

## Title VII and the Trans-Inclusive Paradigm

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### Introduction

In 2012, the Equal Employment Opportunity Commission (EEOC) released *Macy v. Holder*,<sup>1</sup> a courageous decision placing the Commission at the center of an evolving and politically rancorous debate over the definition of “sex” in American law.<sup>2</sup> In *Macy*, the EEOC joined a growing number of U.S. appellate courts in holding that Title VII is “trans-inclusive,” i.e., that Title VII’s prohibition on sex discrimination covers discrimination based on transgender status and gender identity.<sup>3</sup> Still, politicians, some judges, and many legal commentators continue to treat a trans-

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1. See No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

2. The term “sex” used here refers to chromosomal or genital differences, while “gender” refers to the cultural or social constructions and expectations that accompany chromosomal differences. Traditional notions of sex, including those that were pervasive at the time the Civil Rights Act was signed into law, did not distinguish between sex and gender, resulting in a social expectation that assumed all males were masculine, while all females were feminine. This conflation was used to justify gender roles and prevent women from gaining status in society. See Francisco Valdes, *Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins*, 8 YALE J. L. & HUMAN. 161, 164–65 (1996). “Gender nonconformity” refers to any variation between these two variables, such as feminine males and masculine females. *Id.* at 194.

3. See *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. App’x 492, 493 (9th Cir. 2009); *Barnes v. City of Cincinnati*, 401 F.3d 729, 757 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 214 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187, 1193 (9th Cir. 2000). “Transgender” is an “umbrella” term that refers to “all identities or practices that cross over, cut across, move between, or otherwise queer socially constructed sex/gender boundaries.” Susan Stryker, *My Words to Victor Frankenstein Above the Village of Chamounix: Performing Transgender Rage*, 1 GLQ: J. LESBIAN & GAY STUD. 237, 251 n.2 (1994). Not all transgender individuals are “transsexuals,” who “seek surgical alteration of their bodies.” *Id.*

inclusive Title VII as a revolutionary idea.<sup>4</sup> The EEOC's *Macy* decision demonstrates how this treatment has become outdated, and the legal community must now accept a new trans-inclusive Title VII paradigm. Inclusion is no longer an academic fantasy, it is the exclusive conclusion reached by the U.S. appellate courts that have squarely addressed the issue in the past twenty years, it is the position of the EEOC, and it is a logical and necessary extension of sex discrimination jurisprudence.

This paradigm shift can wait no longer. Transgender Americans face deeply entrenched hostility, often leading to ostracism, discrimination, and even violence.<sup>5</sup> Even more troubling, the courts, institutions on which Americans rely to dispense justice, have historically treated transgender individuals unfairly, if not with outright derision.<sup>6</sup> Resistance in the legal community permits these unnecessary injustices to occur. Even more frustrating, it adds unnecessary complications to legislative

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4. See, e.g., *Etsitty v. Utah Transit Auth. (Etsitty I)*, No. 2:04CV616 DS, 2005 WL 1505610, at \*7 (D. Utah June 24, 2005) (rejecting vehemently the idea that Title VII protected transgender individuals from workplace discrimination); Brittany Ems, *Preparing the Workplace for Transition: A Solution to Employment Discrimination Based on Gender Identity*, 54 ST. LOUIS U. L.J. 1329, 1330 (2010) (lamenting the lack of federal and state protection for transgender employees and noting the circuit split on the issue); Jackie Kucinich, *GOP Support for Gay Rights Measure Slips*, ROLL CALL (Apr. 26, 2010), [http://www.rollcall.com/issues/55\\_121/45524-1.html](http://www.rollcall.com/issues/55_121/45524-1.html) (reporting that Republicans would not support a trans-inclusive ENDA).

5. See, e.g., Dan Frosch, *Death of a Transgender Woman is Called a Hate Crime*, N.Y. TIMES, Aug. 2, 2008, at A13; Evelyn Nieves, *After Sex Change, Teacher is Barred From School*, N.Y. TIMES, Sep. 27, 1999, at A12; Chastity Pratt, *The Perilous Times of Transgender Youth*, N.Y. TIMES, Jun. 18, 1995, at CY7.

6. See *Ashlie v. Chester-Upland Sch. Dist.*, Civ. Action No. 78-4037, 1979 U.S. Dist. LEXIS 12516, at \*14 (E.D. Pa. 1979) ("I find it somewhat difficult to accept the proposition that the constitutional right of privacy... attaches also to a person's decision to surgically rearrange the parts of his body.... It might just as easily be argued that the right of privacy protects a person's decision to be surgically transformed into a donkey."); Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 BERKELEY J. GENDER L. & JUST. 150, 154 (2005) ("No matter how a transgender plaintiff articulates his injury, he is likely to encounter a court that draws a line in a way that makes him a stranger to all of the laws that could protect him."). Compare *Daly v. Daly*, 715 P.2d 56, 59 (Nev. 1986) (terminating Daly's rights as a father on the grounds that he was no longer a man), with *In re Ladrach*, 32 Ohio Misc. 2d 6, 10 (Stark Cnty. Prob. Ct. 1987) (denying Ladrach a marriage license because he was still not a woman), *Kantaras v. Kantaras*, 884 So. 2d 155, 161 (Fla. App. 2 Dist. 2004) (voiding the marriage of Michael Kantaras because he was legally a woman), *In re Estate of Gardiner*, 42 P.3d 120, 137 (Kan. 2002) (voiding J'Noel Gardiner's marriage because she was legally a man), and *Littleton v. Prange*, 9 S.W.3d 223, 231 (Tex. App. 1999) (finding Littleton's marriage license void because her husband was still legally a woman).

efforts to pass protective legislation. If Title VII protected transgender individuals from discrimination, the need for such politically unpalatable protection to be added to legislation such as the Employment Nondiscrimination Act (ENDA) would be reduced.<sup>7</sup> This in turn would give progressive politicians cover to pass protections for other vulnerable populations such as gays and lesbians. With ENDA essentially dead in Congress, transgender individuals still without non-discrimination coverage in twenty-one states,<sup>8</sup> and momentum finally building in the judiciary, the need for a paradigm shift could not be more urgent and the time for a bold new vision is now.

The goal of this Note is to challenge conventional assumptions as to the accepted scope of Title VII by arguing that modern courts are no longer split, but have come to a consensus. This Note further argues that, in order to adequately address difficult and looming issues in the area of employment discrimination, the legal community should adopt a new paradigm in which Title VII is trans-inclusive. This paradigm shift from circuit split to consensus is justified by the fact that every federal appellate court to rule on this issue in the past decade, along with the EEOC and a sizable cadre of district courts, has adopted a

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7. The Employment Nondiscrimination Act (ENDA) is legislation that has been proposed regularly over the last twenty years that would prohibit discrimination based on sexual orientation and, since 2007, discrimination based on gender identity. See H.R. Res. 1397, 112th Cong. (2011); S. Res. 811, 112th Cong. (2011). The addition of gender identity in 2007 caused a schism between the pragmatic factions of the Democratic Party that recognized only protection for sexual orientation could pass the House and the absolutist factions of the Lesbian, Gay, Bisexual, and Transgender (LGBT) community that demanded an all-or-nothing package. Shailagh Murray, *Quandary Over Gay Rights Bill: Is It Better to Protect Some or None?*, WASH. POST, Oct. 18, 2007, at A23. Although the House eventually passed a version of ENDA, the legislation self-destructed in the Senate when activists objected to the absence of explicit protection for gender identity.

8. Sixteen states and the District of Columbia have passed trans-inclusive anti-discrimination legislation including California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. See *Transgender Issues: A Fact Sheet*, TRANSGENDER LAW & POLICY INST., <http://www.transgenderlaw.org/resources/transfactsheet.pdf> (last updated Feb. 2012) [hereinafter *Transgender Issues*]. Another thirteen states are covered by trans-inclusive Title VII decisions out of the First, Sixth, Ninth, and Eleventh Circuits including Alabama, Alaska, Arizona, Florida, Georgia, Idaho, Kentucky, Maine, Michigan, Montana, New Hampshire, Ohio, and Tennessee. The remaining twenty-one states have no protection, at neither the state nor federal level, for transgender employees, though individual counties and municipalities may have their own protective ordinances. See *Transgender Issues*, *supra*.

trans-inclusive definition of Title VII.<sup>9</sup> Although some early cases held that “transsexualism” was not covered under Title VII,<sup>10</sup> subsequent Supreme Court precedent has eviscerated their central rationales.<sup>11</sup> These rare non-inclusive cases should not be treated as an alternative model to the modern consensus that Title VII is trans-inclusive.

Part I of this Note follows the history of sex discrimination laws from the Civil Rights Act of 1964 through the rapid expansion of the 1970s, to the retrenchment of the 1980s, and the eventual revival of the 1990s. The purpose of this historical review is to place the entire Note in the broader historical context, which allows a more complete discussion of the issues, controversies, and developments that have lead to the modern consensus that transgender discrimination implicates Title VII. Part II argues that the trans-inclusive model of Title VII has a strong analytical foundation supported by the development of sex discrimination jurisprudence, while the non-inclusive cases are hopelessly flawed or have been implicitly overturned. As a result, the only cases that offer any value to the law are those reaching a trans-inclusive result. Part III offers two legal and policy areas, sexual orientation under Title VII and ENDA, that would benefit from the clarity afforded by adopting of a trans-inclusive paradigm in Title VII law.

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9. See *Glenn*, 663 F.3d at 1321; *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. App'x 492, 493–94 (9th Cir. 2009); *Barnes v. City of Cincinnati*, 401 F.3d 729, 738–30 (6th Cir. 2005); *Smith*, 378 F.3d at 578; *Rosa*, 214 F.3d at 215; *Schwenk*, 204 F.3d at 1201; see also *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 (D.D.C. 2006); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at \*11 (E.E.O.C. Apr. 20, 2012). But see *Etsitty v. Utah Transit Auth. (Etsitty II)*, 502 F.3d 1215, 1227–28 (10th Cir. 2007) (suggesting in dicta that transgender plaintiffs would not be covered by Title VII).

10. See *Ulane v. E. Airlines, Inc. (Ulane II)*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977).

11. See *Schwenk*, 204 F.3d at 1201 (“The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of [*Price Waterhouse v. Hopkins*].”). A few district courts have adhered to early transgender cases in spite of more recent Supreme Court pronouncements, but because the district court opinions fail to address contrary Supreme Court precedent, these early district court decisions offer little in the way of compelling arguments or persuasive reasoning. See, e.g., *Etsitty v. Utah Transit Auth. (Etsitty I)*, No. 2:04CV616 DS, 2005 WL 1505610, at \*3 (D. Utah June 24, 2005) (relying heavily on *Ulane II*); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 3109541, at \*4–\*5 (E.D. La. Sept. 16, 2002) (relying heavily on *Ulane II*).

