LOST IN TRANSITION: THE CHALLENGES OF REMEDYING TRANSGENDER EMPLOYMENT DISCRIMINATION UNDER TITLE VII

JASON LEE*

* Harvard Law School, J.D. Candidate, 2013. Stanford University, B.A., 2004. I would like to thank Lauren Herman and Megan Woodford for their extraordinary comments, insight, and contributions, as well as the editors of the *Harvard Journal of Law & Gender* for their assistance throughout the publication process. Special thanks to Tovah Calderon for providing the initial idea for this Note. Finally, thank you to Isidro Mariscal, whose constant support and invaluable feedback made this Note possible.

Introduction

While few in the LGBT community would be surprised to learn that in this day and age transgender[1] individuals still face intense, pervasive discrimination in the employment context, the statistics are still nothing short of astounding. A recent national survey of almost 6,500 transgender individuals[2] found that nearly half of respondents had experienced an adverse employment action—denial of a job, denial of a promotion, or termination of employment—as a result of their transgender status and/or gender nonconformity.[3] Fifty percent reported harassment by someone at work,[4] forty-five percent stated that co-workers had referred to them using incorrect gender pronouns "repeatedly and on purpose,"[5] and fifty-seven percent confessed

---

[1] Although courts have employed the terms "transgender" and "transsexual" seemingly interchangeably, *see, e.g.*, Glenn v. Brumby, 663 F.3d 1312, 1317–18 (11th Cir. 2011) (discussing a series of cases in which some courts referred to their respective plaintiff as "transgender," while other courts employed the term "transsexual"), the terms originally described two distinct groups: the former referred to those who retained their original anatomy but altered their conduct and outward appearance to inhabit a different gender role, while the latter referred to those who employed surgical methods to alter their anatomical sex. *See, e.g.,* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 Temp. Pol. & Civ. Rts. L. Rev. 573, 581 (2009). Though fully recognizing that disagreement regarding the usage and definition of the term "transgender" still exists, *see* Leigh Goodmark, *Transgender People, Intimate Partner Abuse & the Legal System*, 48 Harv. C.R.-C.L. L. Rev. (forthcoming 2013) (manuscript at 7–8) (on file with author), I use the term "transgender" in this Note to refer broadly to those persons "whose identity or lived experience do not conform to the identity or experiences typically associated with the sex assigned to that person at birth," including those "who identify or live some or all of the time as a gender other than that assigned to them at birth." Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 Colum. Hum. Rts. L. Rev. 713, 713 n.1 (2005). Thus, the word "transgender," as used in this Note, is inclusive of transsexuals—a term frequently used in contemporary speech to refer to a person that has undergone or desires to undergo some form of gender-related medical care. *See id.* Additionally, when discussing transgender plaintiffs and individuals, I have striven to employ the terms and pronouns that those persons use to self-identify.

[2] Jaime M. Grant, Lisa A. Mottet, Justin Tanis, Jack Harrison, Jody L. Herman & Mara Keisling, Nat'l Ctr. for Transgender Equal. and Nat'l Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2 (2011) [hereinafter 2011 Discrimination Survey], *available at* http://www.thetaskforce.org/reports_and_research/ntds. This study provides the clearest picture to date of the prevalence and impact of employment discrimination on the transgender community, with a wealth of data concerning the types of employment discrimination suffered by transgender individuals, the pervasiveness of such discrimination, and the consequences for the transgender population. A handful of other studies have considered the problem of transgender employment discrimination at the national, state, and local levels. *See* Nat'l Gay and Lesbian Task Force, Passing the Employment Non-Discrimination Act: A Toolkit 9–10 (2009) (summarizing studies), *available at* http://www.thetaskforce.org/enda07/ENDAtoolkit_c4.pdf. However, the *2011 Discrimination Survey* contains more recent data and reflects significantly larger sample sizes.

[3] 2011 Discrimination Survey, *supra* note 2, at 53.

[4] *Id.* at 58.

[5] *Id.* at 62.

that they delayed their gender transition in order to avoid discriminatory actions and workplace abuse.[6] It is little wonder that many in the transgender community feel that they have no choice but to suffer through this type of hostility, as transgender employees who lose their job due to workplace bias are six times as likely as the general United States population to be living on a household income under $10,000 per year,[7] and four times as likely to have experienced homelessness as transgender individuals who did *not* lose a job due to workplace bias.[8]

Efforts to remedy the problem of transgender employment discrimination via passage of the Employment Non-Discrimination Act (ENDA), which would "prohibit employment discrimination on the basis of sexual orientation *and gender identity*,"[9] have thus far failed.[10] Indeed, Representative Barney Frank, sponsor of the very first transgender-inclusive version of ENDA in April 2007,[11] introduced a new version of the bill just five months later, which omitted all mention of gender identity and extended protections only to gays, lesbians, and bisexuals.[12] In explaining the decision, Frank stated that while "we have the votes to pass a bill today in the House that would ban discrimination in employment based on sexual orientation . . . sadly, we don't yet have [the votes] on gender identity."[13] Frank proved prescient, for while the trans-exclusive version of the bill subsequently

---

[6] *Id.* at 63.

[7] *Id.* at 66.

[8] *Id*.

[9] Employment Non-Discrimination Act, H.R. 1397, 112th Cong. § 4(a)(1) (2011) (emphasis added).

[10] *See* Summary & Status of H.R.1397, 112th Cong. (2011–12) , THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.01397: (last visited Mar. 23, 2012) (showing that the 2011 version of ENDA in the House of Representatives did not advance beyond referral to the Subcommittee on the Constitution); Summary & Status of S.811, 112th Cong. (2011–12), THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN00811: (last visited Mar. 23, 2012) (showing that the 2011 version of ENDA in the Senate did not advance beyond referral to the Committee on Health, Education, Labor, and Pensions); *see also* Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1, 11–12 (2009).

[11] *See* Summary & Status of H.R.2015, 110th Congress (2007–08) , THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:h.r.02015: (last visited Mar. 23, 2012) (listing Rep. Barney Frank as the bill's sponsor).

[12] *See* Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 4(a)(1) (2007); *see also* Weinberg, *supra* note 10, at 11–12.

[13] 153 CONG. REC. H11383 (daily ed. Oct. 9, 2007) (statement of Rep. Barney Frank).

passed the House,[14] a trans-inclusive version of ENDA has yet to advance through either chamber of Congress.[15]

With federal protections for gender identity stymied by political forces, transgender activists have turned their attention to a legal strategy previously thought futile: Title VII of the Civil Rights Act of 1964 and its prohibition against discrimination "because of . . . sex."[16] For a quarter-century after Title VII's enactment, this approach proved fruitless for transgender plaintiffs, with courts consistently adopting a narrow reading of the statutory text and limiting the remedial scope of Title VII to discrimination on the basis of a plaintiff's birth-assigned sex.[17] The Supreme Court's decision in *Price Waterhouse v. Hopkins*[18] initiated a sea change in this Title VII jurisprudence, holding that discrimination against an employee due to his or her

---

[14] *See* Summary & Status of H.R. 3685, 110th Cong. (2007–08), THE LIBRARY OF CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03685:@@@L&summ2=m& (last visited Mar. 23, 2012) (reporting that the bill passed the House of Representatives). The Senate, however, neither referred the bill to a committee nor brought the bill to the floor for a vote. *See* Jerome Hunt, *A History of the Employment Non-Discrimination Act*, CENTER FOR AMERICAN PROGRESS (July 19, 2011), http://www.americanprogress.org/issues/2011/07/enda_history.html.

[15] Transgender-inclusive versions of ENDA were most recently introduced in the House of Representatives and Senate in April 2011. *See supra* note 10. However, as of this Note's publication, the House version of the bill has stalled in the Subcommittee on the Constitution, and the Senate version has failed to move beyond the Committee on Health, Education, Labor, and Pensions. *Id.* In an interview with the *Washington Blade* in December 2011, Representative Barney Frank predicted that a transgender-inclusive version of ENDA would not be enacted into law until "we have a Democratic House, Senate and president." Lou Chibbaro Jr., *Barney, speaking frankly*, WASHINGTON BLADE (Dec. 8, 2011), http://www.washingtonblade.com/2011/12/08/barney-speaking-frankly/.

[16] 42 U.S.C. § 2000e-2(a)(1) (2006).

[17] *See, e.g.*, Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) (concluding that Congress intended Title VII to address discrimination "which, had the victim been a member of the opposite sex, would not have otherwise occurred"), *aff'd*, 570 F.2d 354 (9th Cir. 1978); Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, *4 (D.N.J. Sept. 10, 1975) (declining to "ascribe any import to the term 'sex' other than its plain meaning"), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

[18] 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994). Although, for the purposes of this Note, the *Price Waterhouse* decision is significant as the genesis of the sex-stereotyping doctrine, the bulk of the decision focuses on the manner in which Title VII and the burden-shifting framework established by *McDonnell Douglas Corp. v. Green* should apply when an employment decision is motivated by a mix of legitimate and illegitimate factors. 411 U.S. 792 (1973); *see Price Waterhouse*, 490 U.S. at 238–55. Writing for a plurality, Justice Brennan found that when a plaintiff establishes that gender played a motivating role in an employment decision, the employer may avoid liability only by demonstrating by a preponderance of the evidence that it would have made the same decision even had it not taken the plaintiff's gender into account. *Price Waterhouse*, 490 U.S. at 250. Congress responded to the *Price Waterhouse* decision in the Civil Rights Act of 1991, which states that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice." 42 U.S.C. § 2000e-2(m) (1991). The Act also limits the remedies available if the employer demonstrates that it would have taken the same action even in the absence of the illegitimate motivating factor. 42 U.S.C. § 2000e-5(g)(2)(B) (1991).

failure to adhere to traditional gender stereotypes constitutes impermissible sex discrimination.[19] This conclusion recognized a "performative dimension"[20] within the concept of "sex" and rendered gender nonconformity a protected status under Title VII.[21]

This Note argues that in the years following *Price Waterhouse*, three different legal theories have emerged to allow transgender plaintiffs to bring cognizable claims of sex discrimination under Title VII. First, a number of courts have held that a plaintiff's transgender status will not spoil a viable Title VII claim so long as the adverse employment action is alleged to have come in response to the perceived gender nonconformity of the plaintiff[22]—in this Note, I refer to this as the Gender Nonconformity Approach. Second, a minority of courts have held that discrimination on the basis of a person's transgender status raises a per se actionable Title VII claim, relying either on the statutory language of Title VII[23] or the nature of transgenderism itself[24]—accordingly, I refer to these as the Per Se Approaches. Finally, one federal district court and a number of legal scholars have argued that because "sex" and "gender" are social constructs, which are formed via the interplay of various factors and which play a special role in shaping one's gender experience, gender performance and/or gender identity should merit protection under Title VII[25]—I refer to this as the Constructionist Approach. While all three approaches provide important avenues by which transgender plaintiffs can contest employment discrimination, I argue in this Note that each approach poses significant doctrinal problems for transgender legal advocates and presents considerable challenges for the larger transgender rights movement.[26]

---

[19] *See Price Waterhouse*, 490 U.S. at 251; *see also* Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465, 482 (2004) [hereinafter Kramer, *Gender Stereotype*].

[20] Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 917 (2002).

[21] *See* Kramer, *Gender Stereotype*, *supra* note 19, at 479.

[22] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 572–73 (6th Cir. 2004).

[23] *See* Schroer v. Billington, 577 F. Supp. 2d 293, 306–07 (D.D.C. 2008).

[24] *See* Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

[25] *See* Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984); *see also* Demoya R. Gordon, Comment, *Transgender Legal Advocacy: What Do Feminist Legal Theories Have to Offer?*, 97 CALIF. L. REV. 1719, 1757–59 (2009); Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 91 (2006) [hereinafter Levi, *Clothes*].

[26] As a cisgender person—a term that refers to a person whose gender identity is consistent with his or her birth-assigned sex, *see* Goodmark, *supra* note 1 (manuscript at 8)—my intent, like other cisgender scholars, has been to "create scholarship that 'does *not* situate trans people as a means to an end or an intellectual curiosity but considers the well-being of trans people as an end in itself.'" *Id.* (manuscript at 7) (emphasis in original) (quoting PAISLEY CURRAH, RICHARD M. JUANG & SHANNON PRICE MINTER, TRANSGENDER RIGHTS, at xxii (Paisley Currah et al. eds., 2006)). I willingly acknowledge, however, that I possess inherent limitations as a cisgender author to fully comprehend the experiences of transgender individuals and to convey the views of the transgender rights movement. Because I sincerely believe that the law should protect the rights of trans-

Legal scholars, to date, have not differentiated among transgender Title VII cases in this way. Most analyses frame the Gender Nonconformity Approach as the dominant method by which transgender plaintiffs have contested employment discrimination following *Price Waterhouse*, treating the case that pioneered the Per Se Approach as a novel outlier.[27] Other observers focus on the version of the Per Se Approach that relies on the statutory language of Title VII and portray its development as part of a linear evolution toward a more enlightened treatment of transgender employment discrimination under Title VII.[28] Meanwhile, the Constructionist Approach has received limited recognition and shallow analysis from legal scholars.[29] Given this backdrop, this Note's proposed organization of transgender Title VII cases assists in distinguishing and contextualizing the three approaches, and helps to assess the comparative advantages and limitations of each.

