relevant in determining the intent of an earlier Congress in using the phrase "in time of peace"); See also *In re Mfrs' Nat'l Bank*, 16 F. Cas. 665, 668 (N.D. Ill. 1873) (No. 9051) (stating the rule of statutory construction that terms of a subsequent statute that do not expressly contradict the terms of a previous statute shall not be interpreted as intended to affect the terms of the previous statute).

¹³⁴ See generally *Fernandez-Vargas v. Ashcroft*, 394 F.3d 881, 886 (10th Cir. 2005) (noting that express exemptions of certain groups of people in subsequent statutory provisions showed that "when Congress intended to exempt certain groups of [people] from the sweep of the . . . statute, it knew how to do so," and concluding that Congress's failure to expressly exempt the group to which the plaintiff belonged showed that the plaintiff was not exempt).

¹³⁵ I believe that, in all likelihood, Congress did not intend for Title VII to protect transsexuals. It just does not make sense. Why would a politician care about a group of people that is politically powerless because they comprise such a small percentage of the population? However, there is a discrete danger in basing decisions on mere speculation and probabilities. The danger is that speculation may lead to both an inaccurate and unjust result. If the law is about justice, then speculation with no evidentiary or factual support is untenable.

¹³⁶ *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006).

¹³⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

legislators by which we are governed.”¹³⁸ Therefore, courts should not look to congressional intent in analyzing whether Title VII protects transsexuals.

VI. THE SEX STEREOTYPING THEORY IS AN INAPPROPRIATE METHOD OF DETERMINING WHETHER TITLE VII PROTECTS TRANSSEXUALS

The recent trend in the federal appellate courts is to hold that Title VII protects transsexuals from employment discrimination under the “sex stereotyping” theory espoused in *Price Waterhouse v. Hopkins*.¹³⁹ In fact, all three circuit courts to decide the issue after *Price Waterhouse* have either expressly held, or stated in *dicta*, that Title VII protects transsexuals under a sex stereotyping theory.¹⁴⁰ The only circuit court to expressly hold that transsexuals are protected from employment discrimination under a sex stereotyping theory is the Sixth Circuit.¹⁴¹ The Eighth and Ninth Circuits have stated in *dicta* that Title VII protects transsexuals under a sex stereotyping theory.¹⁴² This part will discuss the sex stereotyping theory of *Price Waterhouse v. Hopkins* and the cases using this theory as a basis for holding that Title VII protects transsexuals. The author concludes that the sex stereotyping theory, although perhaps applicable to how a transsexual plaintiff may prove causation in an employment discrimination case under Title VII, is not applicable to the threshold question of whether transsexuals are members of a protected class.

A. *Price Waterhouse v. Hopkins*

In the landmark U.S. Supreme Court case of *Price Waterhouse v. Hopkins*, a majority of the Court agreed that a woman who was denied a promotion, in part because she was considered too “macho,”¹⁴³ was discriminated against “because of sex.”¹⁴⁴ Ms. Hopkins was a senior manager in a large accounting firm.¹⁴⁵ She was ultimately denied partnership for many reasons, but some of the partners decided to vote against offering Ms. Hopkins partnership because she needed to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁴⁶ Although the main issues in the case related to

¹³⁸ *Id.* at 79.

¹³⁹ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166, 105 Stat. 1071.

¹⁴⁰ *See, e.g.*, *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004); *see also* *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000).

¹⁴¹ *See* *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005); *Smith*, 378 F.3d at 575.

¹⁴² *See* sources *supra* note 140.

¹⁴³ *Price Waterhouse*, 490 U.S. at 235.

¹⁴⁴ *See id.* at 250-51 (four Justice plurality opinion); *id.* at 259 (White, J., concurring); *id.* at 272-73 (O’Connor, J., concurring).

¹⁴⁵ *Id.* at 231.