## I. Title VII & Sex Discrimination: a History

The development of sex discrimination law has expanded and contracted in a series of waves. Starting with the passage of the Civil Rights Act, the movement for equal employment rights for women has faced significant obstacles. Initially, corporate and business interests convinced regulators to abandon enforcement of the Act's "sex provision."<sup>12</sup> The New Feminists fought back, securing robust enforcement, only to have their efforts halted by a newly conservative Supreme Court.<sup>13</sup> In the thirty years since, the Court's narrow interpretation has been relaxed, but obstacles still remain for many vulnerable groups.<sup>14</sup>

### A. *The First Wave: the Revolutionary Civil Rights Act & the Reactionary EEOC*

Congress took up the first Civil Rights Act in the spring of 1964.<sup>15</sup> As expected, the debates centered on issues of race, national origin, and ethnicity.<sup>16</sup> However, on February 8, 1964, Congressman Howard Smith of Virginia, usually an ardent opponent of women's rights, proposed that the term "sex" be added to the list of protected classes.<sup>17</sup> This surprising announcement set off a heated debate over gender roles in the workplace. Supporters decried oppressive gender stereotypes that kept women out of

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12. Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARV. L. REV. 1307, 1323–24 (2012).

13. *Id.* at 1342, 1353.

14. *Id.* at 1356–57.

15. One year earlier President Kennedy had called for the elimination of race discrimination in a letter to Congress. See 109 CONG. REC. 11,174 (1963). In his letter, the President called for, among other things, a law that would require fair employment practices and prohibit race discrimination in private employment. *Id.* at 11,178.

16. For a more thorough analysis of the Congressional debate on Title VII, see Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

17. 110 CONG. REC. 2577 (1964) (statement of Rep. Smith). Some members of Congress feared the amendment was a poison pill designed to undermine the entire Act. See *id.* at 2581 (statement of Rep. Green) ("I honestly cannot support the amendment . . . and I hope that no other amendment will be added to this bill on sex or age or anything else, that would jeopardize our primary purpose."). The idea that the amendment was intended to sabotage the entire Act has become widely accepted in legal scholarship; however, there is evidence to suggest that conservative supporters may have feared that without the addition of "sex," minority women would get preference over white women. See *id.* at 2583 (statement of Rep. Andrews) ("Unless this amendment is adopted, the [W]hite women of this country would be drastically discriminated against in favor of a Negro woman.").

well-paying positions<sup>18</sup> and the "arrogant prejudice" of protective legislation.<sup>19</sup> Opponents countered with fears that women in the workplace might upset "traditional family relationships."<sup>20</sup> In the end the amendment passed 168 to 133,<sup>21</sup> and the Civil Rights Act of 1964, including the prohibition on sex discrimination in employment, became law on July 2, 1964.<sup>22</sup>

Unfortunately, the agency tasked with enforcing this revolutionary new law, the EEOC,<sup>23</sup> was unprepared to deal with the sex discrimination provision.<sup>24</sup> Opponents of women's rights quickly took advantage of the Agency's confusion by again invoking gender roles and stereotypes to argue for limited enforcement. At the 1965 White House Conference on Equal Employment Opportunity, participants worried that opening managerial jobs to women would make those women unavailable to care for their husbands and children.<sup>25</sup> Even the Executive

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18. *Id.* at 2580 (statement of Rep. St. George).

19. *Id.* at 2580 (statement of Rep. Griffiths). Not all women's rights groups were opposed to protective legislation. The President's Commission on the Status of Women (PCSW) was the most outspoken opponent of the addition. The PCSW, then chaired by Eleanor Roosevelt, supported expanding rights for women, but still believed that the central role of women was in the home. Thus, the PCSW strongly supported protective legislation. See CYNTHIA HARRISON, *ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968*, at 139-54 (1988). The PCSW opposed the Smith Amendment, and Representative James Roosevelt, Eleanor's son, took his mother's message to the floor of the House. See 110 CONG. REC. 2584 (1964) (statement of Rep. Roosevelt).

20. *Id.* at 2577 (statement of Rep. Celler).

21. *Id.* at 2584.

22. Civil Rights Act of 1964, Pub. L. No. 88-352 § 101, 78 Stat. 241 (1964). Title VII states, "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *Id.* at 255.

23. The EEOC was founded in 1961 by President Kennedy to "scrutinize and study employment practices of the government and recommend additional affirmative steps . . . to realize more fully the national policy of nondiscrimination." See Exec. Order No. 10,925, 3 C.F.R. 86, 87 (1961).

24. Because Congress had stripped much of the EEOC's authority to prosecute and try cases, the new Agency suffered from a lack of political power and influence. See HUGH DAVIS GRAHAM, *CIVIL RIGHTS AND THE PRESIDENCY: RACE AND GENDER IN AMERICAN POLITICS, 1960-1972*, at 103-04 (abr. ed. 1992). In addition, many of the Agency's personnel had joined to battle race discrimination, and were unprepared for the influx of so many sex discrimination claims. See Franklin, *supra* note 12, at 1334-35. Finally, many political figures and media outlets treated the "sex" provision as a joke, with some even calling for it to be repealed. *Id.* at 1333. Together these factors contributed to the Agency's inability and unwillingness to effectively respond to sex discrimination claims brought under Title VII.

25. *Id.* at 1336.

Director of the EEOC was not without bias as evidenced by his statement, "no man should be required to have a *male* secretary," alluding to the common practice of treating secretaries as work wives.<sup>26</sup> Richard Berg, the EEOC's Deputy General Counsel, responded to these fears by promising that the EEOC would interpret Title VII taking into account "national mores," a less than subtle euphemism for popular gender stereotypes.<sup>27</sup> Only the Commission's lone female member, Aileen Hernandez, objected, but there was little she could do against this tide of opposition. "The message came through clearly," she stated, "that the Commission's priority was race discrimination . . . and apparently only as it related to Black *men*."<sup>28</sup>

In this climate, the reactionary EEOC released its first interpretations of Title VII, which were overwhelmingly favorable to employers.<sup>29</sup> The Commission declined to take a strong stance on sex-segregated advertisements.<sup>30</sup> The Commission also declined to challenge state protective legislation.<sup>31</sup> However, a second wave of expansion was beginning to form as prominent women joined Hernandez's call for a renewed push for women's rights in employment.<sup>32</sup> A blistering indictment of the EEOC on the House floor,<sup>33</sup> a groundbreaking law review article,<sup>34</sup> and the founding of a new women's rights organization<sup>35</sup> all lead to the rise of the New Feminists, who confronted the EEOC and eventually took control of the national debate on sex discrimination.<sup>36</sup>

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26. *Id.* at 1337 (emphasis added).

27. *Id.* at 1340.

28. GRAHAM, *supra* note 24, at 107.

29. *See* Franklin, *supra* note 12, at 1333-34.

30. *See* Guidelines on Discrimination Because of Sex, 31 Fed. Reg. 6414, 6414 (Apr. 28, 1966) (codified at 29 C.F.R. pt. 1604).

31. *See* Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,927, 14,927 (Dec. 2, 1965) (codified at 29 C.F.R. pt. 1604) ("The Commission does not believe that Congress intended to disturb such laws and regulations which are intended to, and have the effect of, protecting women against exploitation and hazard.").

32. *See* Franklin, *supra* note 12, at 1334.

33. *See id.* at 1343.

34. *See id.* at 1342-44.

35. *See id.* at 1342.

36. *See id.* at 1345. *See also* GRAHAM, *supra* note 24, at 111. The New Feminists, feminists concerned with social and employment equality, are better known today as "Second Wave" feminists, compared to the earlier generation of feminists, "First Wave" feminists, such as Eleanor Roosevelt, who were concerned primarily with suffrage and political consciousness. For a more thorough discussion of the relationship between these two feminist groups, see generally LISA DUGGAN & NAN D. HUNTER, *SEX WARS: SEXUAL DISSENT AND POLITICAL*

B. *The Second Wave: the New Feminists Take on Washington & the Supreme Court*

1. The Rise of the New Feminists & the Anti-Sex-Stereotyping Philosophy

On June 20, 1966, Michigan Representative Martha Griffiths took to the floor of the U.S. House of Representatives and blasted the EEOC's "wholly negative attitude toward the sex provision of Title VII," accusing the EEOC of "fostering public ridicule [of Title VII] which undermines the effectiveness of the law."<sup>37</sup> Other feminist leaders also began to challenge popular gender stereotypes. Professor Pauli Murray co-authored *Jane Crow and the Law*, a groundbreaking article attacking the myth that sex discrimination was less pervasive and less severe than race discrimination, which was often used by the EEOC to justify ignoring the "sex" provision.<sup>38</sup> Betty Friedan published *The Feminine Mystique*, attacking the gendered stereotypes of happy housewives and the male "breadwinner."<sup>39</sup> Together with Aileen Hernandez, these visionary women formed the National Organization for Woman (NOW), whose founding mission would be to fight for equal employment opportunity and an end to sex stereotyping in the workplace.<sup>40</sup>

NOW immediately set to work reversing the EEOC's decisions. In 1966, the EEOC had concluded that the practice of separating job postings into separate columns based on sex did not violate Title VII.<sup>41</sup> NOW demanded that the EEOC and the *New*

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CULTURE (1995); JANE GERHARD, *DESIRING REVOLUTION: SECOND-WAVE FEMINISM AND THE REWRITING OF AMERICAN SEXUAL THOUGHT* (2001).

37. 112 CONG. REC. 13,689 (1966) (statement of Rep. Griffiths).

38. Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. L. REV. 232 (1965). For a more thorough discussion of race-gender analogies in the women's rights movement, see generally Serena Mayeri, "A Common Fate of Discrimination: Race-Gender Analogies in Legal and Historical Perspective," 110 YALE L.J. 1045 (2001).

39. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (N.Y. Dell ed. 1970).

40. At the time, a number of other women's rights organizations, such as the PCSW, existed; however, these groups grew out of the first feminist movement that sought women's suffrage and were pushing the Equal Rights Amendment (ERA). These groups were hesitant to support equal employment opportunities for women, and their refusal to support robust enforcement was a significant factor in the creation of NOW, which would eventually displace these older organizations and dominate the debate. See Nicholas Pedriana, *Help Wanted NOW: Legal Resources, the Women's Movement, and the Battle Over Sex-Segregated Job Advertisements*, 51 SOC. PROB. 182, 192-93 (2004).

41. So long as the job was actually open to both sexes, the EEOC saw no problem with the publisher indicating which sex would find the job most attractive.