Part I of this Note describes the legal landscape for transgender plaintiffs under Title VII prior to *Price Waterhouse*, summarizes the *Price*

---

gender individuals to workplaces devoid of animus, bias, and discrimination, I have endeavored to write a piece that assists transgender legal advocates and activists in combating employment discrimination, while remaining sensitive to the fact that I am not a transgender individual. I hope that I have been successful in each of these goals.

[27] *See, e.g.*, Elizabeth M. Glazer & Zachary A. Kramer, Trans*itional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 658–60 (2009) (noting that "several courts have adopted the [Gender Nonconformity A]pproach taken by the *Smith* court" and arguing that the [Per Se Approach] in the *Schroer* decision is "at once consistent and inconsistent with the path laid out in *Smith*") (citation omitted); Gordon, *supra* note 25, at 1730–32, 1735–37 (concluding that *Smith* and its progeny "appeared to herald a new, more hopeful era in transgender discrimination jurisprudence" and finding that the *Schroer* decision "represents a significant departure from previous Title VII jurisprudence"); Weiss, *supra* note 1, at 579, 631–38 (recognizing that a number of courts have adopted the *Smith* court's rationale and noting that the *Schroer* court employed an entirely new approach).

[28] *See, e.g.*, Amanda S. Eno, Note, *The Misconception of "Sex" in Title VII: Federal Courts Reevaluate Transsexual Employment Discrimination Claims*, 43 TULSA L. REV. 765, 789–90 (2008) (portraying the evolution from *Smith* to *Schroer* as "a new trend . . . emerging amongst federal courts"); Ilana Gelfman, *Because of Intersex: Intersexuality, Title VII and the Reality of Discrimination "Because of . . . [Perceived] Sex,"* 34 N.Y.U. REV. L. & SOC. CHANGE 55, 76–84 (2010) (describing the *Smith* case as an example of "second generation" Title VII cases involving transgender plaintiffs and the *Schroer* case as an example of "third generation" Title VII cases involving transgender plaintiffs); Katrina McCann, Comment, *Transsexuals and Title VII: Proposing an Interpretation of* Schroer v. Billington, 25 WIS. J.L. GENDER & SOC'Y 163, 184 (2010) (discussing transgender Title VII precedents that rely on gender nonconformity arguments and concluding that the *Schroer* approach represents the next "logical step in Title VII jurisprudence"); Kevin Schwin, *Toward A Plain Meaning Approach to Analyzing Title VII: Employment Discrimination Protection of Transsexuals*, 57 CLEV. ST. L. REV. 645, 646 (2009) (concluding that a sex-stereotyping approach is "not well-suited" for deciding transgender Title VII cases and arguing in favor of a "plain meaning" approach, as exampled by the *Schroer* case); Navah C. Spero, Note, *Transgender Plaintiffs in Title VII Suits: Why the* Schroer v. Billington *Approach Makes Sense*, 9 CONN. PUB. INT. L.J. 387, 387–88 (2010) (arguing that the *Schroer* decision represents "the best analysis for intentional discrimination claims brought by transgender people under Title VII and should be followed by other courts in the future").

[29] *See, e.g.*, Weiss, *supra* note 1, at 623–25 (describing the *Ulane* district court's use of scientific evidence in interpreting the term "sex").

Waterhouse decision, and discusses the immediate impact of the case on transgender plaintiffs. Parts II, III, and IV delve into the arguments and relevant case law for the Gender Nonconformity, Per Se, and Constructionist Approaches respectively. These Parts also consider the doctrinal difficulties of each approach and the inherent challenges that they present for the transgender rights movement. These criticisms draw on legal scholarship in the areas of antidiscrimination law, feminist theory, social science, and transgender rights.

In addressing the weaknesses of each approach, my intent is not to undermine the ways in which transgender plaintiffs have been able to claim protections under Title VII, but rather to highlight for legal advocates the most concerning aspects of each approach and inform litigation efforts going forward. No single approach to Title VII will serve all transgender plaintiffs—indeed, the collective force of all three approaches is unlikely to remedy the full spectrum of employment discrimination suffered by the transgender community.[30] So long as the federal government and a supermajority of the states decline to provide *explicit* protections for gender identity,[31] transgender plaintiffs and their legal advocates must weigh the relative costs of each approach and choose their battles (and their tactics) wisely.

I. The Pre- and Post-*Price Waterhouse* Landscape for Transgender Plaintiffs

A. Title VII and Discrimination "Because of . . . Sex"

Title VII was initially included as part of the Civil Rights Act of 1964 as a measure designed to combat racial discrimination.[32] The day before the House of Representatives was due to vote on the Act, Representative How-

---

[30] *See* Amanda Raflo, Note, *Evolving Protection for Transgender Employees Under Title VII's Sex Discrimination Prohibition: A New Era Where Gender is More than Chromosomes*, 2 Charlotte L. Rev. 217, 218–19 (2010) (concluding that the combination of silence from the United States Supreme Court on the issue of transgender employment discrimination under Title VII, a split among some federal circuit courts, a total absence of case law on the issue in other federal circuit courts, and markedly different conclusions among federal district courts has resulted in "no clear answer as to whether a transgender individual will be found to have a viable [Title VII] claim").

[31] *See* Nat'l Gay and Lesbian Task Force, State Nondiscrimination Laws in the U.S. (2012), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_1_12_color.pdf. As of January 2012, thirty-four states provide no employment protections for transgender individuals, *see id.*, though eight states provide protections against transgender employment discrimination in public employment via executive order. *Non-Discrimination Laws that Include Gender Identity and Expression*, Transgender Law & Policy Institute, http://www.transgenderlaw.org/ndlaws/index.htm#public (last visited Feb. 9, 2012).

[32] *See, e.g.*, Ulane v. E. Airlines Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Zachary A. Kramer, *Heterosexuality and Title VII*, 103 Nw. U. L. Rev. 205, 212 (2009) [hereinafter Kramer, *Heterosexuality*].

ard Smith, a staunch opponent of the bill, introduced a floor amendment adding "sex" to the list of impermissible bases for employment discrimination as a last-ditch effort to blunt legislative support and prevent the bill's passage.[33] Representative Smith's gamble failed and Title VII was enacted with the sex provision intact.[34] The amendment's late adoption, however, prevented legislators from engaging in a robust debate regarding the inclusion of "sex" as a protected class and resulted in a paucity of legislative guidance as to the intended scope of the protection.[35]

In the years preceding the *Price Waterhouse* decision, federal appeals courts consistently adopted a narrow interpretation of "sex," limiting the scope of Title VII to discrimination on the basis of a plaintiff's birth-assigned sex,[36] thus rendering the statute inapplicable to transgender individuals.[37] Cases like *Ulane v. Eastern Airlines, Inc.* from the Seventh Circuit, *Sommers v. Budget Marketing, Inc.* from the Eighth Circuit, and *Holloway v. Arthur Andersen & Co.* from the Ninth Circuit generally relied on three bases for their restrictive interpretations. First, the courts concluded that the plain meaning of "sex" referred only to birth-assigned sex and encompassed neither gender identity nor transsexuality.[38] Second, the courts found that the sparse legislative history of Title VII militated against a broader reading

---

[33] *See, e.g.*, *Ulane*, 742 F.2d at 1085; Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); Kramer, *Heterosexuality*, *supra* note 32, at 212; Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 168 (2004) [hereinafter Yuracko, *Neutrality*]. Some scholars have expressed skepticism toward this view, suggesting that Representative Smith may have possessed a sincere desire to add sex as a protected class to the bill. *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 182–83 (1991) (noting that Representative Smith had previously supported a "'sex' amendment" in 1956 and had served as a sponsor of the Equal Rights Amendment since 1943).

[34] Kramer, *Heterosexuality*, *supra* note 32, at 212.

[35] *See, e.g.*, *Ulane*, 742 F.2d at 1085; Kramer, *Heterosexuality*, *supra* note 32, at 213.

[36] Although many courts state that the remedial scope of Title VII extends only to discrimination based on "biological sex," *see, e.g.*, Oiler v. Winn-Dixie Louisiana, Inc., No. CIV.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002), I have deliberately avoided use of that phrase in this Note. Instead, I use the term "birth-assigned sex," which conveys largely the same idea while being more sensitive to transgender and gender nonconforming individuals. *See Media Reference Guide: Transgender Glossary of Terms*, GLAAD, http://www.glaad.org/reference/transgender (last updated May 2010).

[37] *See Ulane*, 742 F.2d at 1087 ("[I]f the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress."); *Sommers*, 667 F.2d at 750 "[F]or the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise."); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977) (declining to expand Title VII's applicability beyond the "traditional meaning" of sex "in the absence of Congressional mandate"), *overruled by* Price Waterhouse *as recognized by* Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

[38] *See Ulane*, 742 F.2d at 1085 (noting that the "plain meaning" of the statute "implies that it is unlawful to discriminate against women because they are women and against men because they are men"); *Sommers*, 667 F.2d at 750 (concluding that, in the absence of contrary congressional intent, the term "sex" as used in Title VII should be "given its traditional definition"); *Holloway*, 566 F.2d at 663 (stating that the "traditional meaning" of "sex" should apply). I use the term "transsexual" in this Note to refer to "a

of "sex," reasoning that Congress would have engaged in a more lengthy debate had it intended to include under the purview of the statute something as controversial as gender identity.[39] Finally, the courts interpreted Congress's consistent rejection of amendments to Title VII that would have added protections for sexual orientation as evidence that Congress intended a narrow reading of "sex."[40] As a result of decisions like *Ulane*, *Sommers*, and *Holloway*, many legal observers quite reasonably viewed Title VII as a legal dead-end for transgender plaintiffs.[41]

B. Price Waterhouse *and the Sex-Stereotyping Theory of Sex Discrimination*

The Supreme Court's decision in *Price Waterhouse* fundamentally altered this landscape. The case concerned Ann Hopkins, a senior manager at Price Waterhouse who was passed up for partnership because the firm's leadership found her to be insufficiently feminine in demeanor, attire, and personality.[42] The Court noted that despite Hopkins's "outstanding" track record at Price Waterhouse,[43] the firm's partners had reacted negatively to her aggressive interpersonal style primarily "because she was a woman."[44] Various partners described Hopkins as "macho," commented that she

---

person that has undergone or desires to undergo some form of gender-related medical care." Romeo, *supra* note 1, at 713 n.1.

[39] *See Ulane*, 742 F.2d at 1085 (concluding that significant legislative debate would have ensued had Congress intended for Title VII to extend beyond the "traditional concept of sex"); *Sommers*, 667 F.2d at 750 (conceding that the act "passed . . . without prior legislative hearings and little debate," but nonetheless concluding that "the major thrust of the 'sex' amendment was towards providing equal opportunities for women"); *Holloway*, 566 F.2d at 663 ("The manifest purpose of Title VII's prohibition against sex discrimination in employment [was] to ensure that men and women are treated equally.").

[40] *See Ulane*, 742 F.2d at 1085–86 (finding that Congress's rejection of amendments to Title VII that would have added protections for sexual orientation "strongly indicates that the phrase in the Civil Rights Act prohibiting discrimination on the basis of sex should be given a narrow, traditional interpretation"); *Sommers*, 667 F.2d at 750 ("[T]he fact that [proposed Title VII amendments that would have added protections for sexual orientation] were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); *Holloway*, 566 F.2d at 662 (relying on the fact that "[s]everal bills have been introduced to amend the Civil Rights Act to prohibit discrimination against 'sexual preference' . . . [and n]one have been enacted into law").

[41] *See, e.g.*, Lisa A. Blanchard, *Sexual Harassment in the Workplace: Employer Liability for a Sexually Hostile Environment*, 66 WASH U. L.Q. 91, 96 n.42 (1988) (stating as fact the notion that "Title VII does not apply to discrimination against transsexuals"); Richard Green, Comment, *Spelling 'Relief' for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125, 126 (1985) (noting that Title VII "has yet to spell relief" for transgender plaintiffs and arguing that transgender legal advocates should instead bring suit under the Rehabilitation Act of 1973, which forbids discrimination against handicapped persons).

[42] Price Waterhouse v. Hopkins, 490 U.S. 228, 234–35 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

[43] *Id.* at 233.

[44] *Id.* at 235.

"overcompensated for being a woman," and recommended that she take "a course at charm school."[45] One partner, in advising Hopkins how she might improve her chances for partnership, suggested that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[46]

The Court found in favor of Hopkins, declaring 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."[47] This principle has come to be known as the sex-stereotyping theory of sex discrimination.[48] It permits an individual to bring a claim under Title VII if an employer has based an employment decision on the individual's failure to conform to stereotypical expectations of how men and women should look and behave.[49] In this way, the *Price Waterhouse* decision represents an expansion of the definition of "sex" as used in Title VII, a term which typi-

---

[45] *Id.*

[46] *Id.*

[47] *Id.* at 251. The opinion only won the support of a plurality of the Court. However, six Justices found that the partners' comments constituted clear gender discrimination and agreed that Title VII barred not just discrimination on the basis of birth-assigned sex, but also gender stereotyping. *See id.* at 250–51; *id.* at 259 (White, J., concurring) ("I agree that the finding [of sex discrimination] was supported by the record."); *id.* at 266, 272 (O'Connor, J., concurring) (stating that "[t]here has been a strong showing that the employer has done exactly what Title VII forbids" and acknowledging that Hopkins "proved discriminatory input into the decisional process, and . . . that participants in the process considered her failure to conform to the stereotypes"). Though disagreeing with the majority's application of the burden-shifting framework laid out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the dissent appeared to concede that discrimination on the basis of an employee's failure to comport with sex-stereotypes violates Title VII, stating that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent" and concluding that "Hopkins plainly presented a strong case . . . of the presence of discrimination in Price Waterhouse's partnership process." *Id.* at 294, 295 (Kennedy, J., dissenting).