¹⁴⁶ *Id.* at 235 (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

causation¹⁴⁷ and the burden of proof in a mixed-motives case¹⁴⁸ under Title VII, there was also an issue of whether discrimination because of a failure to conform to gender stereotypes constituted discrimination “because of sex.”¹⁴⁹ As to this latter issue, the Court stressed 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.”¹⁵⁰ Therefore, an employee is discriminated against “because of sex” where the employer makes an adverse employment decision because of that employee’s failure to act in a manner consistent with the employee’s sex.¹⁵¹

B. *Schwenk v. Hartford*

Schwenk was the first case to apply the *Price Waterhouse* sex stereotyping theory in the context of transsexuals.¹⁵² *Schwenk* involved an MTF transsexual’s claim against a prison guard under the Gender Motivated Violence Act (GMVA).¹⁵³ The Ninth Circuit read the relevant provisions of the GMVA as being analogous with Title VII’s prohibition against discrimination because of sex.¹⁵⁴ The court then went on to say that

The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*. In *Price Waterhouse* . . . the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed “to act like a woman”—that is, to conform to socially-constructed gender expectations. What matters, for purposes of this part of the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem from the fact that he believed that the victim was a man who “failed to act like” one. Thus, under *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. . . . [B]oth [Title VII and the GMVA] prohibit discrimination based on gender as well as sex. Indeed, for

¹⁴⁷ See *id.* at 240-42.

¹⁴⁸ See *id.* at 245-46.

¹⁴⁹ See *id.* at 250-51 (noting that the parties did not overtly dispute whether discrimination because of non-conformity with stereotypes of a particular sex constitutes discrimination “because of sex,” but discussing the issue regardless).

¹⁵⁰ *Id.* at 251.

¹⁵¹ *Id.*

¹⁵² *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

¹⁵³ See *id.* at 1192; see also 42 U.S.C. § 13981(b) (2006) declared unconstitutional by *United States v. Morrison*, 529 U.S. 598 (2000).

¹⁵⁴ *Schwenk*, 204 F.3d at 1201-02.

purposes of these two acts, the terms “sex” and “gender” have become interchangeable.¹⁵⁵

Schwenk ultimately held that the plaintiff’s claim under the GMVA failed,¹⁵⁶ however, the dicta quoted above opened the door for other federal district and appellate courts to hold that Title VII protects transsexuals from employment discrimination.¹⁵⁷

C. *Etsitty v. Utah Transit Authority*

In *Etsitty*, the Eighth Circuit affirmed the district court’s grant of summary judgment to an employer who terminated an MTF transsexual employee for expressing an intention to use women’s restrooms before formally undergoing a sex change operation.¹⁵⁸ This was certainly a peculiar disposition considering the fact that the employer had no evidence that the plaintiff had ever actually used a women’s restroom while at work.¹⁵⁹ The court, however, held that firing an MTF transsexual employee for merely expressing an intention to use a women’s restroom while working constituted a legitimate, non-discriminatory reason for the adverse employment action.¹⁶⁰ In its analysis of whether Title VII protects transsexuals in the first instance, the court expressly rejected¹⁶¹ the plaintiff’s argument that “because a person’s identity as a transsexual is directly connected to the sex organs she possesses, discrimination on this basis must constitute discrimination because of sex.”¹⁶² However, the court “assume[d], without deciding” that Title VII protects transsexuals under a sex stereotyping theory.¹⁶³

D. *Smith v. City of Salem*

In *Smith*, the Sixth Circuit became the first, and thus far, the only, federal circuit court to expressly hold that Title VII protects transsexuals under a sex stereotyping theory.¹⁶⁴ Relying on *Schwenk* and *Price Waterhouse*, the Sixth Circuit held that the transsexual plaintiff had stated a claim for relief under Title VII.¹⁶⁵ *Smith* reasoned that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has

¹⁵⁵ *Id.* (citation omitted) (footnote omitted).

¹⁵⁶ *Id.* at 1205.

¹⁵⁷ *See, e.g., Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004).

¹⁵⁸ *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224-26 (10th Cir. 2007).

¹⁵⁹ *See id.*

¹⁶⁰ *Id.* at 1224-25.

¹⁶¹ *See id.* at 1222.

¹⁶² *Id.* at 1221.

¹⁶³ *Id.* at 1224.

¹⁶⁴ *See Smith v. City of Salem*, 378 F.3d 566, 574-75 (6th Cir. 2004).