*York Times* end the practice, and when these efforts failed, NOW took to the streets in protest.<sup>42</sup> In 1968, the EEOC bent to the pressure and reversed their position.<sup>43</sup> NOW then moved quickly to build on their victory by attacking the EEOC's 1965 guidance shielding protective legislation under the bona fide occupational qualification (BFOQ) exception.<sup>44</sup> In 1969, the EEOC again reversed itself in the face of pressure from NOW, holding instead that protective laws "will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the [BFOQ] exception."<sup>45</sup> By the early 1970s, NOW's influence had spread to Congress, which was pushing through unprecedented pro-women's rights legislation including an expansion of the Civil Rights Act,<sup>46</sup> laws supporting children of working mothers,<sup>47</sup> and the Equal Rights Amendment.<sup>48</sup> Even

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Guidelines on Discrimination Because of Sex, 31 Fed. Reg. 6414, 6414 (Apr. 28, 1966) (codified at 29 C.F.R. pt. 1604).

42. In August of 1967, the New York chapter of NOW aggressively picketed the *New York Times* in an effort to force them to change their practices. In December, NOW held demonstrations against the EEOC in five major cities. Finally, in 1968, NOW filed a writ of mandamus to force the EEOC to "carry out their lawful duty." See Pedriana, *supra* note 40, at 194 (citing AILEEN C. HERNANDEZ & LETITIA P. SOMMERS, *THE FIRST FIVE YEARS, 1966-1971*, at 26-27 (1971)); see also John H. Florer, *NOW: The Formative Years: The National Effort to Acquire Federal Action on Equal Employment Rights for Women in the 1960s*, 64-70 (Dec. 18, 1972) (unpublished Ph.D. dissertation, Syracuse University); JO FREEMAN, *THE POLITICS OF WOMEN'S LIBERATION* 77 (1975).

43. In a short press release the EEOC stated, "the placement of job advertisements under separate male and female column headings violates the law." Pedriana, *supra* note 40, at 194 (citing Press Release, EEOC, EEOC Issues Guidelines on Classified Advertising, Rules Separate Male-Female Ads Illegal (Aug. 6, 1968)). The updated EEOC guidelines did not come out immediately following the announcement because a group of newspapers sued to enjoin the EEOC's publication. See *Am. Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968). However, their efforts eventually failed, and by the early 1970s most newspapers had desegregated their job advertisements. Pedriana, *supra* note 40, at 194 n.6.

44. See 42 U.S.C. § 2000e-2(e) (2010). Rather than taking on these protective statutes directly, the EEOC left it to Congress and the states to root out any "archaic" legislation that no longer served its original purpose. Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926 (Dec. 2, 1965) (codified at 29 C.F.R. pt. 1604).

45. See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1188 (1971).

46. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

47. The Comprehensive Child Development Act offered federal support for child care and was designed to combat the stereotype that women were needed at home to care for children. S. 1512, 92d Cong. (1971). The Act was eventually vetoed by President Nixon and never went into effect.

members of the Supreme Court seemed to favor NOW's anti-sex-stereotyping view, denouncing "ancient canards about the proper role of women."<sup>49</sup>

In this favorable climate, the EEOC, under the influence of NOW, embarked on a new campaign against the airline industry. For the airlines, young, attractive, unmarried stewardesses were an essential part of the in-flight experience for their predominantly male clientele.<sup>50</sup> For NOW, these policies were the worst examples of sex stereotyping in action. The airlines initially argued that the policies fell within Title VII's BFOQ exception on account of their male clientele and their then-famous advertising campaigns.<sup>51</sup> The EEOC disagreed,<sup>52</sup> and it quickly became clear that the BFOQ defense was a losing argument.<sup>53</sup> The airlines then began to challenge whether policies involving both sex and another characteristic, such as marital status or age, could even be considered sex discrimination at all, relying on the recent Supreme Court decision of *Phillips v. Martin Marietta Corp.*<sup>54</sup> In that decision the Supreme Court held, "[t]he existence of such conflicting family obligations . . . could arguably be a basis for distinction under [the BFOQ exception]."<sup>55</sup> These claims became known as "sex plus" claims, and the airlines found some success in

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48. See 118 CONG. REC. 9597 (1972). For a full listing of the acts passed during this era, see Franklin, *supra* note 12, at 1345-46 n.204.

49. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971) (Marshall, J., concurring).

50. Franklin, *supra* note 12, at 1348.

51. See, e.g., *Diaz v. Pan Am. World Airways, Inc. (Diaz I)*, 311 F. Supp. 559, 561-64 (S.D. Fla. 1970) (analyzing the history of the use of flight attendants and concluding that the female-only policy was a BFOQ); *Sprogis v. United Air Lines, Inc. (Sprogis I)*, 308 F. Supp. 959, 962 (N.D. Ill. 1970) (rejecting United's claim that unmarried-only policy was a BFOQ).

52. The airline industry successfully sought to have the EEOC's decisions enjoined because of Hernandez's support of NOW. See *Air Transp. Ass'n of Am. v. Hernandez*, 264 F. Supp. 227, 232 (1967).

53. See *Diaz v. Pan Am. World Airways, Inc. (Diaz II)*, 442 F.2d 385, 388 (5th Cir. 1971) (finding that female-only policy was not a BFOQ); *Sprogis v. United Air Lines, Inc. (Sprogis II)*, 444 F.2d 1194, 1201 (7th Cir. 1971) (finding that unmarried-only policy was not a BFOQ).

54. 400 U.S. 542 (1971) (per curiam).

55. *Id.* at 544-45. Justice Marshall's concurrence demonstrates that the *Phillips* opinion was a departure from Congress's intent to target sex stereotypes. He stated, "I fear that in this case, where the issue is not squarely before us, the Court has fallen into the trap of assuming that the Act permits ancient canards about the proper role of women to be a basis for discrimination. Congress, however, sought just the opposite result." *Id.* (Marshall, J., concurring).

arguing that they were not sex discrimination.<sup>56</sup> Suddenly, the anti-sex-stereotyping philosophy of the New Feminists had a competitor, which would become known as the anti-classification philosophy.<sup>57</sup>

## 2. Pregnancy Discrimination & the Victory of the Anti-Classification Model

Following the airline cases, pregnancy discrimination became the next Title VII battleground. In 1972, the EEOC issued guidelines concluding that pregnancy-related discrimination was sex discrimination and prohibited by Title VII,<sup>58</sup> and by 1975, five federal circuits agreed.<sup>59</sup> Dissenting in an earlier insurance case, Justice Brennan succinctly pointed out that pregnancy was a disability “suffered only by women” and thus singling out pregnancy amounted to sex discrimination.<sup>60</sup> In holding pregnancy discrimination unlawful, the Ninth Circuit explicitly rejected the anti-classification model stating, “[t]he effect of the statute is not to be diluted because discrimination adversely affects only a portion of [women].”<sup>61</sup> Thus, by 1975, the conventional wisdom held that Title VII applied with equal force to “sex plus” claims.

56. See, e.g., *Lansdale v. United Air Lines, Inc.*, No. 68-1458-CIV-CA, 1969 WL 139 (S.D. Fla. Dec. 2, 1969) (holding that the airline’s policy of only hiring unmarried female stewardesses did not violate Title VII because marital status was not protected); see also *Cooper v. Delta Air Lines, Inc.*, 274 F. Supp. 781, 783 (E.D. La. 1967) (“[I]t is plain that Congress did not bann [sic] discrimination in employment due to one’s marital status and that is the issue in this case.”).

57. The anti-classification model of sex discrimination holds that Title VII and other nondiscrimination statutes only prohibit discrimination “against women because they are women and against men because they are men.” See *Ulane v. E. Airlines, Inc. (Ulane II)*, 742 F.2d 1081, 1085 (7th Cir. 1984). Under this extremely narrow interpretation, any policies that place women and men into separate classes violate Title VII. However, where either of the two classes would include both men and women, such as “sex plus” policies distinguishing between pregnant persons (which would only include women) and non-pregnant persons (which would include both men and women), there would be no violation. See, e.g., *Gen. Elec. Co. v. Gilbert (Gilbert II)*, 429 U.S. 125, 125 (1976) (holding that “disparity in treatment between pregnancy-related and other disabilities was not sex discrimination”).

58. *Guidelines on Discrimination Because of Sex*, 37 Fed. Reg. 6835, 6837 (Apr. 5, 1972) (codified at 29 C.F.R. pt. 1604).

59. *Comm’n’s Workers of Am. v. Am. Tel. & Tel. Co.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975); *Gilbert v. Gen. Elec. Co. (Gilbert I)*, 519 F.2d 661 (4th Cir. 1975); *Satty v. Nashville Gas Co.*, 522 F.2d 850 (6th Cir. 1975); *Hutchison v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975).

60. *Geduldig v. Aiello*, 417 U.S. 484, 500 (1974) (Brennan, J., dissenting).

61. *Hutchison*, 519 F.2d at 965 (quoting *Sprogis v. United Air Lines, Inc. (Sprogis II)*, 444 F.2d 1194, 1198 (7th Cir. 1971)).

In 1976, this conventional wisdom came to an abrupt end in *General Electric Company v. Gilbert* (*Gilbert II*).<sup>62</sup> In *Gilbert II*, employees of General Electric were guaranteed up to twenty-six weeks of leave under the company insurance plan.<sup>63</sup> However, pregnancy was not considered a "disability" under the plan and when Gilbert, and other coworkers, requested leave for their pregnancy, they were denied.<sup>64</sup> Gilbert sued and was successful in both of the lower courts.<sup>65</sup> Writing for the Supreme Court, Justice Rehnquist adopted the narrow anti-classification model, holding that Title VII is violated only when the effect of a classification is to "discriminat[e] against the members of one sex or the other."<sup>66</sup> Turning to the case at hand, he found it indisputable that "[t]he fiscal and actuarial benefits of the program . . . accrue to members of both sexes."<sup>67</sup> Accordingly, Justice Rehnquist concluded, "[a]s there is no proof that the package is in fact worth more to men than to women, it is impossible to find any gender-based discriminatory effect."<sup>68</sup> In *Gilbert II*, the Supreme Court not only adopted the relatively new anti-classification approach, but also argued that they were bound by a long history of judicial construction to adhere to it.<sup>69</sup> Whether inadvertently or purposefully, the Court ignored a decade-long public discourse in which both sides assumed that the Civil Rights Act was about gender roles, and then summarily reversed a decade-long progression in which the public and policy-makers determined that reliance on these gender roles in the workplace was unlawful.

*Gilbert II* did not go unnoticed, and members of Congress quickly took to the floor to denounce the Court.<sup>70</sup> Congressman Paul Tsongas responded by admonishing *Gilbert II* as "a function of sex bias in the law."<sup>71</sup> He called for the passage of the Pregnancy Discrimination Act (PDA) as a means of putting an end to a system that "forces women to choose between family and

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62. 429 U.S. 125 (1976).

63. *Id.* at 128.

64. *Id.* at 129.