[48] *See, e.g.*, Glazer & Kramer, *supra* note 27, at 656 (using the term "gender-stereotyping"); Gordon, *supra* note 25, at 1729 (referring to the doctrine as "*Price Waterhouse's* 'sex-stereotyping' theory"); Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 Nw. U. L. Rev. 1147, 1157–59 (2010) (discussing the "Title VII 'sex stereotyping' theory" and its application to transgender plaintiffs); Jennifer L. Levi, *Misapplying Equality Theories: Dress Codes at Work*, 19 Yale J.L. & Feminism 353, 377–79 (2008) (discussing the "sex stereotyping theory" that emerged following *Price Waterhouse*). Some scholars have questioned whether the sex-stereotyping doctrine survived the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998). For an extensive discussion of this argument, see Kramer, *Gender Stereotype*, *supra* note 19, at 476–79, which notes a lack of clarity with regard to whether the Supreme Court, in vacating the judgment in *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), in light of its decision in *Oncale*, meant to overrule *Doe's* holding regarding evidentiary requirements in sexual harassment cases, its holding that harassment based on a victim's failure to live up to expected gender stereotypes constituted discrimination on the basis of sex, or both.

[49] *See* Glazer & Kramer, *supra* note 27, at 656; Landsittel, *supra* note 48, at 1157–58; *see also* Kimberly A. Yuracko, *The Antidiscrimination Paradox: Why Sex Before Race?*, 104 Nw. U. L. Rev. 1, 8 (2010) ("[*Price Waterhouse*] suggested a broad new anti-assimilationist antidiscrimination principle—one protecting workers from prescriptive stereotypes that demand conformance to sex-based gender norms.").

cally "refers to the anatomical and physiological distinctions between men and women,"[50] to include aspects of "gender,"[51] a concept that encapsulates the performative and culturally-constructed characteristics that overlay those anatomical and physiological distinctions.[52] To put the distinction more succinctly, "gender is to sex as feminine is to female and masculine is to male."[53]

Adjudication of a Title VII sex-stereotyping claim generally requires that a court first determine the plaintiff's "anchor gender"—a term that some scholars have used to denote the gender most commonly associated with the plaintiff's sex.[54] Male plaintiffs are thus presumed to have masculine anchor genders and female plaintiffs are correspondingly presumed to have feminine anchor genders.[55] A court will then compare the plaintiff's anchor gender to his or her "expressive gender"—the gender presented by the plaintiff's appearance, conduct, and behavior.[56] If an employer has discriminated against an individual because, in the employer's view, the two genders do not align, such action constitutes impermissible sex-stereotyping in violation of Title VII.[57]

---

[50] Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995).

[51] *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187, 1201–02 (9th Cir. 2000).

[52] *See* Case, *supra* note 50, at 10. Undoubtedly, the Court has at times used the terms sex and gender interchangeably. *Compare* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) ("[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of *gender*.") (emphasis added), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994), *with id.* at 256 (concluding that it was "[Ann Hopkins'] *sex* and not her interpersonal skills that [drew] the criticism") (emphasis added). In other instances, the Court has attempted to draw distinctions between sex and gender:

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

J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

[53] *J.E.B.*, 511 U.S. at 157 n.1 (Scalia, J., dissenting).

[54] *See* Glazer & Kramer, *supra* note 27, at 665; *see also* Marybeth Herald, *Situations, Frames, and Stereotypes: Cognitive Barriers on the Road to Nondiscrimination*, 17 MICH. J. GENDER & L. 39, 53 n.68 (2010) (discussing Professor Glazer and Professor Kramer's use of the term "anchor gender"). The concept of a plaintiff's "anchor gender" and "expressive gender" in Title VII sex-stereotyping doctrine was first proposed by Professor Zachary A. Kramer at Arizona State University, Sandra Day O'Connor College of Law. *See* Kramer, *supra* note 19, at 465. I find these concepts useful for highlighting the way in which the *Price Waterhouse* decision incorporated aspects of gender performance into Title VII jurisprudence.

[55] *See* Glazer & Kramer, *supra* note 27, at 665.

[56] *Id.*

[57] *Id.*

C. The Impact of Price Waterhouse *for Transgender Plaintiffs*

The sex-stereotyping doctrine would seem to be a boon to the transgender community, as transgenderism is defined in significant part by nonconformity with stereotypical gender expectations.[58] These hopes were partially vindicated in the years following *Price Waterhouse*, as courts proved receptive to sex-stereotyping arguments by transgender plaintiffs in non-Title VII cases. In 2000, the Ninth Circuit in *Schwenk v. Hartford* employed the Title VII sex-stereotyping framework to hold that a transgender woman[59] prisoner who was sexually assaulted by a state prison guard could bring a claim under the Gender Motivated Violence Act.[60] The court concluded that the reasoning employed by the *Ulane*, *Sommers*, and *Holloway* courts, which limited Title VII's applicability to discrimination based on birth-assigned sex,[61] had been "overruled by the logic and language of *Price Waterhouse*."[62] The court also emphasized that the primary focus in a sex-stereotyping claim is whether the perpetrator acted on a belief that the victim's actions failed to conform to his or her perceived sex.[63] Later that year, in *Rosa v. Park West Bank & Trust Company*, the First Circuit relied on Title VII case law in reversing the dismissal of an Equal Credit Opportunity Act claim of sex discrimination, in which the plaintiff, a transgender woman, alleged that she was denied service by the defendant-bank because her feminine attire failed to comport with her male birth-assigned sex.[64] The court

---

[58] *See, e.g.*, Taylor Flynn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"); Ilona M. Turner, Comment, *Sex Stereotyping* Per Se*: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563 (2007) ("The very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.").

[59] By "transgender woman," I refer to an individual who has a male birth-assigned sex but whose gender identity and/or gender expression is female.

[60] 204 F.3d 1187, 1203 (9th Cir. 2000). The court found that the guard's "actions were motivated, at least in part, by Schwenk's . . . assumption of a feminine rather than a typically masculine appearance or demeanor." *Id*. at 1202.

[61] *See* cases cited *supra* note 37.

[62] *Schwenk,* 204 F.3d. at 1201.

[63] *See id.* at 1202.

> 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.

Id.

[64] 214 F.3d 213, 214 (1st Cir. 2000). Pursuant to circuit precedent, the court looked to Title VII case law to determine whether the plaintiff had been subject to impermissible sex discrimination in violation of the Equal Credit Opportunity Act. *Id*. at 215. It is also worth noting that although Rosa identifies as a trangender woman, *see* Laura Grenfell, *Embracing Law's Categories: Anti-discrimination Laws and Transgenderism,* 15 YALE J.L. & FEMINISM 51, 66 (2003), the case itself is not formally a transgender rights case. Rosa and her attorneys at the Gay & Lesbian Advocates & Defenders made the presuma-

found it reasonable to infer that Rosa had suffered discrimination as a result of the dissonance that the defendant perceived between Rosa's apparel and her birth-assigned sex.[65]

While *Schwenk* and *Rosa* both analogized to Title VII in upholding gender-based claims, courts continued to express reservations regarding *actual* Title VII claims brought by transgender plaintiffs. In *Oiler v. Winn-Dixie Louisiana, Inc.*, for example, a Louisiana district court rejected a transgender plaintiff's Title VII claim, relying primarily on *Ulane* to hold that transgender employment discrimination fell outside the purview of Title VII.[66] The court distinguished *Price Waterhouse*, concluding that the decision by a transgender person to present as a different sex than his or her birth-assigned sex constitutes a wholly different form of gender nonconformity than that exhibited by Ann Hopkins.[67] As the court stated: "This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex."[68] Federal district courts in New York and Pennsylvania reached similar results, finding Title VII inapplicable to transgender plaintiffs.[69]

D. Three Emerging Approaches for Contesting Transgender Employment Discrimination Under Title VII

In the years following *Oiler*, three distinct legal arguments emerged to allow transgender plaintiffs to contest employment discrimination under Title VII.[70] The first approach, which I refer to as the Gender Nonconformity Approach, treats the plaintiff's transgender status as a neutral element in a Title VII suit and argues that it should not spoil what would otherwise be an actionable sex-stereotyping claim. The Sixth Circuit case *Smith v. City of Salem* best illustrates this posture.[71] The second approach, which I refer to

---

bly strategic decision to portray Rosa not as a transgender individual, but rather as a "a biological male" who "[failed] to meet a stereotype of masculinity." Brief for the Plaintiff-Appellant Lucas Rosa at 4, 9 *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (No. 99-2309), 2000 WL 35571172; *see also* Grenfell, *supra* note 64, at 66.

[65] *Rosa*, 214 F.3d at 215.

[66] No. Civ.A. 00–3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002). In addition to *Ulane*, the *Oiler* court also drew support from *Sommers*, *Holloway*, and a number of federal district court decisions that preceded *Price Waterhouse*. *See id.* at *4 n.51.

[67] *Id.* at *6.

[68] *Id.*

[69] *See* Rentos v. Oce-Office Sys., No. 95 Civ. 7908 LAP, 1996 WL 737215, at *7 (S.D.N.Y. Dec. 24, 1996) (noting the "uniformity of the federal courts' position" in rejecting transgender Title VII claims); Dobre v. Nat'l R.R. Passenger Corp. (Amtrak), 850 F. Supp. 284, 287 (E.D. Pa. 1993) (dismissing the plaintiff's Title VII claim because the allegedly discriminatory actions came as a result of her employer's perception that she was "a male who wanted to become a female").

[70] To date, all transgender plaintiffs that have successfully contested employment discrimination under Title VII have relied on at least one of these three approaches.

[71] 378 F.3d 566, 571–75 (6th Cir. 2004).

as the Per Se Approach, finds that discrimination on the basis of a person's transgender status is per se actionable under Title VII, relying either on the statutory language of Title VII or the nature of transgenderism itself. The District of Columbia federal district court's decision in *Schroer v. Billington*[72] and the Eleventh Circuit's decision in *Glenn v. Brumby*[73] illustrate these two versions of the Per Se Approach respectively. Finally, the third approach, which I refer to as the Constructionist Approach, contends that because the concepts of "sex" and "gender" are mere social constructs comprised of many different elements, and because gender plays an important constitutive role in shaping one's gender experience, Title VII should be interpreted to protect aspects of gender performance and gender identity. While this approach has found favor among legal observers and practitioners,[74] it has thus far proven largely unsuccessful for transgender plaintiffs. Indeed, the federal district court decision in *Ulane v. Eastern Airlines, Inc.* represents the only instance in which a court has accepted a version of this argument,[75] and the Seventh Circuit summarily reversed the decision on appeal.[76] The *Schroer v. Billington* court, however, appeared to find parts of this argument persuasive in an early opinion,[77] which could bode well for the future viability of the Constructionist Approach. Parts II, III, and IV of this Note address each approach in turn.

II. The Gender Nonconformity Approach

Since its debut in the Sixth Circuit case *Smith v. City of Salem*,[78] the Gender Nonconformity Approach has been the dominant way in which

---

[72] 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

[73] 663 F.3d 1312, 1316–18 (11th Cir. 2011).

[74] *See, e.g.*, Gordon, *supra* note 25, at 1757 (arguing that courts should recognize that one's gender identity is constitutive of one's sex); Levi, *Clothes, supra* note 25, at 91 (asserting that courts must "understand the inelasticity of gender for most individuals alongside its social construction" in order to fulfill the promise of sex discrimination claims); Sharon M. McGowan, *Working With Clients to Develop Compatible Visions of What It Means to "Win" a Case: Reflections on* Schroer v. Billington, 45 Harv. C.R.-C.L. L. Rev. 205, 235 (2010) (discussing the ACLU's argument in the *Schroer v. Billington* case that gender identity is constitutive of sex); *see also* Yoshino, *supra* note 20, at 868 (discussing feminist scholar Judith Butler's argument that both sex and gender identity are constructed via social expressions of gender).

[75] Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983) ("[T]he term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity . . . ."), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

[76] Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984).

[77] Schroer v. Billington, 424 F. Supp. 2d 203, 212–13 (D.D.C. 2006) (commenting that the *Ulane* district court's approach provided a "straightforward way to deal with the factual complexities that underlie human sexual identity . . . [which] stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender").

[78] 378 F.3d 566 (6th Cir. 2004).

transgender plaintiffs have contested employment discrimination under Title VII.[79] The approach focuses exclusively on the gender nonconformity of the plaintiff, and thus relies heavily on the rationale underlying the *Price Waterhouse* decision. This tactic has proved to be a double-edged sword for transgender plaintiffs: on one hand, the Gender Nonconformity Approach allows plaintiffs to capitalize on a doctrine that has been embraced by numerous circuit courts,[80] but on the other hand, it ignores entirely the fact that the plaintiff experienced employment discrimination *as a transgender individual*.