¹⁶⁵ *Id.* at 573-75.

suffered discrimination because of his or her gender non-conformity.”¹⁶⁶ The plaintiff in *Smith* was an MTF transsexual whose employer suspended her shortly after she informed her supervisor of her diagnosis with, and treatment for, Gender Identity Disorder.¹⁶⁷ Notably, the court in *Smith* operated on the premise that transsexuals are, in fact, of the sex that they were assigned at birth.¹⁶⁸ From this premise, it becomes rather obvious that a transsexual is the epitome of somebody who does not conform to the stereotypes associated with the group to which doctors assigned that individual upon birth.¹⁶⁹ Therefore, discrimination against transsexuals is an easily recognizable form of sex stereotyping that constitutes impermissible discrimination under Title VII.¹⁷⁰

This all makes perfect sense if, and only if, one accepts the court’s premise that transsexuals are of the sex that they were assigned at birth. This premise is arguably factually inaccurate,¹⁷¹ but more importantly, it is bad policy to regard transsexuals as members of the sex to which they were assigned at birth.¹⁷² As to the factual inaccuracy of this premise, “Medical literature recognizes that: Gender Identity Disorder . . . is not meant to describe a child’s nonconformity to stereotypic sex-role behavior as, for example, in ‘tomboyishness’ in girls or ‘sissyish’ behavior in boys. Rather, it represents a profound disturbance of the individual’s sense of identity with regard to maleness or femaleness.”¹⁷³ In addition, transsexuals *do* conform to gender stereotypes;¹⁷⁴ in fact, as part of the treatment for transsexualism, they are *required* to conform to gender stereotypes.¹⁷⁵ In *Price Waterhouse*, the plaintiff was a woman who identified as a woman, but whose *behavior* resembled that of a man.¹⁷⁶ In the case of an MTF transsexual, you have a *woman* who identifies *and acts* like a woman,¹⁷⁷ but whose *body parts* resemble those of a man.

There are two policy problems with operating from the premise that transsexuals belong to the sex to which they were assigned at birth. First, this sort of conceptualization feeds right into the mindset of a transphobic. Remember that transphobia stems from a belief that transsexuals are deceptive and cannot be trusted

¹⁶⁶ *Id.* at 575.

¹⁶⁷ *Id.* at 568-69.

¹⁶⁸ *See, e.g., id.* at 572, 574 (referring to the plaintiff as “he” and referring to the plaintiff’s complaint as “his” complaint).

¹⁶⁹ *See id.* at 574.

¹⁷⁰ *See id.* at 574-75.

¹⁷¹ *See Schroer v. Billington*, 424 F. Supp. 2d 203, 210 (D.D.C. 2006).

¹⁷² *See generally*, Vade, *supra* note 21, at 296-97.

¹⁷³ *Schroer*, 424 F. Supp. 2d at 210 (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 564 (4th ed. 1994)).

¹⁷⁴ *Id.* at 211.

¹⁷⁵ *See The Harry Benjamin Int’l Gender Dysphoria Ass’n*, *supra* note 18, at 3.

¹⁷⁶ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989), *superseded by statute*, Civil Rights Act of 1991 § 107, Pub. L. No. 102-166, 105 Stat. 1071.

¹⁷⁷ *See Schroer*, 424 F. Supp. 2d at 210-11.

because they do not identify with the doctor-declared “truth” that is their sex assigned at birth.¹⁷⁸ Therefore, a court giving credence to this doctor-declared “truth” engages in a subtle form of communication, which allows transphobic people to carry on in their bigotry.

Second, saying that transsexuals belong to the sex to which they were assigned at birth requires plaintiffs in a Title VII claim to plead, and admit that they belong to, that sex, even though they do not themselves believe that they belong to that sex. Such a pleading requirement may create collateral consequences for the transsexual plaintiff that the Sixth Circuit probably did not have in mind when it held that Title VII protects transsexuals under a sex stereotyping theory. For example, say a pre-operative MTF transsexual in Ohio is fired and files a suit under Title VII. According to *Smith*, the plaintiff must plead that she is a man, and that she was discriminated against for failing to conform to stereotypical masculine behavior.¹⁷⁹ Later in life, after the same person has undergone sexual reassignment surgery, she falls in love and seeks to marry to a man. But wait! There is public record where the same woman who now seeks to marry a man *admitted* that she was, indeed, a man. Will the marriage be valid?¹⁸⁰ When the husband dies, will the wife be able to share in his estate?¹⁸¹ All of these potential collateral issues could be avoided if courts give credence to the plaintiff’s self-identified sex, rather than the doctor-assigned sex.