65. See *Gilbert v. Gen. Elec. Co. (Gilbert I)*, 519 F.2d 661, 663 (4th Cir. 1975).

66. *Gilbert II*, 429 U.S. at 136-37.

67. *Id.* at 138 (quoting *Geduldig v. Aiello*, 417 U.S. 484, 497 n.20 (1974)).

68. *Gilbert II*, 429 U.S. at 138.

69. Professor Cary Franklin takes the *Gilbert II* Court to task, arguing that they "invented" this "long tradition" to support their narrow view of the sex discrimination provision. See Franklin, *supra* note 12, at 1363-66.

70. See 124 CONG. REC. 21,434 (1978).

71. *Id.* at 21,442 (statement of Rep. Tsongas).

career.”<sup>72</sup> The PDA passed both houses of Congress with overwhelming majorities,<sup>73</sup> and it was clear that Congress had reversed not only the holding in *Gilbert II*, but also the reasoning applied by the Court.<sup>74</sup> Unfortunately, despite Congress’s explicit rebuke, *Gilbert II* continues to exert often-controlling influence on sex discrimination law.<sup>75</sup>

### 3. The Courts Reject “Transsexualism” as a Protected Class Under Title VII

The first transgender discrimination cases arose just as the anti-classification model was taking hold in the federal judiciary.<sup>76</sup> The courts of the era relied primarily on two justifications in holding, without exception, that transgender discrimination was not sex discrimination: (1) that Congress’s silence on the matter was proof of Congressional intent to exclude transgender plaintiffs; and (2) that sex discrimination was limited to classifications bisecting all men and all women.<sup>77</sup> The Ninth Circuit was the first to tackle this issue, just one year after the Supreme Court’s sweeping decree in *Gilbert II*. In *Holloway v. Arthur Anderson*, the plaintiff was terminated from her job shortly after informing her supervisor of her intent to transition from male to female.<sup>78</sup> The Ninth Circuit found that the “clear intent” of

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72. *Id.* The House Committee on Education and Labor struck a similar chord, stating that women being forced to leave the labor market when they became pregnant was at the “root of the discriminatory practices which keep women in low-paying and dead-end jobs.” H.R. REP. NO. 95-948, at 149 (1978).

73. The bill passed the Senate by a vote of seventy-five to eleven. 123 CONG. REC. 29,664 (1977). The bill passed the House by a vote of 376 to 43. 124 CONG. REC. 21,450 (1978).

74. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (“When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert II* decision.”). Although the legacy of *Gilbert II* remains a persistent controversy, it is clear that the Court has fully embraced the prohibition on pregnancy discrimination. In fact, the Court has gone so far as to permit preference *in favor of pregnancy*, which is a complete reversal of their prior position. See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272 (1987).

75. See, e.g., *Derungs v. Wal-Mart Stores, Inc.*, 141 F.2d 884, 889–90 (S.D. Ohio 2000) (relying exclusively on *Gilbert II* and concluding that a ban on breastfeeding was not sex discrimination).

76. See, e.g., *Elec. Co. v. Gilbert (Gilbert II)*, 429 U.S. 125 (1976). While not the first transgender discrimination case decided by the Court, *Gilbert II* was among the earliest of these cases, and it remains the quintessential anti-classification case in this field.

77. See *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 659 (9th Cir. 1977); *Ulane v. E. Airline, Inc. (Ulane II)*, 742 F.2d 1081, 1082 (7th Cir. 1984).

78. 566 F.2d at 661.

Title VII was to remedy the "economic deprivation of women as a class" and that "Congress had only the traditional notions of 'sex' in mind."<sup>79</sup> Accordingly, the court declined to extend protection to "transsexuals."<sup>80</sup>

In 1984, the Seventh Circuit further explained *Holloway's* "traditional notion of sex" in *Ulane v. Eastern Airlines*.<sup>81</sup> Kenneth Ulane, a decorated veteran, began flying for Eastern Airlines in 1968.<sup>82</sup> In 1980, Ulane underwent surgery to become a woman, after which her employment with the airline was terminated.<sup>83</sup> The district court found that Ulane could state a claim for sex discrimination.<sup>84</sup> Judge Grady wrote, "sex is not a cut-and-dried matter of chromosomes," but involves society's perception of the individual.<sup>85</sup> The Seventh Circuit rejected Judge Grady's nuanced opinion and reversed, holding that "sex" should be given its "ordinary, common meaning," implying that Title VII is limited to discrimination "against women because they are women and against men because they are men."<sup>86</sup> The court found support for this conclusion in the "dearth of legislative history" and the fact that Congress had attempted and failed to amend Title VII to include "affectional or sexual orientation."<sup>87</sup> Accordingly, the court

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79. *Id.* at 662.

80. *Id.* at 664. Judge Goodwin objected to the panel's treatment of "transsexuals" as though they were genderless. Goodwin stated:

Had the employer waited and discharged the plaintiff as a postsurgical female because she had changed her sex, I suggest that the discharge would have to be classified as one based upon sex. I fail to see any valid Title VII purpose to be served by holding that a discharge while an employee is in surgery, or a few days before surgery, is not as much a discharge by reason of sex.

*Id.* (Goodwin, J., dissenting).

81. *Ulane II*, 742 F.2d at 1086.

82. *Id.* at 1082.

83. *Id.* at 1083–84.

84. *Id.* at 1084.

85. *Ulane v. E. Airlines, Inc. (Ulane I)*, 581 F. Supp. 821, 825 (N.D. Ill. 1983). Judge Grady's prophetic decision has enjoyed something of a renaissance in recent years. Both commentators and judges have looked to that decision, rather than the majority of decisions in this and other early transgender cases, as instructive on the proper interpretation of sex discrimination. See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) (citing *Ulane I*, 581 F. Supp. 821, 825 (N.D. Ill. 1983) ("[I]t 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.'").

86. *Ulane II*, 742 F.2d at 1085.

87. *Id.*

found that Ulane was terminated not because of her sex but because she was a “transsexual.”<sup>88</sup>

Before the 1990s, not a single court found transgender plaintiffs protected under Title VII or similar state laws.<sup>89</sup> However, the anti-classification model suffered significant erosion following *Gilbert II*.<sup>90</sup> Over time the court opened other avenues for victims of workplace discrimination. In the third wave of expansion, plaintiffs found the courts more willing to adopt the anti-sex-stereotyping philosophy and recognize that “sex” and “gender” are broad terms that apply to a wide range of discrimination.<sup>91</sup> With the resurgence of the anti-sex-stereotyping philosophy, Title VII protection was finally extended to transgender plaintiffs at the turn of the century.<sup>92</sup>

88. *Id.* at 1087.

89. See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that Title VII’s ban on sex discrimination does not encompass discrimination based on “transsexualism”); *Voyles v. Ralph K. Davis Med. Ctr.*, 403 F. Supp. 456, 457 (N.D. Cal. 1975) (holding that employment discrimination based on “transsexualism” is not covered under Civil Rights Act protection); *Sommers v. Iowa Civil Rights Comm’n*, 337 N.W.2d 470, 474 (Iowa 1983) (holding that employment discrimination on basis of “transsexualism” is not banned under the Iowa Civil Rights Act); *Powell v. Read’s, Inc.*, 436 F. Supp. 369, 371 (D. Md. 1977) (holding that Title VII does not touch discrimination against “transsexuals”); *Grossman v. Bernards Twp. Bd. of Educ.*, 11 Fair Emp. Prac. Cas. 1196, 1199 (D.N.J. 1975) (dismissing school teacher’s sex discrimination claim on the grounds that termination from her teaching position on account of her gender reassignment surgery was not based on sex); *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177–78 (E.D. Pa. 1987) (holding discrimination originating from gender reassignment surgery does not constitute sex discrimination under the Pennsylvania Human Relations Act); *Terry v. EEOC*, 35 Fair Emp. Prac. Cas. 1395, 1397 (E.D. Wisc. 1980) (concluding that Title VII and the U.S. Constitution do not protect males who dress or act as females and vice versa).

90. See 124 CONG. REC. 21,434, 21,439–42 (1978) (statement of Rep. Tsongas); 124 CONG. REC. 21,450, 21,452 (1978); 123 CONG. REC. 29,664, 29,662–64 (1977); see also *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (disapproving of the *Gilbert II* Court’s narrow interpretation of the term “sex” in Title VII).

91. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (finding a hostile environment sexual harassment claim is a class of sexual discrimination covered under Title VII); *Rogers v. EEOC*, 454 F.2d 234, 241 (5th Cir. 1971) (concluding that the EEOC “should be granted access to information concerning the petitioners’ patient applications” and remanding for further proceedings); *Barnes v. Costle*, 561 F.2d 983, 990–01 (D.C. Cir. 1977) (finding *quid pro quo* discrimination prohibited under Title VII).

92. The first case in which a circuit court recognized transgender discrimination as sex discrimination was *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000).

*C. The Third Wave: the Anti-Sex-Stereotyping Philosophy  
Re-Emerges to Protect Women Who Swear & Men Who  
Wear Makeup*

Following *Gilbert II*, the anti-classification model of discrimination exerted a strong influence on Title VII law. Although it still serves as a baseline for anti-discrimination cases, the court has slowly expanded the scope of discrimination beyond purely biological classifications.<sup>93</sup> In the decade following the passage of the PDA, the anti-sex-stereotyping model of discrimination re-emerged as the Court found objectionable two forms of sexual harassment and the use of sex-stereotyping. These developments gave rise to some level of protections for gender non-conforming persons.

1. Applying the Anti-Sex-Stereotyping Philosophy to  
Protect Gender Non-Conforming Women in the  
Workplace

Over the course of a decade following *Gilbert II*, the Court recognized two forms of harassment: *quid pro quo* harassment,<sup>94</sup> where some job-related status is conditioned on acceptance of a sexual advance, and "hostile environment" harassment,<sup>95</sup> where an employer creates a work environment so "heavily charged" with sex discrimination "as to destroy completely the emotional and psychological stability of minority group workers."<sup>96</sup> *Quid pro quo* discrimination flows naturally from the anti-classification doctrine. In *Barnes v. Costle*, an Environmental Protection Agency employee was terminated when she refused her supervisor's sexual advances.<sup>97</sup> The court initially seemed to apply the anti-classification model, stating, "her job was conditioned upon submission to sexual relations[,] an exaction which the supervisor would not have sought from any male."<sup>98</sup> However, the court then departed from this narrow view by observing, "the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the

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93. See *Barnes*, 561 F.2d at 994; *Meritor Sav. Bank*, 477 U.S. at 67.

94. See *Barnes*, 561 F.2d at 994.

95. See *Meritor Sav. Bank*, 477 U.S. at 66; see also *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982) (finding "that a hostile or offensive atmosphere created by sexual harassment can, standing alone, constitute a violation of Title VII").