A. Summary of the Argument and Relevant Case Law

Although the *Smith* decision was not the first to adopt the Gender Nonconformity Approach,[81] it is almost certainly the most important.[82] The case concerned a city fire department employee who began to express a more feminine appearance at work after being diagnosed with Gender Identity Disorder.[83] After Smith notified her[84] immediate supervisor of her diagnosis and communicated her intent to transition from male to female, city officials conspired to arrange for Smith to undergo three separate psychological eval-

---

[79] *See infra* note 95 and accompanying text.

[80] Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1042 (8th Cir. 2010) (recognizing the validity of sex-stereotyping Title VII claims under *Price Waterhouse*); Chadwick v. WellPoint, Inc., 561 F.3d 38, 44–45 (1st Cir. 2009) (same); Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (same); Smith v. City of Salem, 378 F.3d 566, 571–72 (6th Cir. 2004) (same); Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 874–75 (9th Cir. 2001) (same).

[81] *See* Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 36, 2003) (stating that "[t]ranssexuals are not genderless, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex," and thus concluding that Tronetti's allegation that she faced discrimination "for failing to 'act like a man'" constituted an actionable Title VII claim).

[82] *See, e.g.*, Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination?*, 32 SIGNS 83, 84 (2006) (describing the *Smith* decision as "one of the strongest and most expansive federal court rulings yet on the meaning of 'sex' in U.S. antidiscrimination law"); *see also* McGowan, *supra* note 74, at 211 (suggesting that the ACLU would have been more resistant to taking the *Schroer v. Billington* case had the Sixth Circuit not decided the *Smith* and *Barnes* cases as it did).

[83] *Smith*, 378 F.3d at 568.

[84] Although the court recognized that the plaintiff, Jimmie L. Smith, had been diagnosed with Gender Identity Disorder, identified as transgender, and was subject to discriminatory treatment after adopting a more feminine gender expression, the court nonetheless referred to Smith using male pronouns. *See id.* at 567–68. In their court pleadings, Smith's attorneys also employed male pronouns when referring to Smith. *See* Plaintiff's Response to the Court's Show cause Order (Doc. 12) at 2, Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (No. 4:02-CV-1405). In this Note, however, I adhere to standard transgender style guidelines and use gender pronouns that are consistent with Jimmie Smith's own appearance and gender expression. *See, e.g.*, GLAAD, *supra* note 36. Like other scholars before me, I have thus employed female pronouns when describing Jimmie Smith so as to avoid creating "yet another forum in which Jimmie Smith must mask her identity." Glazer & Kramer, *supra* note 27, at 657 n.45.

uations with physicians of the city's choosing, with the express hope that Smith would either refuse to comply or resign.[85] After learning of the city officials' plan, Smith filed a Title VII sex discrimination suit in federal district court, claiming that the city had discriminated against her because of her failure to conform to its officials' stereotypical expectations of how a man should appear and act.[86] The judge, however, characterized the suit as a disingenuous façade for Smith's *true* claim: discrimination based on her transgender status.[87] The court consequently dismissed the suit, relying on *Ulane*, *Sommers*, and *Holloway* for the proposition that transgender individuals do not enjoy Title VII protections.[88]

The Sixth Circuit reversed the lower court's decision, noting that Smith had properly alleged discrimination on the basis of nonconformity with her supervisors' and other municipal officers' stereotypical notions of masculinity.[89] In considering the *Ulane*, *Sommers*, and *Holloway* decisions, the court concluded that the reasoning and logic behind those cases had been "eviscerated by *Price Waterhouse*."[90] The Sixth Circuit went on to criticize other courts that had nonetheless found Title VII inapplicable to transgender plaintiffs post-*Price Waterhouse*.[91] It accused those courts of taking *actionable* discrimination claims based on gender nonconformity and reframing them as discrimination based on *unprotected* traits by "superimpos[ing] classifications such as 'transsexual' on a plaintiff . . . ."[92] Discrimination against a transgender person due to his or her nonconformity with sex stereotypes, the court concluded, is "no different" than the type of discrimination that Price Waterhouse directed against Ann Hopkins.[93] As a result, the court concluded that a plaintiff's transgender status cannot be treated as fatal to a sex discrimination suit when the discrimination is properly alleged to have stemmed from the defendant's perception of the plaintiff as gender nonconforming.[94] In the years following *Smith*, an overwhelming number of courts have

---

[85] *Smith,* 378 F.3d at 568–69.

[86] Smith v. City of Salem, No. 4:02CV1405, 2003 WL 25720984, at *3 (N.D. Ohio Feb. 26, 2003), *rev'd and remanded*, 378 F.3d 566 (6th Cir. 2004).

[87] *Id*. ("A fair reading of the Complaint reveals that, although Plaintiff invokes the term-of-art created by *Price Waterhouse*, that is, 'sex-stereotyping', [sic] the discrimination [she] alleges in [her] Complaint is, in reality, based upon [her] transsexuality.").

[88] *Id.* at *2–3.

[89] Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004).

[90] *Id.* at 573.

[91] *Id.* at 574–75.

[92] *Id.* at 574.

[93] *Id.* at 575.

[94] *Id.* Professor Zachary A. Kramer argues in his article, *Of Meat and Manhood*, that the approach adopted in *Smith* should be applied to all traits that are unprotected under Title VII. *See* Zachary A. Kramer, *Of Meat and Manhood*, 89 WASH. U. L. REV. 287, 293, 318 (2011) [hereinafter Kramer, *Meat*]. In other words, courts should treat unprotected traits—"whether vegetarianism, sexual orientation, or that the employee roots against the Chicago Bears"—as neutral when determining whether there exists discrimination based on a protected trait. *Id.* at 293.

adopted this reasoning in holding that transgender plaintiffs may bring sex-stereotyping claims under Title VII.[95]

B. Doctrinal Challenges Posed by the Gender Nonconformity Approach

While the Sixth Circuit should be commended for the undeniably bold stance taken in the *Smith* case, its approach presents a number of doctrinal challenges. Most obvious is the inherent difficulty in differentiating between discrimination on the basis of a person's transgender status and discrimination based on a person's gender nonconformity.[96] Transgender

---

[95] *See, e.g.*, Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493 (9th Cir. 2009) ("[I]t is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) (finding that based on "the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes"); Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010) ("[D]iscrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex.") *aff'd*, 663 F.3d 1312, 1316–17, 1321 (11th Cir. 2011) (affirming the outcome of the district court case but employing the Per Se Approach, *see infra* Part III.A.ii); Schroer v. Billington, 577 F. Supp. 2d 293, 304 (D.D.C. 2008) (stating that a plaintiff's transgender status "is not a bar to a sex stereotyping claim" so long as the claim "arise[s] from the employee's appearance or conduct and the employer's stereotypical perceptions") (internal quotation marks omitted); Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 659–60 (S.D. Tex. 2008) (stating that the plaintiff's transgender status "is not a bar to her sex stereotyping claim" and concluding that "Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer") (internal quotation omitted); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *4 (N.D. Ind. Aug. 3, 2007) (stating that the plaintiff's claims of discrimination due to "failure to comply with male stereotypes support a plausible claim she suffered discrimination because of her sex"); Mitchell v. Axcan Scandipharm Inc., No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (holding that a transgender plaintiff may state a claim for sex discrimination by "showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind [the] defendant's actions"); Tronetti v. TLC HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that a transgender plaintiff states an actionable Title VII claim by "claiming to have been discriminated against for failing to 'act like a man' "). Because the Gender Nonconformity Approach merely enables a transgender plaintiff to state a prima facie Title VII claim, transgender victims of employment discrimination may nonetheless lose under Title VII if their employer supplies a legitimate nondiscriminatory reason for the adverse employment action and the plaintiff cannot demonstrate that the employer's reason is pretextual. *See, e.g.*, *Kastl*, 325 F. App'x at 493–94 (9th Cir. 2009) (affirming summary judgment because the transgender plaintiff could not show that her employer's safety concerns regarding her restroom usage were pretextual); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1227 (10th Cir. 2007) (affirming summary judgment because the transgender plaintiff failed to show that her employer's concerns that it would incur legal liability if the plaintiff were allowed to use public restrooms while on duty were pretextual).

[96] *See Schroer*, 577 F. Supp. 2d at 305 ("[D]irect evidence of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality itself."); *see also* Gelfman, *supra* note 28, at 81–82 (discussing instances in which courts have conflated claims of gender nonconformity with claims of discrimination based on transgender status); *cf.* Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005)

persons, by definition, call into question societal assumptions regarding the immutability of sex and traditional conceptions of gender.[97] Indeed, contemporary usage of the term "transgender" typically describes a person whose gender expression deviates from the cultural dimorphic norm.[98] Consequently, discrimination based on transgender status will very often overlap with and manifest itself in similar ways to discrimination based on gender nonconformity. For example, imagine a scenario in which an employer, acting purely out of animus toward transgender individuals, fires a transgender woman employee who has recently begun dressing in feminine attire. From the perspective of a third-party observer, *the discriminatory act would look no different* if the employer had instead acted based on a personal distaste of men who fail to act and dress in a sufficiently masculine manner. Seen in this way, claims of discrimination based on gender nonconformity will often rest on facts that are equally indicative of discrimination based on a person's transgender status. This congruence is extremely problematic for transgender plaintiffs, for while gender nonconformity constitutes a protected basis under Title VII, the vast majority of courts have held that gender identity does not.[99]

As noted in Section A above, the Sixth Circuit in *Smith* warned of this exact danger and entreated courts to refrain from characterizing actionable gender nonconformity claims as *un*actionable claims of transgender discrimination.[100] In the realm of Title VII claims by gay and lesbian plaintiffs, scholars have termed this phenomenon the "sexual orientation loophole"[101]: because Title VII lacks protections for sexual orientation, employers will

---

(expressing difficulty in determining whether the plaintiff alleged employment discrimination on the basis of her homosexuality or gender nonconformity); Yuracko, *Neutrality*, *supra* note 33, at 232 (noting that discrimination based on homosexuality and discrimination based on gender nonconformity will tend to "blend" together).

[97] *See* sources cited *supra* note 58.

[98] *See* Weiss, *supra* note 1, at 589.

[99] *See, e.g.*, *Etsitty*, 502 F.3d at 1221–22 (considering the sex-stereotyping doctrine under *Price Waterhouse* but concluding that "discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII"); *Lopez*, 542 F. Supp. 2d at 658 (noting the viability of gender nonconformity claims under *Price Waterhouse* but recognizing that "[c]ourts consistently find that transgendered persons are not a protected class under title [sic] VII *per se*").

[100] *See* Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004).

[101] This phrase was first coined by Professor Francisco Valdes of the University of Miami School of Law. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 18 (1995).

> [S]exual orientation is used strategically both by defendants and decisionmakers to shift claims of unlawful sex and gender discrimination . . . enabling defendants and decisionmakers to (re)characterize, at will, a plaintiff's sex and gender discrimination claim as involving only permissible sexual orientation discrimination. In this way, a sexual orientation loophole that ratifies sex and gender discrimination is created and activated.

Id. Many legal scholars have since employed the phrase when discussing the applicability of Title VII to gay and lesbian plaintiffs. *See* sources cited *infra* note 102.

escape liability if they can demonstrate that they discriminated against a victim because he or she was gay or lesbian, and *not* because of the victim's gender nonconformity.[102] The hypothetical discussed in the preceding paragraph suggests that transgender plaintiffs may fall victim to an analogous "transgender/gender identity loophole"—though, admittedly, no scholar has described this problem in quite this way.

One could quite legitimately argue, however, that this loophole relies on a descriptively inaccurate and logically incoherent premise. After all, an employer that discriminates against an employee based on his or her transgender status has not done so for reasons distinct from the employee's gender nonconformity. Rather, the employer has acted based on a belief that the employee should behave in a way that accords with the norms related to the employee's birth-assigned sex.[103] While this may be true as a factual matter, not all courts have reached this conclusion. For example, the district court in *Oiler v. Winn-Dixie Louisiana, Inc.*, discussed in Part I.C, and the district court in *Schroer v. Billington*, discussed in Part III.A.i, each found that discrimination based on transgender status is distinct from discrimination based on gender nonconformity for the purposes of their respective sex-stereotyping analysis.[104] Thus, while the transgender/gender identity loophole is neither accurate nor convincing in its distinction between discrimination based on transgender status and discrimination based on gender nonconformity, in terms of doctrine it remains a real risk.

A second doctrinal challenge posed by the Gender Nonconformity Approach is the fact that the approach may prove in practice to be an inaccurate and arbitrary endeavor that eludes consistent application. A claim of gender nonconformity requires that a court classify certain traits as "masculine" and "feminine," and then measure a plaintiff's conformity with those traits.[105] Many individual traits and combinations of traits, however, may be

---

[102] *See*, *e.g.*, Case, *supra* note 50, at 57–58; Kramer, *Heterosexuality*, *supra* note 32, at 242–43; Turner, *supra* note 58, at 571–72.

[103] *See* Email from Dean Spade, Assistant Professor at Seattle University School of Law, to the *Harvard Journal of Law & Gender* (Feb. 29, 2012, 20:38 EST) (on file with author) [hereinafter Spade Email].