Before moving on, the author would like to clear up any potential confusion in this discussion. It is quite conceivable, maybe even likely, that an employer would view an MTF transsexual employee as a man, and then take an adverse employment action against that employee for failing to conform with the employer’s stereotypes about how men should act. Since the employer’s subjective intent in deciding whether to make an adverse employment decision is what matters,¹⁸² it may seem difficult to understand how the sex stereotyping theory would not apply. However, as a threshold matter, the plaintiff in a Title VII case must prove that he or she is a member of a protected class.¹⁸³ It is in this context that the author argues that the sex stereotyping theory from *Price Waterhouse* should not apply. An MTF transsexual plaintiff is a member of a protected class because she is a woman, despite what doctors, employers, and everybody else in society may think. Even if one chooses to classify an MTF transsexual as a man, that individual would still be a member of a protected class under Title VII because Title VII protects everybody.¹⁸⁴ If the employer fires her (the MTF plaintiff) for failing to be “manly,” then presumably, the sex stereotyping rule would enter its way into the analysis of whether the employer’s reason for making the adverse employment decision gives rise to liability

¹⁷⁸ See Vade, *supra* note 21, at 287-88.

¹⁷⁹ See *supra* notes 167-68 and accompanying text.

¹⁸⁰ See OHIO CONST. art. XV, § 11 (“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions.”).

¹⁸¹ See, e.g., *In re Estate of Gardiner*, 42 P.3d 120, 121-22 (Kan. 2002).

¹⁸² See *supra* notes 47-54 and accompanying text.

¹⁸³ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

¹⁸⁴ See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

under Title VII.¹⁸⁵ If the termination is, instead, for failure to look like a woman or for failure to be born with female genitalia, then presumably, there would still be discrimination “because of sex,” but the sex stereotyping rule would not apply in such cases. The sex stereotyping rule is nothing more than one of the many ways in which a plaintiff can show that he or she was discriminated against “because of sex.”

Price Waterhouse was not a case where Ms. Hopkin’s status as a member of a protected class was at issue.¹⁸⁶ Yet, circuit courts often misapply the “logic and language” of *Price Waterhouse* in analyzing whether a transsexual plaintiff who brings a claim under Title VII is a member of a protected class.¹⁸⁷ This misapplication of the sex stereotyping theory likely results from the history of the case law interpreting Title VII, which initially held that transsexuals are not members of a protected class because Congress did not intend to protect transsexuals when enacting Title VII.¹⁸⁸ Indeed, it makes more sense to analyze Title VII protection of transsexuals under the “protected class” prong of the plaintiff’s *prima facie* case if using a congressional intent approach. However, under a sex stereotyping approach, one must first assume that transsexuals are members of a protected class because the sex stereotyping rule only applies in analyzing whether the employer’s reason(s) for taking an adverse employment action constitute(s) discrimination “because of sex.”¹⁸⁹ *Price Waterhouse* relates to proof of causation and has nothing to do with the separate issue of whether the plaintiff is a member of a protected class.¹⁹⁰

VII. COURTS SHOULD ANALYZE WHETHER TITLE VII PROTECTS TRANSEXUALS BY LOOKING TO THE PLAIN MEANING OF THE STATUTE

Statutory analysis both begins and ends with the plain meaning of the words that the Legislature has chosen to employ.¹⁹¹ In the context of Title VII, the statute prohibits discrimination in the “compensation, terms, conditions or privileges of employment, because of . . . sex.”¹⁹² As noted before, given the total lack of legislative history regarding the meaning of the word “sex,”¹⁹³ courts are left with nothing to analyze but the plain meaning of this seemingly simple and straightforward word. Using such a plain meaning approach, courts have come to opposite conclusions as to whether “sex” also includes a “sex change.” This part will discuss three cases in which the court used a plain meaning approach to determine whether Title VII protects transsexuals, and concludes that the word “sex”

¹⁸⁵ See *supra* notes 144-50 and accompanying text.

¹⁸⁶ See generally *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁸⁷ See, e.g., *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222-24 (10th Cir. 2007).

¹⁸⁸ See, e.g., *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984).

¹⁸⁹ See generally *Price Waterhouse*, 490 U.S. 228.

¹⁹⁰ *Id.*

¹⁹¹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (“[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”).

¹⁹² See 42 U.S.C. § 2000e-2(a)(1) (2006).

¹⁹³ See *Ulane*, 742 F.2d at 1084-85.

should be construed liberally to include discrimination against transsexuals because they are transsexuals.