96. See *Rogers*, 454 F.2d at 238.

97. 561 F.2d at 989.

98. *Id.* at 989.



contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way.”<sup>99</sup> This broader language would open the door to “hostile work environment” claims a few years later.<sup>100</sup>

Unlike *quid pro quo* discrimination, it is more difficult to justify “hostile work environment” claims by arguing that they fall along strict gender lines. In fact, sexually hostile environments often target *both* men and women who fail to conform to the “masculine” culture of the work place.<sup>101</sup> The same anti-feminine barbs, such as “bitch,” are used to attack nonconformity regardless of the person’s sex.<sup>102</sup> Thus, these claims would likely be defeated under the anti-classification model because both men and women are subjected to the anti-feminine environment and harassment. The court got around this problem by employing a race-gender analogy, a clear departure from the strict standard in *Gilbert II*. In *Meritor Savings Bank v. Vinson*, Mechelle Vinson, a bank teller, was physically fondled at work and agreed to have sexual intercourse with her supervisor for fear that she might lose her job

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99. *Id.* at 990.

100. See, e.g., *Meritor Sav. Bank*, 477 U.S. at 57 (extending the “hostile work environment” logic used in racial discrimination cases to gender discrimination cases); *Henson*, 682 F.2d at 897 (finding that sexual harassment creates a “hostile work environment” which violates Title VII).

101. Professor Ann C. McGinley observes that the culture of the workplace is one dominated by “masculinity.” Employers rely on “masculine” supervisory practices such as authoritarianism, paternalism, entrepreneurialism, informalism, and careerism that heavily favor employees who exhibit masculine characteristics, while disfavoring women, effeminate men, and sexual minorities. At the same time, employees compete with one another to prove their “masculinity” through the feminization of their supervisors and coworkers. These practices at all levels of the business structure create an environment that is inherently hostile to women, effeminate men, and sexual minorities. See Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 721–26 (2009).

102. Men and women are both harassed in the work place through the same use of vulgar language and sexualization. When applied to women it is easily recognizable as pejoratives such as “bitch,” but the same language is often used to harass men as well, suggesting that all sexual harassment is primarily an attack on real or perceived feminine characteristics. Compare *Hocevar v. Purdue Fredrick Co.*, 223 F.3d 721, 724 (8th Cir. 2000) (“[H]e constantly referred to women as ‘bitches,’ ‘fucking bitches,’ and ‘fat fucking bitches.’”), and *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 810 (11th Cir. 2010) (“Calling a female colleague a ‘bitch’ is firmly rooted in gender. It is humiliating and degrading based on sex.”), with *James v. Platte River Steel Co.*, 113 F. App’x 864, 865 (10th Cir. 2004) (“Groth’s conduct included . . . calling [James] his ‘bitch,’ and making obscene and vulgar statement[s] with sexual connotations.”).

if she refused.<sup>103</sup> The court analogized “hostile environment” claims under race discrimination, which were already widely accepted.<sup>104</sup> The court reasoned, “[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality.”<sup>105</sup> This language re-opened the door to the anti-sex-stereotyping principles that existed before *Gilbert II*.

The Court finally embraced the anti-sex-stereotyping philosophy in *Price Waterhouse v. Hopkins*, when the Court recognized a cause of action for discrimination based on “sex stereotypes.”<sup>106</sup> *Price Waterhouse* involved a female associate at a large accounting firm who was denied a partnership because of her sex.<sup>107</sup> By all accounts, Hopkins was one of the best associates at the firm, however, when it came time to be evaluated for partner, a number of partners commented that she needed a “course at charm school” and that she was “a lady using foul language.”<sup>108</sup> When it came time to inform her of why she was denied a partnership, she was told she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her

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103. *Meritor Sav. Bank*, 477 U.S. at 60. The district court concluded that there was no sexual harassment, and thus no sex discrimination. *Vinson v. Taylor* (*Vinson I*), No. 78-1793, 1980 WL 100, at \*7 (D.D.C. Feb. 26, 1980). On appeal the D.C. Circuit ordered a remand so the district court could review previously disregarded evidence. *Vinson v. Taylor* (*Vinson II*), 753 F.2d 141, 152 (D.C. Cir. 1985).

104. See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); *Firefighters Inst. for Racial Equal. v. City of St. Louis*, 549 F.2d 506, 514–15 (8th Cir. 1977).

105. See *Meritor Sav. Bank*, 477 U.S. at 67 (citing *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (reaffirming and clarifying the “hostile environment” standard).

106. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). Judge Posner questions whether *Price Waterhouse* actually created a separate cause of action or whether the Court intended for sex-stereotypes to serve merely as evidence of sex discrimination. *Hamm v. Weyauwega Milk Prod., Inc.*, 332 F.3d 1058, 1066–67 (7th Cir. 2003) (Posner, J., concurring). Most of the courts reviewing transgender discrimination, however, have treated sex-stereotyping as a separate cause of action. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination based on gender non-conformity constitutes sex-based discrimination); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009) (holding that “it 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.”).

107. *Price Waterhouse*, 490 U.S. at 234.

108. *Id.* at 235.

hair styled, and wear jewelry.”<sup>109</sup> After quoting Title VII the Court concluded, “we take these words to mean that gender must be irrelevant to employment decisions.”<sup>110</sup> The Court continued, “when, therefore, an employer considers both gender and legitimate factors at the time of making a decision, that decision was ‘because of’ sex . . . .”<sup>111</sup> In so doing, the Court set aside the anti-classification model and adopted a broad view that outlawed all uses of sex-stereotyping, even when it does not categorize people into male and female groups. Relying on this new understanding, the Court found, “in the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”<sup>112</sup> The Court continued, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.”<sup>113</sup> *Price Waterhouse* may represent a philosophical return to the anti-sex-stereotyping rationale of the New Feminists.<sup>114</sup> At the very least, however, it is a significant departure from the anti-classification model.

## 2. Applying the Anti-Sex-Stereotyping Philosophy to Protect Gender Non-Conforming Men in the Workplace

In the ten years immediately following *Price Waterhouse*, a second wave of transgender discrimination cases came before the

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109. *Id.* The United States District Court for the District of Columbia found other legitimate, non-discriminatory reasons for *Price Waterhouse's* partnership decision, but concluded that it still constituted sex discrimination unless *Price Waterhouse* could show through clear and convincing evidence that they would have made the same decision in the absence of the discriminatory reasons. *Hopkins v. Price Waterhouse (Hopkins I)*, 618 F. Supp. 1109, 1121 (D.D.C. 1985). The Court of Appeals affirmed the district court's finding of liability, but reversed its decision as to proper relief and remanded. *Hopkins v. Price Waterhouse (Hopkins II)*, 825 F.2d 458, 461 (D.C. Cir. 1987).

110. *Price Waterhouse*, 490 U.S. at 240.

111. *Id.* at 241.

112. *Id.* at 250.

113. *Id.* at 251.

114. The lower courts have applied *Price Waterhouse* in a number of recent decisions targeting policies that unfairly prohibit mothers from finding work. See *Chadwich v. Wellpoint, Inc.*, 561 F.3d 38, 44–48 (1st Cir. 2009) (concluding that a woman who was denied a promotion because she had three children could make a sex-stereotyping claim under Title VII); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (concluding that “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive”).

courts. Some courts initially ignored the new precedent and continued to mechanically apply *Holloway* and *Ulane II*.<sup>115</sup> Other courts acknowledged *Price Waterhouse*, but expressed reservations about departing from what was at that point an unbroken chain of cases holding against transgender plaintiffs.<sup>116</sup> However, a few brave state courts began to interpret state nondiscrimination laws, often analogous to Title VII, more expansively in order to protect transgender plaintiffs.<sup>117</sup>

The first major shift in federal court interpretation of sex discrimination came in *Schwenk v. Hartford*, where the Ninth Circuit held that a transgender plaintiff could state a claim for sex discrimination under the Gender Motivated Violence Act (GMVA).<sup>118</sup> Crystal Schwenk, a transgender woman, was sexually harassed and assaulted while incarcerated at an all-male state penitentiary in Washington state.<sup>119</sup> Judge Reinhart, writing for the panel, began by recognizing that *Holloway* was no longer good law: "[t]he initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."<sup>120</sup> Freed from the constraints of *Holloway*, the court applied *Price Waterhouse*'s sex-stereotyping rationale: "[h]ere . . . the perpetrator's actions stem from the fact that he

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115. See, e.g., *Dobre v. Nat'l R.R. Passenger Corp.*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (holding that an employee is not protected under Title VII for discrimination on the basis of her "transsexualism"); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (holding the District of Columbia Human Rights Act does not protect an employee discharged on the basis of one's "transsexuality"); *James v. Ranch Mart Hardware, Inc.*, 881 F.Supp. 478, 480–82 (D. Kan. 1995) (finding a plaintiff "cannot state a claim for discrimination based upon "transsexualism" because employment discrimination based upon "transsexualism" is not prohibited by Title VII").

116. See, e.g., *Broadus v. State Farm Ins. Co.*, No. 98–4254CVCSOWECF, 2000 WL 1585257, at \*4 (W.D. Mo. Oct. 11, 2000) (finding that "it is unclear, however, whether a transsexual is protected from sex discrimination and sexual harassment under Title VII").

117. See, e.g., *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. App. Div. 1995) (finding "transsexuals are protected against discrimination under the provisions of the [New York City] Administrative Code"); *Rentos v. Oce-Office Sys.*, No. 95 Civ. 7908 LAP, 1996 WL 737215, at \*8–\*9 (S.D.N.Y. Dec. 24, 1996) (citing *Maffei*, 626 N.Y.S.2d 391, *supra*) (finding that New York Human Rights Law and New York City Law protected "transsexuals" from discrimination); *Enriquez v. W. Jersey Health Sys.*, 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001) (concluding that "sex discrimination under the [New Jersey Law Against Discrimination] includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman").

118. 204 F.3d 1187, 1199–200 (9th Cir. 2000).

119. *Id.* at 1193–94.