[104] *See* Schroer v. Billington, 424 F. Supp. 2d 203, 210–11 (D.D.C. 2006) (stating that the plaintiff, a transgender woman, faced discrimination "not because she does not conform to the [employer's] stereotypes about how men and women should look and behave" but because of the employer's "intolerance toward a person like her, whose gender identity does not match her anatomical sex"); Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *5 (E.D. La. Sept. 16, 2002) (concluding that the plaintiff, a transgender woman, "was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee" but rather "because he is a man with a sexual or gender identity disorder"); *see also* Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *5 (D. Utah June 24, 2005) ("There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman."), *aff'd*, 502 F.3d 1215 (10th Cir. 2007).

[105] *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 255–56 (1989) (affirming the district court's finding of impermissible sex-stereotyping given that Hopkins' candidacy for partnership was hindered by perceptions of partners that she was insufficiently femi-

considered inherently androgynous or gender neutral.[106] Consequently, this approach, which forces one to conceive of gender as a linear "spectrum" with "paradigmatic masculinity" at one end and "paradigmatic femininity"[107] at the other, is ultimately unsatisfying, as it leaves little room for a nuanced and multi-dimensional understanding of gender that more accurately reflects lived reality.[108] Indeed, Dylan Vade, a transgender attorney and activist, argues persuasively that the law should reject a linear conception of gender and instead embrace the idea of a "gender galaxy," which would have the advantage of accommodating multidimensional reference

---

nine due to her aggressive personality, lack of charm, attire, and presentation), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994); *see also* Kramer, *Meat*, *supra* note 94, at 300–01 (noting that the Gender Nonconformity Approach forces judges to determine the employer's gender expectations and then measure the plaintiff's departure from those expectations); *cf.* Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1113–17 (9th Cir. 2006) (Pregerson, J., dissenting) (arguing that the plaintiff's refusal to wear make-up in compliance with her employer's "Personal Best" program, a policy which embodied "a cultural assumption—and gender-based stereotype—that women's faces are incomplete, unattractive, or unprofessional without full makeup," constituted impermissible sex-stereotyping); Doe by Doe v. City of Belleville, 119 F.3d 563, 581 (7th Cir. 1997) (stating that a man who faces harassment because of feminine-coded attributes—for example, "because his voice is soft, his physique is slight, [or] his hair is long"—states a viable Title VII claim under the sex-stereotyping doctrine), *vacated*, 523 U.S. 1001 (1998) (remanding for further consideration in light of Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998)); Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (suggesting that because homosexuality is not perceived as masculine, homosexuality alone could provide sufficient gender nonconformity to support a Title VII sex-stereotyping claim). The difficulty of coding behavior as either masculine or feminine is further complicated by the constant evolution of cultural assumptions and individual subjective experience. *Compare Doe by Doe*, 119 F.3d at 575 (finding it reasonable to infer that the plaintiff's harassers believed "that in wearing an earring, [the plaintiff] did not conform to male standards"), *with Jespersen*, 444 F.3d at 1118 (Kozinski, J., dissenting) ("[N]ot so long ago a man wearing an earring was a gypsy, a pirate or an oddity. Today, a man wearing body piercing jewelry is hardly noticed.").

[106] Professor Kimberly A. Yuracko of Northwestern Law School argues that even though employers uncomfortable with gender nonconforming behavior by their employees may attempt to impose gender-neutral workplace norms, those seemingly "androgynous" appearance standards are nonetheless inherently gendered. *See* Yuracko, *Neutrality*, *supra* note 33, at 202–03. Dylan Vade suggests, however, that due to the "infinite variation[s]" of potential gender attribute combinations in real life experience, individuals possessing a range of masculine- and feminine-coded traits may still fall outside "socialized binary gender norms." *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, 265 (2005).

[107] Gelfman, *supra* note 28, at 102; *see also* Vade, *supra* note 106, at 273 ("Often when people get past the myth of two genders and attempt to describe gender diversity, they paint a line and see a spectrum running from female to male.").

[108] *See* Gordon, *supra* note 25, at 1757 (noting that courts' adherence to rigid understandings of sex and gender "does not reflect the lived reality and experiences of thousands of individuals"); *see also* Gelfman, *supra* note 28, at 101–02 ("By adopting a doctrine that requires clear classification within the binary, anti-discrimination law may do psychological damage to those who struggle with binary sex labels . . . ."). For a thorough exploration of the problems that arise when courts engage in the process of classifying certain traits and attributes as masculine or feminine, see Kirkland, *supra* note 82, at 101–05.

and positioning, avoiding hierarchical ordering, and allowing for greater gender fluidity.[109] Further complicating a court's gender calculus is the fact that the "gender" of a transgender plaintiff is quite literally in flux during the periods preceding, during, and immediately following gender transition.[110] As a result, the very act of measuring a transgender plaintiff's gender nonconformity becomes an incredibly challenging task, with courts presented with a person in the midst of adopting a new gender expression and operating within a doctrinal structure that fails to comport with lived experience. Such an exercise may easily devolve into an arbitrary naming and framing game.[111]

The final doctrinal problem stems from the fact that one can read *Smith* broadly to stand for the liberation of employees "from employer demands to look or act in any gendered way."[112] However, it is clear that courts are not willing to do away with all gendered distinctions in the workplace. Perhaps the most obvious example of this comes in the area of sex-based personal appearance standards, an area of the law that has long afforded inadequate protections to gender nonconforming employees, even after *Price Waterhouse*.[113] For example, in *Jespersen v. Harrah's Operating Co., Inc.*, the Ninth Circuit upheld a program of grooming and appearance standards that required, inter alia, female employees to wear makeup while at work.[114] Rejecting the plaintiff's claim that the program forced women to "conform to sex-based stereotypes as a term and condition of employment,"[115] the court found no evidence "that the policy was adopted to make [female employees] conform to a commonly-accepted stereotypical image of what women should wear."[116] The court further concluded that the makeup requirement was reasonable "in the context of the overall standards imposed on employees in a given workplace."[117] Although commentators have argued that the *Jespersen* decision is flawed,[118] "at odds with established Title

---

[109] Vade, *supra* note 106, at 273–76.

[110] *See* Glazer & Kramer, *supra* note 27, at 665 (arguing that the sex and gender of the plaintiff in *Smith* were "literally in a state of transition" at the time of the plaintiff's case).

[111] *See* Gelfman, *supra* note 28, at 102–03 (discussing transgender men, butch lesbians, and intersex persons, and concluding that because "each individual expresses personality and sexuality in a different way," measuring and comparing the gender nonconformity exhibited by those liminal groups are impossible tasks).

[112] *See* Kirkland, *supra* note 82, at 94 (discussing the "strong liberation view" of *Smith*).

[113] Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales From Title VII & An Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 184 (2009) (contending that cases involving sex-based dress and grooming codes demonstrate that "antidiscrimination law inadequately protects gender nonconforming employees").

[114] Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1106 (9th Cir. 2006).

[115] *Id.* at 1108.

[116] *Id.* at 1112.

[117] *Id.* at 1113.

[118] Weiss, *supra* note 1, at 634.

VII jurisprudence,"[119] and perhaps wrongly decided,[120] it is clear that "[t]he precedent sustaining gender-based dress codes is now longstanding and well-established."[121] Cases like *Jespersen* thus undermine a broad reading of *Smith* and suggest that the Gender Nonconformity Approach will not insulate employees from noncompliance with reasonable, sex-specific workplace grooming and conduct standards.[122]

C. Challenges that the Gender Nonconformity Approach Presents for the Transgender Rights Movement

The Gender Nonconformity Approach also presents specific challenges for the transgender rights movement as a whole. First, the approach requires that courts reconstruct the very sex stereotypes that the doctrine purports to disdain.[123] The act of determining whether a plaintiff's expressive gender deviates from his or her anchor gender forces a court to wade through antiquated, clichéd, and/or stereotypical notions of traditional gender roles in order to manufacture an "anchor gender" for comparative purposes. The process is problematic in that a court's "articulation that certain appearance, conduct, and behavior do not conform to conventional sex stereotypes . . . effectively reiterat[es] these stereotypes" and risks lending legitimacy to those views.[124] Employing the Gender Nonconformity Approach to preserve

---

[119] Jennifer L. Levi, *Some Modest Proposals For Challenging Established Dress Code Jurisprudence*, 14 DUKE J. GENDER L. & POL'Y 243, 253 (2007) [hereinafter Levi, *Dress Code*]; *see also* Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 960 (2008) (arguing that cases that "have permitted sex-differentiated personal appearance standards" are "at odds with *Price Waterhouse's* broad prohibition of sex-stereotyping in the workplace").

[120] Levi, *Clothes, supra* note 25, at 97.

[121] Levi, *Dress Code*, *supra* note 119, at 255; *see also* Ritu Mahajan, Note, *The Naked Truth: Appearance Discrimination, Employment, and the Law*, 14 ASIAN AM. L.J. 165, 193 (2007) (concluding that "[t]he Jespersen case reinforces the long-standing rule that as long as a grooming policy is universally applicable and uniformly applied," it will be upheld despite its sex-differentiated requirements).

[122] *See* Schroer v. Billington, 424 F. Supp. 2d 203, 208–09 (D.D.C. 2006) (recognizing tension between *Price Waterhouse* and personal grooming cases under Title VII); *see also* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 801 (2011); Yuracko, *Neutrality*, *supra* note 33, at 187.

[123] *See* Gelfman, *supra* note 28, at 109 (noting that use of the sex-stereotyping doctrine to eliminate gender stereotypes requires that the law first "construct and reiterate them") (quoting Grenfell, *supra* note 64, at 53); Kramer, *Meat*, *supra* note 94, at 300–01 (noting that the Gender Nonconformity Approach "pits the discrimination claimant against a hypothetical male or female, a heuristic rather than an actual person"); *cf.* Yuracko, *Neutrality*, *supra* note 33, at 171–72 (discussing various suggestions by scholars of ways to combat trait discrimination, and pointing out that all approaches permit forms of sex discrimination that "reinforce the very sex-based work world hierarchy that Title VII was intended to dismantle").

[124] Grenfell, *supra* note 64, at 93–94.

sex-stereotyping claims can thus serve to entrench, rather than liberate employees from, sex stereotypes.[125]

This proposition, however, is not immune from debate. After all, in adjudicating a claim of sex-stereotyping a court merely needs to consider whether, *from the point of view of an employer*, an employee failed to conform to the gender norms *held by that employer*, and need not determine for itself whether a plaintiff is in truth gender nonconforming.[126] While this may be true as a matter of pure doctrine, not all courts have adhered to this approach in practice. Indeed, many courts seem to instead make broad, descriptive claims about the *actual* gender nonconformity of their respective transgender plaintiffs.[127] Thus, to the extent that some in the transgender community favor a more fluid and flexible approach to gender,[128] the potential reification of existing gender stereotypes under the Gender Nonconformity Approach is a significant concern.

The Gender Nonconformity Approach also requires that a transgender plaintiff sacrifice his or her transgender identity in bringing a Title VII claim. As scholars have been quick to point out, although the Gender Nonconformity Approach purports to render a plaintiff's transgender status neutral for the purposes of a court's analysis, in actuality it asks the court to

---

[125] *See* Gelfman, *supra* note 28, at 108–09 (discussing arguments that anti-discrimination law "requires courts to determine who fits in which category and which characteristics make that individual belong to that category," which thus "reifies the very categories it endeavors to make irrelevant") (referencing Grenfell, *supra* note 64, at 53); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 96 (2008) ("In protecting a plaintiff's gender non-conformity, a court must articulate those acts which constitute nonconformity and in doing so must delineate the contours of conformity."); Kramer, *Meat*, *supra* note 94, at 300–01 (noting that the Gender Nonconformity Approach "tends to reify the most extreme stereotypes about men and women").

[126] *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

> It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins' character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.

Id. at 258.

[127] *Compare* Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (noting that Smith had properly alleged that she "did not conform with [her] employers' and coworkers' sex stereotypes of how a man should look and behave"), *with* Mitchell v. Axcan Scandipharm, Inc., CIV.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006) (finding that the plaintiff stated an actionable Title VII claim by pleading "facts showing that his failure to conform to sex stereotypes of how a man should look and behave was the catalyst behind defendant's actions"), *and* Tronetti v. TLC HealthNet Lakeshore Hosp., 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (finding that the plaintiff stated an actionable Title VII claim by "claiming to have been discriminated against for failing to 'act like a man'").

[128] *See* Vade, *supra* note 106, at 298 ("If the courts recognized the existence of nonbinary genders and the importance of self-identification, then more transgender people would be legally protected.").

ignore the plaintiff's transgender status altogether.[129] Indeed, courts following this approach must characterize a transgender plaintiff not (for example) as a transgender woman but rather as a gender nonconforming man,[130] thus producing pronounced tension between the plaintiff's authentic gender identity and the legal strategy required to win the plaintiff's case. The *Smith* case provides a clear example of this, as Jimmie Smith and her attorney made the tactical decision to refer to Smith using male pronouns throughout the litigation.[131] Many transgender plaintiffs will find this to be an unacceptable sacrifice, for as one transgender female Title VII plaintiff put it, "I haven't gone through all this only to have a court vindicate my rights as a gender nonconforming man."[132]

Moreover, by focusing on a plaintiff's gender nonconformity rather than his or her transgender status, a court blithely ignores the likely reason why the plaintiff was subjected to discrimination in the first place: the perceived threat that a transgender person poses to the traditional understanding of sex and gender as binary and static.[133] Indeed, one observer argued that "the *Smith* jurisprudence goes out of its way to avoid the idea that the real problem many trans people have is that nontrans people find them threatening, horrifying, aesthetically shocking and deviant," commenting pointedly that "[a]n employer fires a trans person *as* a trans person, not as a man who wants to wear women's clothing."[134] By ignoring an employer's *actual* motivation for discriminating against a transgender person, the Gender Nonconformity Approach may hinder the ability of antidiscrimination law to effectively combat and deter transgender discrimination itself.[135]

---

[129] *See, e.g.*, Glazer & Kramer, *supra* note 27, at 666 (arguing that the *Smith* approach "reduces Smith's transgender identity to little more than a fashion choice to wear women's clothing"); Kirkland, *supra* note 82, at 94–95.