A. *Ulane v. Eastern Airlines (Ulane I)*

In *Ulane I*, the United States District Court for the Northern District of Illinois held “that the term, ‘sex,’ as used in any scientific sense and as used in [Title VII] can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII.”¹⁹⁴ The court explicitly refused to make any assumptions about what Congress intended when using the word “sex,” or to draw any conclusions from the scant legislative history on the addition of the word “sex” to the statute.¹⁹⁵ The court’s reasoning was simple and straightforward; the MTF transsexual plaintiff was terminated from her employment because she had an operation whereby her male genitalia were medically converted into female genitalia,¹⁹⁶ and termination for such a reason was “literally” discrimination because of sex.¹⁹⁷

B. *Schroer v. Billington*

In *Schroer*, the United States District Court for the District of Columbia revisited the decision in *Ulane I* and held that “discrimination against transsexuals *because they are transsexuals* is ‘literally’ discrimination ‘because of . . . sex.’”¹⁹⁸ The court distinguished the line of cases applying the sex stereotyping theory from *Price Waterhouse* by noting that

Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that “Diane” is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library’s stereotypes about how men and women should look and behave—she adopts those norms. Rather, her problems stem from the Library’s intolerance toward a person like her, whose gender identity does not match her anatomical sex.¹⁹⁹

Schroer is the only case to date which scratches beneath the surface of the post *Price Waterhouse* case law interpreting Title VII to come to the right conclusion. Moreover, *Schroer* is the only case to embrace the self-identification notion of sex and to operate from the premise that transsexuals belong to the sex with which they identify themselves.

¹⁹⁴ *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).

¹⁹⁵ *See id.*

¹⁹⁶ *See id.* at 828-38.

¹⁹⁷ *Id.* at 825.

¹⁹⁸ *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006).

¹⁹⁹ *Id.* at 211-12.

C. *Etsitty v. Utah Transit Authority*

In *Etsitty*, the plaintiff made two arguments in support of the finding that transsexuals were members of a protected class: the first argument was that the plain meaning of the statute protects transsexuals as transsexuals,²⁰⁰ and the second argument was that Title VII protects transsexuals under a sex stereotyping theory.²⁰¹ As to the first argument, the court held that Title VII “protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.”²⁰² In so holding, the court noted that “[s]cientific research may someday cause a shift in the plain meaning of the term ‘sex’ so that it extends beyond the two starkly defined categories of male and female.”²⁰³ Apart from the fact that there is scientific research recognizing that sex extends beyond the male-female binary,²⁰⁴ to the author fails to understand how or why science could change the “plain meaning” of the word “sex.” Moreover, as has been previously stated, if courts give credence to the transsexual’s self-identification of his or her sex, then the issue will never be whether a transsexual plaintiff is a member of a protected class (since transsexuals identify themselves as either being male or female), but rather whether the employer terminated the plaintiff “because of sex.”

This is not to say that the *Etsitty* approach is illogical. To the contrary, it makes sense to narrowly interpret “discrimination because of sex” as meaning discrimination against men because they are men or women because they are women. However, it also makes sense to broadly interpret “discrimination because of sex” as meaning discrimination against men because they are perceived as being women or discrimination against women because they are perceived as being men. Many courts have said that “Title VII is a remedial statute which should be liberally construed.”²⁰⁵ Therefore, there is no reason to interpret the word “sex” narrowly absent any indication that Congress intended otherwise when enacting the statute.

VIII. CONCLUSION

If employment discrimination law is intended to protect people from discrimination based on immutable characteristics, then the law ought to protect transsexuals. The best way to protect transsexuals from employment discrimination is through legislative means. Legislation can protect a broad range of transgendered people, and the Legislature is better equipped than courts to resolve all the policy issues that may arise by granting transsexuals protection from employment discrimination.

However, Title VII should also be interpreted as protecting transsexuals. In the end, law is nothing more and nothing less than the government’s attempt to create rules and policies intended to curb behavior and realize justice through the use of words. These words must be given their plain meaning unless otherwise defined.

²⁰⁰ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007).

²⁰¹ See *Etsitty*, 502 F.3d at 1222-24.

²⁰² *Id.* at 1222.

²⁰³ *Id.*

²⁰⁴ See, e.g., *Schroer*, 424 F. Supp. 2d at 213 n.5.

²⁰⁵ See, e.g., *Etsitty*, 502 F.3d at 1220.

Where, as in the case of Title VII, there is a statute that was intended to be construed liberally, and there is literally no legislative history from which one could conclude what Congress intended by using the word “sex,” there is no reason not to hold that Title VII protects transsexuals as transsexuals. The sex stereotyping theory from *Price Waterhouse*, although presumably applicable to the element of causation in the case of a transsexual plaintiff, should not be applied to determine whether transsexuals are members of a protected class. Rather, courts should operate on the premise that transsexuals are of the sex that they believe themselves to be, and then seek to determine whether they have been discriminated against because of sex.