120. *Id.* at 1201.

believed that the victim was a man who ‘failed to act like’ one.”<sup>121</sup> The sex-stereotyping rationale has served as the basis for expanding the definition of “sex discrimination” to transgender plaintiffs under other statutes and constitutional provisions as well.<sup>122</sup>

In 2004, the Sixth Circuit extended this logic to Title VII and became the first federal appellate court to hold that transgender plaintiffs are protected under Title VII: in *Smith v. City of Salem*, Smith, a lieutenant in the Fire Department, drew the ire of her co-workers when she first began dressing as a woman at the direction of her doctor.<sup>123</sup> When she complained to her supervisors, she was

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121. *Id.* at 1202. The court supported its conclusion with the undisputed evidence that the harassment began only after Mitchell became aware that Schwenk identified as a female, and that Mitchell sought to bolster that identification by bringing Schwenk “girl stuff.” *Id.* Thus, the Court reasoned that Mitchell’s actions were motivated, at least in part, by Schwenk’s “assumption of a feminine rather than typically masculine appearance or demeanor.” *Id.*

122. See *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 216 (1st Cir. 2000) (applying *Price Waterhouse* to the Equal Credit Opportunity Act and finding transgender plaintiffs protected); *Glenn v. Brumby*, 663 F.3d 1312, 1318 (11th Cir. 2011) (“All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype . . . . The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause . . . .”). *Glenn* is a particularly interesting case, since the court called for heightened scrutiny. *Id.* at 1319. For a more thorough examination of the use of heightened scrutiny in *Glenn v. Brumby*, see Gwen Havlik, *Equal Protection for Transgender Employees? Analyzing the Court’s Call for More Than Rational Basis in the Glenn v. Brumby Decision*, 28 GA. ST. U. L. REV. 1315 (2012).

123. *Id.* *Smith v. City of Salem*, 378 F.3d 566, 568 (6th Cir. 2004). Smith was diagnosed with Gender Identity Disorder (GID), a requirement before a transgender person can get access to gender reassignment surgery. See Arlene Istar Lev, *Disordering Gender Identity: Gender Identity Disorder in the DSM-IV-TR*, 17 J. PSYCHOL. & HUMAN SEXUALITY 53–54 (2005) (referring to GID as an “admissions ticket” to receiving medical treatment). Four of the largest insurance companies also have strict policies requiring a GID diagnosis before they will cover the extremely expensive gender reassignment surgery, making it nearly impossible for most people to access the procedure without such a diagnosis. See Cigna HealthCare Coverage Position, CIGNA, [https://my.cigna.com/teamsite/health/provider/medical/procedural/coverage\\_positions/medical/mm\\_0266\\_coveragepositioncriteria\\_gender\\_reassignment\\_surgery.pdf](https://my.cigna.com/teamsite/health/provider/medical/procedural/coverage_positions/medical/mm_0266_coveragepositioncriteria_gender_reassignment_surgery.pdf) (last updated Dec. 15, 2006); Clinical Policy Bulletin: Gender Reassignment Surgery, AETNA, [http://www.aetna.com/cpb/medical/data/600\\_699/0615.html](http://www.aetna.com/cpb/medical/data/600_699/0615.html) (last updated Oct. 15, 2013); Clinical UM Guideline: Gender Reassignment Surgery, ANTHEM, [http://www.anthem.com/medicalpolicies/guidelines/gl\\_pw\\_a051166.htm](http://www.anthem.com/medicalpolicies/guidelines/gl_pw_a051166.htm) (last updated June 8, 2012); Gender Identity Disorder Treatment (Sex Transformation), UNITEDHEALTHCARE, [https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Policies%20and%20Protocols/Medical%20Policies/Medical%20Policies/Gender\\_Identi](https://www.unitedhealthcareonline.com/ccmcontent/ProviderII/UHC/en-US/Assets/ProviderStaticFiles/ProviderStaticFilesPdf/Tools%20and%20Resources/Policies%20and%20Protocols/Medical%20Policies/Medical%20Policies/Gender_Identi)

forced to undergo three humiliating psychological examinations in the hopes that she would resign.<sup>124</sup> Instead, she filed a claim with the EEOC.<sup>125</sup> The Sixth Circuit chastised the district court for relying on pre-*Price Waterhouse* cases stating, “the approach in *Holloway*, *Sommers*, and *Ulane* [II] . . . has been eviscerated by *Price Waterhouse*.”<sup>126</sup> The court then analogized the discrimination against Ann Hopkins, asserting:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.<sup>127</sup>

Therefore, the court concluded that discrimination against transgender persons was indistinguishable from the discrimination against Ann Hopkins.<sup>128</sup> Both the Ninth and Sixth Circuits have reaffirmed their positions in subsequent decisions,<sup>129</sup> and a number of district courts have also recognized *Price Waterhouse* as creating a viable path for transgender plaintiffs.<sup>130</sup>

ty\_Disorder\_CD.pdf (last updated Apr. 1, 2013). A few courts have come close to suggesting that a GID diagnosis might also be necessary to prove transgender status for Title VII purposes. However, this view has been criticized, and no court has explicitly required a GID diagnosis in order to prove transgender status. See, e.g., Jackie Barber, Glenn v. Brumby: *Extending Protection from Sex-Based Discrimination to Transsexuals in the Eleventh Circuit*, 21 TUL. J.L. & SEXUALITY 169, 176–77 (2012).

124. *Smith*, 378 F.3d at 568–69.

125. *Id.* at 569.

126. *Id.* at 573.

127. *Id.* at 574.

128. *Id.* at 575 (holding that “discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman”).

129. See *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 F. App’x 492, 493 (9th Cir. 2009) (finding that “transgender individuals may state viable sex discrimination claims on the theory that the perpetrator was motivated by the victim’s real or perceived non-conformance to socially-constructed gender norms”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005) (finding that “a claim for sex discrimination under Title VII, however, can properly lie where the claim is based on ‘sexual stereotypes’”). But see James G. O’Keefe, *Pyrrhic Victory: Smith v. City of Salem and the Title VII Rights of Transsexuals*, 56 DEPAUL L. REV. 1101, 1111–27 (2007) (criticizing *Smith* and predicting that more similar decisions would cause Congress to amend Title VII to explicitly exclude “transsexuals”).

130. See *Doe v. United Consumer Fin. Servs., Inc.*, No. 1:01 CV 1112, 2001 WL 34350174, at \*4 (N.D. Ohio Nov. 9, 2001); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899, at \*4 (E.D. Wash. June 23, 2005); *Mitchell v. Axcan*

### 3. Coming Full Circle: Gender-Nonconformity as Sex Discrimination Per Se

Sex-stereotyping may not be the only path for transgender plaintiffs. In *Schroer v. Billington*, the District Court for the District of Columbia suggested that transgender discrimination might be sex discrimination per se.<sup>131</sup> Diane Schroer applied for and was hired as a Terrorism Research Analyst while still presenting as a man.<sup>132</sup> When she informed her supervisor of her intention to transition, her offer was promptly rescinded.<sup>133</sup> Judge Robertson rejected the application of *Price Waterhouse* in *Smith*, arguing, “[p]rotection against sex stereotyping is different, not in degree, but in kind, from protecting men, whether effeminate or not, who seek to present themselves as women, or women, whether masculine or not, who present themselves as men.”<sup>134</sup> According to the court, Schroer was seeking recognition not as a feminine man, but as a traditional woman.<sup>135</sup> Thus, since her goal was not to transgress stereotypes, but to adopt an entirely new gender and conform to its stereotypes, *Price Waterhouse* did not apply.<sup>136</sup> However, the court held that this same logic suggests that Schroer should have a claim for sex discrimination per se, since her offer was rescinded solely because of her gender identity, which the court defined as the “real variations” in how biological sex and social concepts of gender, both protected by Title VII already, interact together.<sup>137</sup> This, the court reasoned, was per se discrimination because of sex.<sup>138</sup>

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Scandipharm, Inc., No. Civ. A. 05-243, 2006 WL 456173, at \*1–\*2 (W.D. Pa. Feb. 17, 2006).

131. 424 F. Supp. 2d 203, 212 (D.D.C. 2006).

132. *Id.* at 206. There was no question that Schroer was the most qualified applicant for the position. As a twenty-five-year veteran, she spent her last seven years in Special Operations Command coordinating special operations in the War on Terror. After her military service, she became an analyst for a consulting firm working with the National Guard on infrastructure security. *Id.* at 205–06.

133. *Id.* at 206.

134. *Id.* at 210.

135. *Id.* at 211.

136. *Id.*

137. *Id.* at 213. The court also makes the case for strong protection of intersex individuals, arguing that “[d]iscrimination against such women (defined in terms of their sexual identity) because they have testes and XY chromosomes, or against any other person because of an intersexed condition, cannot be anything other than ‘literal[]’ discrimination ‘because of . . . sex.’” *Id.* at 213 n.5 (citing *Ulane I*, 581 F. Supp. 821, 825 (N.D. Ill. 1984)); see also 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, 118 (2010) (arguing

The per se discrimination argument received a boost in 2012, when the EEOC released a unanimous decision by the commissioners that transgender discrimination was per se sex discrimination. In *Macy v. Holder*, Mia Macy's offer for employment with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) was rescinded when she informed her employer that she was transgender.<sup>139</sup> Macy filed a complaint, but the ATF split the claims into two separate claims, one for sex and another for transgender status.<sup>140</sup> Under agency policy the sex discrimination claim would be adjudicated by the EEOC, and the transgender claim would be adjudicated by the ATF.<sup>141</sup> Macy appealed the claim identification to the Agency itself for resolution, arguing that the transgender claim should be classified as a sex discrimination claim.<sup>142</sup> The Agency accepted the appeal and unanimously reversed the ATF's classification.<sup>143</sup> The Agency rejected the idea that "sex stereotyping" was a distinct cause of action, rather an employer's reliance on stereotypes was simply evidence that "the employer actually relied on gender . . . in making its decision."<sup>144</sup> Since any reliance on gender was prohibited by Title VII, the Agency had little trouble finding the decision to change one's gender protected.<sup>145</sup> The Agency analogized gender "conversion" to religious conversion: "[i]magine that an employee is fired because she converts from Christianity to Judaism . . . . Discrimination 'because of religion' easily

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that intersex individuals should be protected, and that Title VII should be reinterpreted as prohibiting discrimination "because of perceived sex.").

138. *Schroer*, 424 F. Supp. 2d at 212–13. The "per se approach" received mixed reviews from commentators. Compare Illona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 563 (2007) (asserting that it is "morally and logically necessary for the courts to . . . [conclude] that transgender discrimination is per se sex discrimination."), with Katrina McCann, *Transsexuals and Title VII: Proposing an Interpretation of Schroer v. Billington*, 25 WIS. J. L. GENDER & SOC'Y 163, 179–80 (2010) (arguing that the per se approach in *Schroer* was ambiguous and that sex stereotyping should remain a viable alternative to prove sex discrimination).

139. Appeal No. 0120120821, 2012 WL 1435995, at \*2–\*3 (E.E.O.C. Apr. 12, 2012).

140. *Id.*

141. *Id.* The ATF's policy offers far fewer rights and remedies than the EEOC, and the ATF's decisions cannot be appealed to the EEOC. *Id.* This makes a hearing before the EEOC's administrative law judges preferable to adjudication within the ATF. *Id.*

142. *Id.* at \*3.

143. *Id.* at \*4.