[130] *See, e.g.*, Lopez v. River Oaks Imaging & Diagnostic Grp., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *4 (N.D. Ind. Aug. 3, 2007); Mitchell v. Axcan Scandipharm, Inc., No. Civ.A. 05-243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006).

[131] Glazer & Kramer, *supra* note 27, at 657 n.45.

[132] McGowan, *supra* note 74, at 205.

[133] *See* Richard F. Storrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 275, 279 (1997) (stating that transgender persons "threaten[ ] an unhinging of a paradigmatic sexual order and a defiance of closure and certainty in the realm of sexual identity"); *cf.* Flynn, *supra* note 58, at 415 (arguing that transgender litigation offers a "unique opportunity to directly address and refute the view of sex and gender as inextricable from anatomy, which challenges the perceived fixity of gender roles").

[134] Kirkland, *supra* note 82, at 108.

[135] *Cf.* Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 387 (1991) (arguing that antidiscrimination law should focus less on immutable traits and more on the negative associations with immutable traits that lead to discrimination).

III. The Per Se Approach

As discussed briefly at the end of Part I, the Per Se Approach treats employment discrimination on the basis of a person's transgender status as per se actionable under Title VII. This argument can take one of two forms. One may argue that discrimination against an individual because he or she has transitioned, is transitioning, or plans to transition to another sex constitutes sex discrimination under a literal interpretation of the term. Alternatively, one may argue that transgenderism inevitably entails some measure of gender nonconformity, and consequently it provides an actionable basis under Title VII using the sex-stereotyping doctrine. The following subsections explore each argument in turn.

A. Summary of the Argument and Relevant Case Law

1. Schroer v. Billington *and Its Text-Based Argument*

The Per Se Approach has only recently found favor with courts, and as a result the number of cases that employ the Gender Nonconformity Approach far outstrips that of the Per Se Approach. Indeed, *Schroer v. Billington*,[136] a case from the District Court for the District of Columbia, represents the only instance thus far in which a court has accepted the text-based version of the Per Se Approach, though the dissent in *Holloway* expressly endorsed this approach as well.[137] The case concerned Diane Schroer, a twenty-five-year veteran of the U.S. Armed Forces and a former Colonel assigned to the U.S. Special Operations Command, an organization tasked with tracking and targeting high-threat international terrorist organizations.[138] Following retirement from the military, Schroer worked as a program manager on an infrastructure security project for the National Guard at a private consulting firm.[139] In 2004, Schroer applied for and was offered the position of Specialist in Terrorism and International Crime with the Congressional Research Service at the Library of Congress ("the Library"),[140] receiving the highest interview score of all candidates and winning a unanimous recommendation from the selection committee.[141] Schroer had applied for the position under her legal name at the time, David Schroer, and had presented as a man during the interview process.[142] She was, however, about

---

[136] 577 F. Supp. 2d 293 (D.D.C. 2008).

[137] *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting) (arguing that discrimination based on a person's past or planned sexual transition should constitute unlawful sex discrimination based on "the language of [Title VII] itself").

[138] *Schroer*, 577 F. Supp. 2d at 295.

[139] *Id.*

[140] *Id.*

[141] *Id.* at 296.

[142] *Id.* at 295–96.

to begin a phase of her gender transition in which she would use a traditionally feminine name, dress in feminine attire, and present full-time as a woman.[143] Schroer thus harbored hopes of presenting as a woman from the very start of her employment with the Library, believing that it would be less disruptive to the workplace environment than if she altered her gender presentation at a later date.[144]

After accepting the Library's offer of employment, Schroer met with Charlotte Preece, a representative from the Library, in order to explain her planned gender transition, provide assurance that her transition would interfere neither with her start date nor with any of the functions of the job, and provide the contact information of her therapist who could answer any questions that Preece might have.[145] Preece subsequently relayed the details of their conversation to multiple officials at the Library, and after numerous internal communications and discussions, Preece contacted Schroer the following day and rescinded the offer of employment.[146]

The court relied on two independent bases in finding for Schroer. First, the court employed the Gender Nonconformity Approach discussed in Part II, stating that although a plaintiff's transgender status "is not a bar to a sex stereotyping claim," the claim "must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions."[147] The court found this requirement satisfied, concluding that "the Library's hiring decision was infected by sex stereotypes."[148] Second, and more important for the purposes of this Note, the court found that Schroer was entitled to relief based on the language of Title VII itself, reasoning that discrimination on the basis of an individual's *transition* from one sex to another constituted literal discrimination "because of . . . sex."[149] The court supported this conclusion by analogizing to a hypothetical situation in which an employer fires an employee that has converted from Christianity to Judaism, and then testifies that he harbors no bias against Christians or Jews, but only "con-

---

[143] Schroer v. Billington, 424 F. Supp. 2d 203, 206 (D.D.C. 2006) (order denying motion to dismiss).

[144] *Schroer*, 577 F. Supp. 2d at 296.

[145] *Id.* at 296–97.

[146] *Id.* at 297–99.

[147] *Id.* at 304 (quoting Schoer v. Billington, 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (order denying motion to dismiss)) (internal quotations omitted).

[148] *Id.* at 305. The court concluded based on Preece's testimony and conversations with colleagues at the Library of Congress that Preece was unable to "visualize Diane Schroer as anyone other than a man in a dress." *Id.* Additionally, Preece believed that if Schroer was called to testify before Congress as a Specialist in Terrorism and International Crime, legislators and their staff "would not take Diane Schroer seriously because they, too, would view her as a man in women's clothing." *Id.* As a result, the court concluded that Schroer had stated a viable claim for sex discrimination under Title VII, finding it irrelevant whether Preece had perceived Schroer as "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual." *Id.*

[149] Schroer v. Billington, 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

verts."[150] Such a scenario, the court concluded, would present a clear case of discrimination "because of religion."[151] In applying the same reasoning to the sex discrimination context, the court concluded that the plain language of Title VII provided an alternate avenue of recourse for Diane Schroer.[152]

2. Glenn v. Brumby *and the Nature of Transgenderism*

The recent Eleventh Circuit decision in *Glenn v. Brumby*[153] articulates a slightly different Per Se Approach by focusing on the nature of transgenderism. In 2005, Glenn was hired as an editor in the Georgia General Assembly's Office of Legislative Counsel ("OLC").[154] Glenn had been diagnosed with Gender Identity Disorder earlier that year and had already begun the process of transitioning from male to female under the supervision of health care providers.[155] The next year, Glenn informed her direct supervisor that she was a transgender woman and that she was in the process of transitioning to her new sex.[156] By 2007, Glenn had undergone electrolysis to remove facial hair, completed facial feminization surgery, received regular hormone therapy, and was living as a woman outside of the workplace.[157] In the fall of that year, Glenn advised her supervisor that she was ready to proceed to the next stage of her transition, that she would begin presenting as a woman at work, and that she planned to change her legal name.[158] When the head of OLC, Sewell Brumby, learned of this, he called Glenn into his office and inquired whether Glenn "had formed a fixed intention to [become] a woman."[159] When Glenn answered that she had, Brumby summarily terminated her employment.[160]

Glenn brought suit under 42 U.S.C. § 1983,[161] alleging that her employer had discriminated against her on the basis of sex in violation of her constitutional rights under the Equal Protection Clause.[162] The district court granted summary judgment in favor of Glenn and the Eleventh Circuit af-

---

[150] *Id.* at 306.
[151] *Id.*
[152] *Id.* at 308.
[153] Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).
[154] *Id.* at 1314.
[155] *Id.*
[156] *Id.*
[157] Glenn v. Brumby, 724 F. Supp. 2d 1284, 1289 (N.D. Ga. 2010), *aff'd*, 663 F.3d 1312 (11th Cir. 2011).
[158] Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011).
[159] *Glenn*, 724 F. Supp. 2d at 1292.
[160] *Id.*
[161] Although Glenn alleged unlawful sex discrimination in violation of her rights under the Equal Protection Clause, *see Glenn*, 663 F.3d at 1313, the Eleventh Circuit's analysis is directly applicable to the Title VII setting because discrimination claims brought under the Equal Protection Clause and Title VII "are subject to the same standards of proof and employ the same analytical framework." Bryant v. Jones, 575 F.3d 1281, 1296 n. 20 (11th Cir. 2009).
[162] *Glenn*, 724 F. Supp. 2d at 1296.

firmed on appeal.[163] In doing so, the Eleventh Circuit all but announced that discrimination on the basis of an individual's transgender status per se violates Title VII as unlawful sex-stereotyping. The court began by emphasizing that under *Price Waterhouse*, "discrimination on the basis of gender stereotype is sex-based discrimination."[164] The court then noted that "[a] person is defined as transgender *precisely because of the perception that his or her behavior transgresses gender stereotypes*."[165] The inexorable logic of these points led the court to conclude that there is "a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms."[166] In addition, the court expressly rejected the idea that a dispositive difference exists between the type of gender nonconformity expressed by a transgender person and that expressed by a cisgender person, declaring that they "differ in degree but not in kind."[167]

As radical as this approach might appear, the Eleventh Circuit is not alone in finding this Per Se/Gender Nonconformity argument compelling. Indeed, the Sixth Circuit's *initial* decision in the *Smith* case, which was superseded two months later by the decision discussed at length in Part II, endorses much the same conclusion.[168] The original decision stated:

> Even if Smith had alleged discrimination based only on [her] self-identification as a transsexual . . . [her claim] is actionable pursuant to Title VII. *By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify*.[169]

The Sixth Circuit court retreated from this strong Per Se Approach in the amended *Smith* decision, which omitted all mention of per se gender nonconformity in the final text. One commentator has suggested that the court purposefully adopted a more narrow approach in the superseding *Smith* opinion to avoid rehearing the case *en banc* and risking the possibility of a contrary outcome.[170]

B. Doctrinal Challenges Posed by the Per Se Approaches

As with the Gender Nonconformity Approach, the Per Se Approaches present clear doctrinal challenges for legal advocates. Perhaps the most obvious is that both *Schroer* and *Glenn* conflict with existing Title VII prece-

---

[163] *Glenn*, 663 F.3d at 1321.
[164] *Id.* at 1316.
[165] *Id.* (emphasis added).
[166] *Id.*
[167] *Glenn v. Brumby,* 663 F.3d 1312, 1319 (11th Cir. 2011).
[168] *See* Kirkland, *supra* note 82, at 96 (discussing the two *Smith* rulings).
[169] Smith v. City of Salem, 369 F.3d 912, 921 (6th Cir. 2004) (emphasis added), *amended and superseded by* 378 F.3d 566 (6th Cir. 2004).
[170] *See* Kirkland, *supra* note 82, at 96.

dent. Cases like *Ulane* rejected outright the approach embraced by the *Schroer* court, holding that Title VII is only applicable to "discriminat[ion] against women because they are women and against men because they are men,"[171] and *not*, as the lower court had concluded, individuals that have "gone through sex reassignment surgery."[172] Indeed, the decision in *Schroer* does little to alleviate this doctrinal tension, expressly declining to find cases like *Ulane* overruled by the logic of *Price Waterhouse*.[173] Similarly, the *Glenn* court's conclusion that transgender individuals embody per se gender nonconformity conflicts with cases like *Oiler*, which held that transgender nonconformity constitutes an altogether different form of nonconformity than that exhibited by Ann Hopkins in *Price Waterhouse*.[174] While it is true that *Schroer* and *Glenn* postdate *Ulane* and *Oiler*, the preceding analysis is merely intended to suggest that the conclusions of the *Schroer* and *Glenn* courts by no means represent settled law.

Moreover, the Per Se Approaches possess limited efficacy with regard to what scholars have termed "second generation employment discrimination."[175] While first generation discrimination manifests itself through overt discriminatory acts and patterns of obvious exclusion (e.g. blatant job segregation, transparent racial or sexual comments, and policies such as "Irish

---

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

[172] Ulane v. E. Airlines, Inc., 581 F. Supp. 821, 822 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984)

[173] Schroer v. Billington, 577 F. Supp. 2d 293, 307 (D.D.C. 2008).

[174] Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002). In 2007, the Tenth Circuit rejected a transgender plaintiff's Title VII claim alleging discrimination on the basis of her transgender status and failure to conform to gender stereotypes. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1219–20 (10th Cir. 2007). Relying heavily on *Ulane*, the *Etsitty* court concluded that transgender individuals do not constitute a protected class under Title VII. *Id.* at 1221–22. While this case, on its face, would appear to present a more daunting challenge to *Schroer* than the *Oiler* decision, the *Etsitty* court did not consider whether discrimination based on one's *transition* between sexes would qualify as sex discrimination for the purposes of Title VII. Rather, the court addressed the question of whether Title VII applied to transgender individuals *as a class*. *Id.* Nor does the *Etsitty* decision present any conflict with *Smith* and its progeny, as the court assumed without deciding that Title VII would provide relief to a transgender plaintiff alleging discrimination based on gender nonconformity, but found that the plaintiff had failed to establish that her employer's nondiscriminatory explanation was pretextual. *Id.* at 1224.

[175] The concepts of first generation and second generation employment discrimination were developed by Professor Susan P. Sturm of Columbia Law School. In her seminal article, *Second Generation Employment Discrimination: A Structural Approach*, Professor Sturm outlines her theory of first generation and second generation employment discrimination and proposes a structural regulatory solution. 101 COLUM. L. REV. 458 (2001). Many antidiscrimination law scholars have since built upon Professor Sturm's analysis. *See, e.g.*, Yifat Bitton, *The Limits of Equality and the Virtues of Discrimination*, 2006 MICH. ST. L. REV. 593, 632 (2006) (discussing the implications of first and second generation discrimination in the area of de facto and de jure discrimination); Franita Tolson, *The Boundaries of Litigating Unconscious Discrimination: Firm-Based Remedies in Response to a Hostile Judiciary*, 33 DEL. J. CORP. L. 347, 371–72 (2008) (discussing Sturm's theories in relation to unconscious discrimination).

need not apply"), second generation discrimination is far more subtle.[176] It uses unprotected traits as proxies for discrimination[177]—such as prohibiting hairstyles that are associated with a particular racial group instead of discriminating against that group directly[178]—and employs indirect relational and situational tactics that are difficult to trace to discrete discriminatory purposes.[179]

It is therefore quite difficult to address second generation employment discrimination using the Per Se Approaches,[180] as a plaintiff may not be able to demonstrate conclusively that animus toward his or her transgender status motivated an employer's action.[181] Indeed, this can be particularly challenging when an employer relies on gender-attribute proxies to mask discriminatory intent. Unlike most sex-based distinctions, distinctions based on gendered attributes are permissible in some employment contexts.[182] For example, an employer may reasonably require that an employee exhibit specific feminine or masculine-coded characteristics in certain vocations—one might want nurses and flight attendants to demonstrate gentleness or warmth, while one might want a used car salesperson to exhibit aggressiveness.[183] In these types of circumstances, the Per Se Approaches may provide scant relief to a transgender employee penalized for failing to exhibit certain gendered attributes, even if the employer's arguments are pretextual.

---

[176] *See* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 Nw. U. L. Rev. 1379, 1419–20 (2008); Sturm, *supra* note 175, at 466–68.

[177] *See, e.g.*, Glazer, *supra* note 176, at 1420 (noting that under second generation discrimination individuals are asked to "downplay" group identity traits); Kimberly A. Yuracko, *Trait Discrimination as Race Discrimination: An Argument About Assimilation*, 74 Geo. Wash. L. Rev. 365, 367 (2006) [hereinafter Yuracko, *Assimilation*] (arguing that second generation discrimination is directed against "cultural traits associated with [a] group, rather than at the group as a whole") (quoting Kenji Yoshino, Second-Generation Discrimination 2 (Mar. 30, 2004) (unpublished manuscript on file with Yuracko)). Professor Yoshino of the New York University School of Law has written extensively on the ways in which direct and indirect discrimination against racial, gender, and sexual minorities lead such groups to employ conversion, passing, and covering tactics. *See* Yoshino, *supra* note 20, at 774–75.

[178] *See* Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 232 (S.D.N.Y. 1981).

[179] *See* Sturm, *supra* note 175, at 460, 468.

[180] It is worth noting that both *Schroer* and *Glenn* dealt with *first generation* employment discrimination. *See* Glenn v. Brumby, 663 F.3d 1312, 1314 (11th Cir. 2011) (discussing Brumby's admission that Glenn was terminated because he found her planned gender transition to be "inappropriate" and "disruptive"); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) ("Schroer's case indeed rests on direct evidence, and compelling evidence, that the Library's hiring decision was infected by sex stereotypes."). To date, no transgender plaintiff has succeeded on a Title VII case using the Per Se Approach in the context of *second generation* employment discrimination.

[181] *See* Yuracko, *Assimilation*, *supra* note 177, at 371–72 (noting that while status-based discrimination still exists, contemporary discrimination is more likely to be covert, and thus more difficult to identify and prove). This difficulty is compounded when the discrimination is unconscious. *See* Tolson, *supra* note 175, at 352 (pointing out that plaintiffs bringing claims of unconscious bias typically sue "based on facts that obscure rather than reveal the existence of any potential bias").

[182] *See* Case, *supra* note 50, at 12–13.

[183] *Id.* at 13.

Two other types of proxies may prove troublesome for transgender employees utilizing the Per Se Approaches. First, transgender case law is replete with instances in which employers rely on their inability to accommodate a transgender employee's bathroom needs to successfully defend against a Title VII suit.[184] Indeed, the enduring effectiveness of this defense has led one observer to opine that "the bathroom does seem to be the last frontier in Title VII cases involving transgender plaintiffs."[185] Because courts have been, by and large, unwilling to question the sincerity of employers' concerns with regard to restroom usage,[186] a transgender plaintiff faced with these types of employer justifications will be hard pressed to demonstrate that a discriminatory action was motivated in fact by animus toward his or her transgender status.

Second, as greater numbers of transgender plaintiffs succeed in bringing viable Title VII claims, employers may attempt to recharacterize discrimination based on transgender status as discrimination based on sexual orientation, which, as discussed in Part II.B, is unprotected under Title VII. A recent nationwide poll of transgender persons found that forty-six percent of respondents identified as gay, lesbian, or queer, twenty-five percent identified as bisexual, and only twenty-three percent identified as heterosexual.[187] Although the conclusions that may be drawn from these statistics are limited in that the study provides no indication as to what percentage of each group was pre- or post-transition, at the very least the survey suggests that a substantial portion of the transgender community is sexually attracted to individuals of the same sex as which they currently present (e.g., a transgender female who presents, for the most part, as male and who is attracted to men). Consequently, an employer could conceivably escape Title VII liability by exploiting the sexual orientation loophole and claiming that the perceived homosexuality of a transgender plaintiff motivated its allegedly discriminatory action.[188]

---

[184] *See, e.g.*, Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 493–94 (9th Cir. 2009) (finding that the defendant's safety concerns constituted legitimate nondiscriminatory reasons for banning Kastl, a transgender woman employee, from using the women's restroom); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (holding that the Utah Transit Authority's inability to accommodate the bathroom needs of a transgender employee constituted a legitimate nondiscriminatory reason for discharging the employee); *cf.* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (stating in dicta that allowing a transgender woman employee to use the women's restroom raised legitimate concerns regarding the privacy interests of the employer's female employees). For an exploration of the impact of "bathroom discrimination" on the transgender community, see Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133 (2010).

[185] Gelfman, *supra* note 28, at 116.

[186] *See Kastl*, 325 F. App'x at 493–94; *Etsitty*, 502 F.3d at 1224.

[187] 2011 DISCRIMINATION SURVEY, *supra* note 2, at 28.

[188] *See* Gilden, supra 125, at 99 (concluding that "where a plaintiff's gender nonconformity implicates not only her gender identity but also her sexual orientation, the infusion of homophobia into a claim of transphobia almost always renders the transphobia inactionable").

C. Challenges that the Per Se Approaches Present for the Transgender Rights Movement

The Per Se Approaches possess undeniable appeal for transgender rights activists, as they appear to expand Title VII's protections and render discrimination on the basis of a person's transgender status unlawful.[189] However, when one considers the diversity of opinion and experience with regard to gender transition and nonconformity within the transgender community, it becomes clear that the two Per Se Approaches suffer from considerable under-inclusiveness. For example, the approach in *Schroer* relies on the proposition that discrimination on the basis of a person's transition from one sex to another violates Title VII.[190] However, eighteen percent of transgender persons state that they do not wish to live full time in a gender other than the one assigned at birth.[191] Similarly, the *Glenn* court assumes that transgender persons are defined in large part by their gender nonconformity.[192] However, visual conformers constitute a significant portion of the transgender community. Indeed, twenty-one percent of transgender persons report that when meeting strangers and interacting with people in casual settings, those individuals "never" discern their transgender status and will only become aware after being told.[193] Thus, reliance on gender transition may leave a large portion of the transgender community unprotected, and sweeping conclusions about the failure of transgender individuals to conform to gender stereotypes may suffer from significant inaccuracy.

Moreover, it is not clear that the *Schroer* decision provides relief to transgender plaintiffs who do not intend to undergo sex reassignment surgery. The *Schroer* court specifically noted that the Library revoked Diane Schroer's offer of employment "when it learned that a man named David intended to become, *legally, culturally, and physically,* a woman named Diane."[194] The court's careful wording invites the interpretation that Schroer found recourse under Title VII because her planned gender transition was comprehensive across the legal, cultural, *and* physical aspects of her gender

---

[189] In particular, observers have expressed significant enthusiasm toward the approach employed by the *Schroer* court. *See, e.g.*, Eno, *supra* note 28, at 789; McCann, *supra* note 28, at 182; Spero, *supra* note 28, at 404; Weiss, *supra* note 1, at 631.

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

[191] 2011 DISCRIMINATION SURVEY, *supra* note 2, at 26. The report is silent as to whether respondents who reported a lack of desire to live full-time in a gender different from their birth-assigned sex held that view due to fear that pursuing gender transition would result in discrimination, harassment, and/or violence from others.

[192] Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011).

[193] 2011 DISCRIMINATION SURVEY, *supra* note 2, at 27.

[194] *Schroer*, 577 F. Supp. 2d at 306 (emphasis added); *see also id.* at 308 (repeating the elements of "legal[ ], cultural[ ], and physical[ ]" transition in the conclusion of the decision).

identity.[195] Moreover, the decision makes clear that its allusion to "physical transition" refers specifically to Schroer's intention to undergo genital surgery, finding that "the Library's refusal to hire Schroer after being advised that she planned to *change her anatomical sex by undergoing sex reassignment surgery* was literally discrimination 'because of . . . sex.' "[196]

This aspect of the *Schroer* decision may significantly limit its remedial scope. Anatomical transition holds little appeal for large segments of the transgender community, with seventy-two percent of transgender men reporting no interest in phalloplasty and fourteen percent of transgender women expressing no desire to undergo vaginoplasty.[197] A portion of this aversion may be explained by the fact that "medical care associated with sex reassignment is still doled out through gender-regulating processes that reinforce oppressive and sexist gender binaries."[198] Even for those who would like to undergo genital surgery, however, the procedure is often not a realistic option due to its high cost and frequent exclusion from most health insurance plans.[199] Thus, transgender plaintiffs who lack the desire and/or financial resources to pursue genital surgery may find little recourse under *Schroer*.[200]

Finally, one should note that because the Per Se Approach as applied in *Glenn* renders the Gender Nonconformity Approach broadly applicable to discrimination on the basis of transgender status, the approach falls victim to the same movement-related problems discussed in Part II.C.

IV. The Constructionist Approach

The third and final approach for transgender plaintiffs contesting employment discrimination under Title VII is the Constructionist Approach. As the following subsection illustrates, this approach is perhaps the most gestational of the three, with sparse application by transgender plaintiffs and minimal success in the courtroom.

---

[195] For an extensive analysis of the *Schroer* court's reference to and reliance on Diane Schroer's "legal[ ], cultural[ ], and physical[ ]" gender transition, see McCann, *supra* note 28, at 174–79.

[196] *Schroer*, 577 F. Supp. 2d at 308 (emphasis added, alteration in original).

[197] 2011 Discrimination Survey, *supra* note 2, at 79.

[198] Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 Berkeley Women's L.J. 15, 18 (2003) [hereinafter Spade, *Medicine*].

[199] *Id.* at 77.

[200] Landsittel, *supra* note 48, at 1168 (arguing that reliance on diagnosis and treatment of Gender Identity Disorder and conformity with binary gender norms ultimately create "an insecure foundation on which to rest transgender-protective doctrine, because reliance on them excludes the majority of transgender people from protection").

A. Summary of the Argument and Relevant Case Law

The Constructionist Approach expands Title VII protections to transgender individuals by challenging the traditional conception of the interplay between gender and sex. In its broad form, the Constructionist Approach argues that the concept of gender, as incorporated in the statutory term "sex" in Title VII, describes a social construct that is neither essential nor inevitable, but which plays an important role in informing one's identity.[201] This view draws significant force from post-structural/post-modern feminist scholars, who contend that contemporary "understandings of sex-based differences are highly contingent and that sex as we know it is entirely 'performatively produced' rather than real."[202] Indeed, Judith Butler, a prominent post-structural/post-modern feminist,[203] argues that "gender proves to be performative—that is, constituting the identity it is purported to be."[204] Many transgender advocates and legal scholars have since "embraced the deconstructive project of postmodern feminism" in challenging the "legal system's rigid binary notions of sex and gender,"[205] espousing the view that "[b]oth sex and gender are socially constructed."[206] Indeed, some commentators expressly favor a legal strategy that exposes the constructive nature of gender, reasoning that "a robust system of transgender rights necessarily requires a critical engagement and transformation of unjust gender norms."[207]

One must distinguish, however, between the societal and individual aspects of gender. Though the *descriptive* aspects of gender are indeed socially constructed, gender is also an "*ascriptive* facet of human identity" and hence "not socially constructed for any particular individual."[208] In this way, gender identity is properly understood as a "presocial fixed category,"[209] with individuals inhabiting gender categories and experiencing them as real.[210] Thus, under this view, to the extent that *Price Waterhouse* established that Title VII's reference to "sex" encompasses aspects of gen-

---

[201] *See* Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (an Unfinished Draft)*, 105 HARV. L. REV. 1045, 1048 (1992).