144. *Id.* at \*7 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

145. *Macy*, 2012 WL 1435995, at \*7.



encompasses discrimination because of a change in religion.”<sup>146</sup> The Agency found no reason to distinguish between the two situations and found that transgender discrimination constituted discrimination “because of sex.”<sup>147</sup>

A few courts have continued to adhere to *Ulane II*, despite the expansion of the law. In *Oiler v. Winn-Dixie Louisiana*, a federal district court in Louisiana found *Price Waterhouse* distinguishable because the transgender plaintiff was not exhibiting stereotypical behavior, but rather was “pretend[ing] to be a woman.”<sup>148</sup> In *Etsitty v. Utah Transit Authority (Etsitty I)*, a federal district court in Utah similarly held that “[t]here is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman.”<sup>149</sup> Perhaps most startling is *Sweet v. Mulberry Lutheran Home*, where a federal district court in Indiana concluded that *Ulane II* was still good law and thus prohibited the transgender plaintiff’s claim, because other courts have refused to apply *Price Waterhouse*.<sup>150</sup>

#### 4. The Courts Continue to Police the Boundaries of Gendered Bathrooms

Although *Price Waterhouse* has expanded the definition of sex discrimination, transgender plaintiffs must still contend with the “legitimate business reasons” prong of the *McDonnell Douglas* test.<sup>151</sup> One area where businesses have found success using this defense is gendered bathrooms. This was the issue in the Tenth Circuit case *Etsitty v. Utah Transit Authority (Etsitty II)*.<sup>152</sup> Krystal Etsitty, a bus operator for the Utah Transit Authority (UTA), was terminated shortly after she began presenting as a

146. *Id.* at 8 (citing *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

147. *Macy*, 2012 WL 1435995, at \*8.

148. *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*5 (E.D. La. Sept. 16, 2002).

149. *Etsitty v. Utah Transit Auth. (Etsitty I)*, No. 2:04CV616 DS, 2005 WL 1505610, at \*5 (D. Utah June 24, 2005).

150. No. IP02-0320-C-H/K, 2003 WL 21525058, at \*3 (S.D. Ind. June 17, 2003).

151. Sex discrimination claims fall under the *McDonnell Douglas* burden shifting analysis. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under this approach, a court first looks to whether the employee has made a prima facie case of discrimination. *See id.* at 802-05. When the plaintiff successfully makes such a showing, the employer may still show that it had a “legitimate business reason” for taking the action. *See id.* If the employer satisfies this second prong, it is fatal to a discrimination claim unless the plaintiff can show that the proffered reason is a pretext for an unlawfully discriminatory decision. *See id.*

152. 502 F.3d 1215 (10th Cir. 2007).

woman, because the UTA feared that they might be held liable for her use of public restrooms.<sup>153</sup> The district court found that she could not state a claim for sex discrimination.<sup>154</sup> However, the Tenth Circuit ultimately determined that it “need not decide” that issue.<sup>155</sup> Instead, the court assumed that Etsitty had stated a claim and turned to the second prong of the *McDonnell Douglas* test.<sup>156</sup> On this prong, the court concluded that “an employer’s requirement that employees use restrooms matching their biological sex does not expose biological males to disadvantageous terms and does not discriminate against employees who fail to conform to gender stereotypes.”<sup>157</sup> Thus, the court found the UTA’s proffered business reason—that the agency feared lawsuits from passengers—was not pretext for discrimination on the basis of sex.<sup>158</sup> Thus far, no court has ruled otherwise.<sup>159</sup>

### III. The Transgender Consensus: Why a Trans-Inclusive Paradigm Is the Only Interpretation that Makes Sense

The conventional wisdom for many years has been that there is a deep circuit split on the question of whether transgender plaintiffs are entitled to protection under Title VII’s sex discrimination prohibition.<sup>160</sup> On one side are the cases of *Schwenk*, *Smith*, and *Schroer*, and on the other are *Ulane II* and

153. *Id.* at 1219.

154. *Id.* at 1218.

155. *Id.* at 1220–24.

156. *Id.* at 1224.

157. *Id.* at 1225.

158. *Id.*

159. See *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000–02 (N.D. Ohio 2003) (holding that an employer’s rule that a pre-operative transgender woman may only use the men’s restroom did not violate the ADA and was not sex stereotyping discrimination under Title VII); see also *Cruzan v. Special Sch. Dist. No. 1*, 294 F.3d 981, 984 (8th Cir. 2002) (interpreting the Minnesota Human Rights Act to mean that allowing of a transgender woman to use the women’s restroom does not constitute sexual harassment toward other female employees).

160. See, e.g., Marvin Dunson III, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 481 (2001) (“This is too rosy a picture, of course, for if *Manhart* and *Sprogis II* can be overlooked, so too can *Schwenk*.”); Ems, *supra* note 4, at 1330 (“[M]ore than thirty states currently lack antidiscrimination legislation for transgenders in the employment arena . . . . [T]he federal government provides little more protection . . . . [C]ircuits are split as to whether Title VII protects transgender plaintiffs.”); Shannon H. Tan, *When Steve is Fired for Becoming Susan: Why Courts and Legislators Need to Protect Transgender Employees from Discrimination*, 37 STETSON L. REV. 579, 581 (2008) (“[T]he circuits are split over whether Title VII protects transgender plaintiffs.”).

*Etsitty II*. Five years ago caution may have been appropriate, but today transgender individuals are protected from discrimination in twenty-nine states, representing nearly two hundred million Americans,<sup>161</sup> the EEOC<sup>162</sup> and the federal courts are generally friendly to transgender claims,<sup>163</sup> and the anti-classification model, which for so long was used to deny transgender plaintiffs their day in court, has fallen out of favor.<sup>164</sup> In this positive climate, there is reason to challenge the conventional wisdom. In fact, adopting a new trans-inclusive paradigm is the only reasonable way to account for these advancements in Title VII jurisprudence. The following section argues that the trans-inclusive cases are the logical extension of sex discrimination jurisprudence, while the non-inclusive cases, *Ulane II* and *Etsitty II*, cannot be squared with the development of the law. If there is a disagreement among the circuit courts today, it is not between the trans-inclusive and non-inclusive cases, but rather within the trans-inclusive paradigm—whether transgender discrimination should be challenged as sex discrimination per se or sex-stereotyping.<sup>165</sup>

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161. See *supra* note 8 and accompanying text. According to the U.S. Census Bureau, these twenty-nine states contain approximately two hundred million residents. See U.S. Census Bureau, USA Quick Facts, U.S. DEPT OF COMMERCE, <http://quickfacts.census.gov/qfd/index.html> (last visited Sep. 27, 2012).

162. It is worth noting also that the EEOC's *Macy* decision, though not binding on the federal courts, is controlling within the Agency's own adjudicatory apparatus, which covers all of the nearly three million employees of the federal government. See *Rasmussen v. Potter*, No. 01A51123, 2005 WL 936731, at \*2 (E.E.O.C. Apr. 12, 2005).

163. See *Glenn v. Brumby*, 663 F.3d 1312, 1320 (11th Cir. 2011) (finding that transgender individuals are covered by the Equal Protection Clause's prohibition on sex discrimination, and applying heightened scrutiny); *Kastl v. Maricopa Cnty. Cmty. Coll. Dist.*, 325 Fed. App'x 492, 494 (9th Cir. 2009) (concluding that discrimination against transgender employees could constitute sex stereotyping in violation of Title VII, but concluding that safety concerns justify enforcement of gender-exclusive bathrooms); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (finding that discrimination against transgender individuals can constitute impermissible sex stereotyping under Title VII); *Smith v. City of Salem*, 378 F.3d 566, 572–73 (6th Cir. 2004) (establishing that discrimination against transgender individuals can constitute impermissible sex stereotyping under Title VII); *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000) (holding that discrimination against transgender individuals can constitute discrimination on the basis of sex under the Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187, 1200 (9th Cir. 2000) (establishing that the protections of the Gender Motivated Violence Act extend to transgender individuals).

164. See, e.g., *Smith*, 378 F.3d at 574 (holding that discrimination against individuals failing to conform to gender stereotypes is sex discrimination).

165. There may also be a third option, referred to as a “constructionist approach” and discussed in *Ulane I* by Judge Grady, that the sexual binary itself is socially “constructed.” This approach might playfully be referred to as *Price Waterhouse*

A. *The Trans-Inclusive Consensus Is the Logical Extension of Sex Discrimination Jurisprudence*

The First, Sixth, Ninth, and Eleventh Circuits have held that transgender discrimination is sex discrimination.<sup>166</sup> They were joined in 2012 by a unanimous determination by the EEOC.<sup>167</sup> There are two reasons why these cases should be given controlling weight. First, *Price Waterhouse* is clearly controlling over transgender cases and commands a trans-inclusive result. Second, the court has a long history of adhering to the reasoned view of the EEOC on matters relating to sex discrimination.<sup>168</sup> These reasons, expounded upon below, counsel in favor of a trans-inclusive result and should be given substantial respect and persuasive authority.

No matter how one tries to categorize transgender discrimination, *Price Waterhouse* is controlling precedent. There are only two reasons why an employer might discriminate against transgender individuals: because they dress or act in a manner associated with the opposite gender, or because they wish to *be* a member of the opposite gender. The former situation, where an employer discriminates because of dress or behavior, is precisely the issue addressed in *Price Waterhouse*. In *Price Waterhouse* the Court condemned the employer for requiring that women conform to certain feminine stereotypes, such as wearing make up and being soft-spoken.<sup>169</sup> As the court in *Smith* recognized, if it is unlawful to require women to conform to sex stereotypes, it must be equally unlawful when applied to men.<sup>170</sup> Therefore, terminating a male employee for wearing a dress or being effeminate runs directly counter to *Price Waterhouse*.

The second situation, where an employer bases its decision on transgender identity alone, is slightly more complicated, but still

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"on steroids," since it appears to suggest that all differences in sex or gender are necessarily socially constructed "stereotypes." *Ulane v. E. Airlines, Inc. (Ulane I)* 591 F. Supp. 821, 823 (N.D. Ill. 1983). This approach has only been seriously debated in feminist scholarship, and has yet to be taken up by the courts. See Jason Lee, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 455–60 (2012). The argument has merit, but without discussion by the courts it falls outside the scope of this Note.