[202] Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 284–85 (2008) (quoting JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 33 (1990)).

[203] *Id.* at 280 n.3.

[204] BUTLER, *supra* note 202, at 25.

[205] Gilden, *supra* note 125, at 87.

[206] Vade, *supra* note 106, at 282; *see also* Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—the Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 144 (2011) ("[B]inary sex classifications can only be viewed as a social construct that disciplines the body in ways that defy logic, compassion, and medical science.").

[207] Gilden, *supra* note 125, at 84–85.

[208] Levi, *Clothes, supra* note 25, at 112 (emphasis added).

[209] Gilden, *supra* note 125, at 106 n.80 (quoting Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, *in* TRANSGENDER RIGHTS 18 (Currah et al. eds., 2006).

[210] Spade Email, *supra* note 103.

der,[211] an employer may not discriminate against an individual based on the gender construct that he or she inhabits, regardless of his or her birth-assigned sex. While this approach, at first glance, looks very similar to *Price Waterhouse*'s prohibition on discrimination based on sex stereotypes, it carries the added benefit of emphasizing the "organic . . . expressive, [and] relational" aspects of gender.[212] As transgender advocate Jennifer Levi points out, "until courts understand the inelasticity of gender for most individuals *alongside* its social construction, sex discrimination claims will have limited utility."[213] No transgender plaintiff, however, has succeeded in a Title VII suit using this form of the Constructionist Approach—not a surprising finding given the radical breadth of this view.

The more narrow form of the Constructionist Approach limits its focus to the statutory term "sex," contending that for the purposes of Title VII, "sex" should be interpreted to include gender identity.[214] Transgender plaintiffs have found only marginal success under this approach, with the district court decision in *Ulane v. Eastern Airlines, Inc*.[215] representing the only instance in which a court has embraced the argument. In that case, the district court judge heard testimony from dueling expert witnesses regarding the biological basis and nature of gender identity, and ultimately concluded that "sex is not a cut-and-dried matter of chromosomes."[216] The court went on to hold "that the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of [gender] identity and that, therefore, transsexuals are protected by Title VII."[217] The Seventh Circuit reversed the decision on appeal, noting that the plain language of the statute prohibited discrimina-

---

[211] Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

[212] Vade, *supra* note 106, at 276.

[213] Levi, *Clothes, supra* note 25, at 91 (emphasis added).

[214] While I recognize that the narrow version of the Constructionist Approach leads to essentially the same outcome as the two Per Se Approaches—namely, that discrimination on the basis of transgender status is rendered per se actionable under Title VII—I do not view the narrow Constructionist Approach as merely a third way by which transgender employment discrimination is rendered per se actionable under Title VII. Unlike the Per Se Approaches, the Constructionist Approach strikes at the very foundation of society's traditional conception of sex as static and fixed. Because some scholars have found this to be a normatively attractive goal, I have chosen to analyze the narrow Constructionist Approach separately from the Per Se Approaches. *See* Gordon, *supra* note 25, at 1754 ("[E]ffective advocacy on behalf of trans persons requires challenging *both* the construction of gender and expectations that biology and gender expression will line up in normative ways *and* the assumption that biological sex is a priori and unconstructed.") (emphasis added).

[215] 581 F. Supp. 821 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

[216] *Id.* at 825.

[217] *Id.* Although the court, in the quoted passage, used the term "sexual identity," *id*., it is clear that the court was in fact referring to gender identity. *See id.* at 823 (describing transgender individuals as "persons with a problem relating to their very sexual identity as a man or a woman").

tion against "women because they are women and against men because they are men," and not "a person who has a sexual identity disorder."[218]

The novel approach of the *Ulane* district court has been largely forgotten with the onset of *Price Waterhouse* and its progeny, with gender nonconformity claims dominating the transgender Title VII landscape since then. It is worth noting, however, that the *Schroer* court expressly considered the *Ulane* district court's approach when denying the defendant's motion to dismiss, musing that "it may be time to revisit Judge Grady's conclusion in *Ulane I* that discrimination against transsexuals *because they are transsexuals* is 'literally' discrimination 'because of . . . sex,'" especially given the complexities in how "components of biological sexuality . . . [interact] with social, psychological, and legal conceptions of gender."[219] Even though, as discussed in Part III.A, the *Schroer* court ultimately focused on Diane Schroer's *transition* between sexes as opposed to her gender identity,[220] the *Schroer* court's openness to the *Ulane* district court's rationale still bodes well for its potential application in future cases.

Indeed, the narrow Constructionist Approach clearly comports with current antidiscrimination law doctrine. Because Title VII is a remedial statute, courts have an obligation to construe its text liberally and to avoid overly technical interpretations.[221] This maxim is important given the inherent ambiguity in the term "sex," which may refer to differences in reproductive function, differences in chromosomes, genital attributes, birth-assigned sex, gender identity, or some combination of all of the above.[222] Additionally, the Supreme Court has recognized that Title VII's protections extend to conduct beyond the contemplation of Congress at the time it enacted the legislation.[223] As Justice Scalia wrote for a unanimous Court regarding same-sex sexual harassment in *Oncale v. Sundowner Offshore Services, Inc.*:

> [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

---

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

[219] Schroer v. Billington, 424 F. Supp. 2d 203, 212–13 (D.D.C. 2006) (emphasis in original).

[220] Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

[221] *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1220 (10th Cir. 2007) ("Title VII is a remedial statute which should be liberally construed . . . ."); *see also In re* Carter, 553 F.3d 979, 985 (6th Cir. 2009) ("According to 'traditional canons of statutory interpretation, remedial statutes should be construed broadly to extend coverage . . . .'") (quoting Cobb v. Contract Transp., Inc., 452 F.3d 543, 559 (6th Cir. 2006)); 29 C.F.R. § 1601.34 (2010) ("These rules and regulations shall be liberally construed to effectuate the purpose and provisions of title VII [sic] . . . .").

[222] *See* Gelfman, *supra* note 28, at 76 (quoting D. Douglas Cotton, Ulane v. Eastern Airlines: *Title VII and Transsexualism*, 80 Nw. U. L. Rev. 1037, 1051–52 (1986)).

[223] *See id.* at 96 (quoting Cotton, *supra* note 222 at 1050) (noting that courts have expanded Title VII subgroups to include "women with preschool-age children, single pregnant women, [and] married women," in addition to extending Title VII coverage to prohibit employment discrimination against Caucasians and men).

> 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.[224]

Thus, the narrow Constructionist Approach seems to present, at least in theory, a viable interpretation of Title VII.

B. Doctrinal Challenges Posed by the Constructionist Approach

Undoubtedly, the most challenging doctrinal aspect of the Constructionist Approach is its near-total lack of acceptance by federal courts. As discussed in the preceding subsection, no plaintiff has ever succeeded on a Title VII claim using the broad version of the approach, and the Seventh Circuit reversed the only judicial decision adopting the narrow version.[225] Indeed, the *Schroer* court's reluctance to determine whether there exists a biological basis for gender identity,[226] despite the best efforts of Diane Schroer's attorneys,[227] serves to highlight the unwillingness of courts to adopt a more expansive understanding of "sex."

Cases like *Ulane* and *Holloway* may present additional doctrinal obstacles, as they explicitly held that transgender individuals do not constitute a protected class under Title VII.[228] These decisions, however, relied heavily on the presumed intent of Congress with regard to the scope of "sex," and thus do not accord with Justice Scalia's comments in *Oncale* that legislative intent is not controlling when interpreting Title VII.[229] Moreover, the decisions emphasized the plain meaning of "sex" in limiting Title VII's protections to birth-assigned sex—a questionable approach given that *Price Waterhouse* expressly incorporated aspects of gender into its Title VII analysis.[230] Thus, as noted earlier, many courts have concluded that *Ulane* and *Holloway* no longer constitute good law.[231]

---

[224] 523 U.S. 75, 79 (1998).

[225] *See supra* Part IV.

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

[227] *See* McGowan, *supra* note 74, at 236–37 (discussing the efforts by Diane Schroer's legal team to convince the court that gender identity has a biological basis).

[228] Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977).

[229] *See* Glenn v. Brumby, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (noting the inconsistency between the decision in *Oncale* and the analysis employed by pre-*Price Waterhouse* Title VII cases).

[230] Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (concluding that an employer that "acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," thus violating Title VII), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 § 107, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244, 251 (1994).

[231] *See*, *e.g.*, Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Schwenk v. Hartford, 204 F.3d 1187, 1201 (9th Cir. 2000).

C. Challenges that the Constructionist Approach Presents for the Transgender Rights Movement

The radical reconceptionalization of sex proposed by the broad version of the Constructionist Approach may give pause to some in the transgender community. As noted by Jennifer Levi, the view that "all gender is socially constructed and that there is nothing essential about gender identity,"—a premise rejected by Levi—when "taken to its logical conclusion, posits that transsexualism[232] does not exist."[233] This necessarily relies on the notion that if individuals could embrace gender norms "despite the social construction of biologically female traits as feminine or biologically male traits as masculine, no one would ever need to take hormones or have surgery to fully express their gender identity."[234] In questioning trans-identity, this line of argument offends many transsexuals and perplexes those in the transgender community.[235]

Additionally, transgender individuals might find unappealing any approach that results in a fundamental revision of cultural gender roles. Claudine Griggs, a transgender author, conducted numerous interviews with transgender individuals and concluded that most perceived gender as an "an inherent quality" that nonetheless "remains dependent on gender expression."[236] Many transgender individuals, however, must endure significant personal and social hardships in order to express their "true" gender, and thus the ability to adopt "a single [gender] identity within the binary may therefore be very important."[237] Moreover, for those transgender individuals who have transitioned or intend to transition to a new sex, success is often measured by the ability to "pass" as a member of their new sex in the eyes of cisgender persons.[238] A significant portion of the transgender community may therefore wish to *retain* existing gender constructs because faithful adherence to those constructs enables one to pass.[239] Indeed, a sizable portion

---

[232] As noted earlier, the terms "transsexual" and "transgender" have at times been used interchangeably. *See supra* note 1. However, in this context, Levi uses the term "transsexual" specifically to refer to a person that has undergone or desires to undergo some form of gender-related medical care. *See* Romeo, *supra* note 1, at 713 n.1 (defining the term "transsexual").

[233] Levi, *Clothes*, *supra* note 25, at 108.

[234] *Id.*

[235] *Id.*

[236] Claudine Griggs, S/he: Changing Sex and Changing Clothes 42 (1998).

[237] Gelfman, *supra* note 28, at 114.

[238] *Cf.* Spade, *Medicine, supra* note 198, at 26 (noting that within the medical community and transgender community, "the ability to be perceived by non-trans people as a non-trans person is valorized").

[239] Gilden, *supra* 125, at 90 ("In order for one to claim a gender identity within a particular cultural framework, that person must be able to reference particular actions that will be recognized by others as constituting the identity being claimed.").

of the transgender community is not at all interested in "blur[ring] the categories of male and female."[240]

Conclusion

Based on my own experience working as a legal advocate for low-income transgender clients, two things seem eminently clear: employment discrimination remains to this day a prevalent, pervasive problem for the transgender community, and explicit protections for transgender individuals at the federal level are likely many years away. Given this backdrop, the development of the Gender Nonconformity, Per Se, and Constructionist Approaches has been hugely important for the transgender community and its allies, as they provide avenues for contesting employment discrimination where no such mechanisms had existed before.

In writing this Note, it has not been my intent to play the role of the cynic or the killjoy, pointing out the clouds that lie at the center of these silver linings. Rather, I merely wish to take stock of the various arguments that have emerged following the *Price Waterhouse* decision, consider the extent to which they have been successful for transgender plaintiffs, and discuss the flaws inherent in each approach in an open and honest way. The reality is that until lawmakers expand the reach of antidiscrimination statutes and include express protections for transgender individuals, the only option available for legal advocates of transgender plaintiffs is to shoehorn discrimination claims into a system not designed to vindicate those interests. At best, the current approaches serve as makeshift remedies.

And yet, they are remedies all the same. As such, I believe that providing an unvarnished assessment of each approach will enable legal advocates to better tailor their arguments to the needs and facts of a given case—e.g., using the Gender Nonconformity Approach when a post-transition plaintiff has adopted gender nonconforming behavior, incorporating the Per Se Approach when a plaintiff plans to undergo genital surgery, and employing the Constructionist Approach when armed with medical data that suggests a biological basis for gender identity. I thus eagerly place this piece into the able hands of transgender legal advocates and other legal scholars, hopeful that it will prove helpful in closing the yawning gap between the rights that exist and the rights that are needed.

---

[240] Terry S. Kogan, *Transsexuals and Critical Gender Theory: the Possibility of a Restroom Labeled "Other"*, 48 Hastings L.J. 1223, 1249 (1997).