166. See *Glenn*, 663 F.3d at 1317; *Smith*, 378 F.3d at 574; *Rosa*, 214 F.3d at 215–16; *Schwenk*, 204 F.3d at 1202.

167. See *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

168. See Franklin, *supra* note 12, at 1314.

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

170. *Smith*, 378 F.3d at 574.

controlled by the logic of *Price Waterhouse*. Where the employer relies instead on the desire to “be” or “transition” to another gender, common sense suggests that the result should still be the same. An employer cannot terminate an employee for wanting to change her sex, without first taking the employee’s current or future sex into account. Such a decision would clearly be prohibited by *Price Waterhouse*, which held that “gender must be irrelevant.”<sup>171</sup> Even if we make the far-fetched assumption that it is the *transition*, and not the employee’s current or future sex being targeted, the District Court for the District of Columbia correctly analogized religious conversion in *Schroer*.<sup>172</sup> An employer who terminates an employee for wishing to change her religion has clearly made a decision based on religion. The same would be true for an employee who wishes to change her sex.<sup>173</sup>

The trans-inclusive decisions therefore rest on a solid foundation of legal analysis and scholarship. They should, however, hold additional persuasive authority because they are supported by the EEOC, which the courts have long looked to for reasoned analysis in sex discrimination cases.<sup>174</sup> The Supreme Court has adopted the EEOC’s view in almost every sex discrimination case to come before the Court.<sup>175</sup> Most notably, the Court adopted the EEOC’s position on sexual harassment in

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171. *Price Waterhouse*, 490 U.S. at 240.

172. *Schroer v. Billington*, 557 F. Supp. 2d 293, 306 (D.D.C. 2006) (“[D]iscrimination ‘because of religion’ easily encompasses discrimination because of a change of religion.”).

173. Even assuming that the “transition” had nothing to do with sex, identities like “transgender” or “transsexual” identify an individual with a class defined by nonconformity to sex stereotypes, and as such are so “loaded” with gender stereotypes as to be indistinguishable from them. Thus, *Price Waterhouse*’s prohibition on sex stereotypes could be triggered even when the employer makes a decision based solely on “transgender” status. See Sunish Gulati, *The Use of Gender-Loaded Identities in Sex Stereotyping Jurisprudence*, 78 N.Y.U. L. REV. 2177, 2195–96 (2003).

174. It is true that the federal courts are not bound by an EEOC decision in the same way that they would be bound by a decision of the National Labor Relations Board. See *Gen. Elec. Co. v. Gilbert (Gilbert II)*, 429 U.S. 125, 141 (1976). However, the EEOC decisions, like any agency pronouncements, “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

175. It is true, however, that the Court has been far less accepting of EEOC pronouncements in other areas of employment discrimination. See *Sutton v. United Airlines*, 527 U.S. 471, 479 (1999); *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 194 (2002). It is noteworthy, however, that these cases were also overturned by Congress. See ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008). Thus, the Court’s refusal to accept EEOC guidance has still been a dangerous enterprise.

*Meritor Savings Bank v. Vinson*.<sup>176</sup> The Court again adopted the EEOC position when it held that Title VII applied equally to men in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*.<sup>177</sup> Only once has the Court declined to follow the EEOC's lead. In *Gilbert II*, the Supreme Court dismissed the EEOC's interpretation, stating, "the 1972 guideline flatly contradicts the position which the [A]gency had enunciated at an earlier date, closer to the enactment of the governing statute."<sup>178</sup> The result of the Court's failure to respect the EEOC's interpretation was a Congressional rebuke.<sup>179</sup> Given this long history of deference and the EEOC's extensive experience in sex discrimination, it would be wise to give the commissioners' unanimous decision in *Macy* substantial consideration.

*B. Old & Out of Context: the Absurdity of Applying Ulane II and Etsitty II*

*Ulane II* and *Etsitty II* are often seen as counterweights to *Smith*, *Schwenk*, and *Schroer*; however, *Ulane II* and *Etsitty II* should not be included in the same class as the latter cases. *Ulane II* is now outdated, and, although it has yet to be explicitly overruled, its rationale has been all but eviscerated by contemporary sex discrimination jurisprudence. *Etsitty II*, on the other hand, is a recent decision; however, it does not address the same issue that trans-inclusive cases do, namely the definition of sex discrimination. Instead, *Etsitty II* addresses the separate issue of whether, notwithstanding the scope of the definition of sex, a business can have legitimate reasons for limiting bathroom access based on gender. This is a legally distinct problem that should not be conflated with the scope of sex discrimination addressed in *Smith*, *Schwenk*, and *Schroer*.

*Ulane II* should be retired, but not simply because it is a case from another era. More importantly, the theoretical

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176. 477 U.S. 57, 65 (1986).

177. 462 U.S. 667, 676 (1983).

178. *Gilbert II*, 429 U.S. at 142

179. See 42 U.S.C. § 2000(e)-2(e) (2010) (amending Title VII to prohibit pregnancy-based employment discrimination). The Justices themselves have also been critical when their colleagues have failed to give "respectful consideration" to the EEOC's guidance. See *Ricci v. DeStefano*, 557 U.S. 557, 626 (2009) (Ginsberg, J., dissenting) ("Recognizing EEOC's 'enforcement responsibility' under Title VII, we have previously accorded the Commission's position respectful consideration . . . . Yet the Court today does not so much as mention EEOC's counsel.").

underpinnings of the case have collapsed. In *Ulane II*, the Seventh Circuit relied on two arguments to justify its decision: legislative silence and the strict anti-classification model.<sup>180</sup> These justifications are no longer valid. First, the court's use of legislative intent was misplaced, since it took Congressional inaction on legislation protecting sexual orientation as dispositive evidence of Congress's view toward "transsexuals."<sup>181</sup> This argument is seriously flawed because there is a clear, well-recognized difference between homosexuality, the subject of the legislation in question, and gender identity, which was not included in national legislation until 2007.<sup>182</sup> However, even if we assume this is the correct interpretation, legislative silence has always been a dubious method of statutory interpretation.<sup>183</sup> Even the use of legislative intent itself has come under attack. Justice Scalia's textualist approach in *Oncale* demonstrates the downfall of legislative intent in sex discrimination analysis: "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."<sup>184</sup> It is hard to imagine two "evils" more intimately related than the rigid sex stereotypes applied to women and those applied to "transsexuals." As such, the textual analysis favored by the Supreme Court's most conservative members may actually favor transgender plaintiffs.<sup>185</sup>

Second, *Ulane II* rests heavily on the anti-classification view that sex discrimination is limited to discrimination against "men because they are men" or "women because they are women."<sup>186</sup> As Justice Holmes wrote, "a page of history is worth a volume of logic."<sup>187</sup> The historical perspective offered in Part II of this Note

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180. *Ulane v. E. Airlines, Inc. (Ulune II)*, 742 F.2d 1081, 1084–85 (7th Cir. 1984).

181. *Id.*; see also Richard F. Sorrow, *Naming the Grotesque Body in the "Nascent Jurisprudence of Transsexualism,"* 4 MICH. J. GENDER & L. 272, 313–14 (1997) ("[B]y equating transexualism with sexual orientation, the courts, in jurisdictions whose anti-discrimination laws do not prohibit discrimination on the basis of sexual orientation . . . ultimately deny them, along with gays and lesbians, legal protection from employment discrimination.").

182. See Valdes, *supra* note 2, at 161–64.

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

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

185. For a more thorough discussion of textualism's potential value to transgender plaintiffs, see 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, 638–49 (2009).

186. *Ulune II*, 742 F.2d at 1085.

187. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

demonstrates that Title VII was never intended to be limited by anti-classification principles, but was designed to strike at the "spectrum" of arbitrary gender roles and their corresponding social and economic limitation.<sup>188</sup> Legal scholars and judges should not limit their analysis to the debates of 1964, but should also look to the circumstances of 1972, when Title VII of the Civil Rights Act of 1964 was expanded and the anti-sex-stereotyping view had come to dominate the political scene.<sup>189</sup> It can hardly be argued that a Congress concerned with childcare, an issue consistently treated as a "sex plus" claim in court, had only the extremely narrow anti-classification view of discrimination in mind at the time. Even if the original intent of Title VII had been narrow, the subsequent amendments were clearly designed to expand it. The Supreme Court mistakenly held otherwise in *Gilbert II* and was rebuked by Congress as a result.<sup>190</sup> Further evidence that the anti-classification view should no longer sustain *Ulane II* is that sex discrimination law has grown substantially. Cases on which *Ulane II* relies heavily, such as *Holloway*, have since been overturned.<sup>191</sup> In retiring *Holloway*, the Ninth Circuit noted that *Price Waterhouse* had "eviscerated" the decision.<sup>192</sup> The demise of *Holloway* should be seen as a serious blow to *Ulane II*, and *Ulane II* should also be retired in recognition of the fact that its core principles and rationale have long been abandoned.<sup>193</sup>

*Etsitty II* is the only contemporary circuit court decision to question whether transgender discrimination implicates "sex." Although the district court decision, *Etsitty I*, does find that

188. See discussion in Part II, *supra*; see also *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (citing *Sprogis II*, 444 F.2d 1194, 1198 (7th Cir. 1971) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.")).

189. See The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972); GRAHAM, *supra* note 24, at 200-03.

190. See *General Elec. Co. v. Gilbert (Gilbert II)*, 429 U.S. 125, 135; *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983); 124 CONG. REC. 21434, 21442 (1978) (statement of Rep. Tsongas); H.R. Rep. No. 95-948, at 3 (1978); *supra* note 74 and accompanying text.

191. *Schwenk v. Hartford*, 204 F.3d 1187, 1201-02 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."); see also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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

193. See *Dunson*, *supra* note 160, at 474 ("This entire line of cases and its odd reasoning stands in stark contrast to the other Title VII cases that involve the interpretation of 'sex' outside the transgender context. These cases concluded that employment decisions based on stereotyped characteristics of men and women are unlawful under Title VII.").



transgender discrimination is not sex discrimination, the Tenth Circuit in *Etsitty II* sidestepped that issue,<sup>194</sup> instead resolving the case on the less controversial issue of gendered bathrooms.<sup>195</sup> It is somewhat disingenuous, therefore, to suggest that *Etsitty II* offers an alternative view to *Schwenk*, *Smith*, and *Schoer*. It does not. Although the Tenth Circuit does question these cases in dicta, the court comes to no firm holding on the definition issue.<sup>196</sup> *Etsitty II* is, therefore, part of a separate line of cases. Access to gendered bathrooms will certainly be an issue of incredible importance in the future and is one that deserves thorough review;<sup>197</sup> however, these decisions have rested largely on the “legitimate business reason” prong of the sex discrimination analysis, not the definition prong (the definition prong being the focus of this Note).<sup>198</sup> Accordingly, *Ulane II* and *Etsitty II* offer nothing to counter the well-reasoned analysis of *Schwenk*, *Smith*, and *Schoer*. As such, *Ulane II* and *Etsitty II* should not be viewed as part of a circuit split with the trans-inclusive cases. Instead, *Ulane II* should be retired, and *Etsitty II* should delineate a separate line of cases, leaving only the trans-inclusive ones as the consensus.

#### IV. The Road Ahead: How a Trans-Inclusive Paradigm Offer Solutions to Difficult Title VII Problems

The failure to adopt a trans-inclusive paradigm until now has had real consequences. The perception that there is a circuit split has permitted reactionary lower courts to further victimize transgender plaintiffs, forestalled reexamination of workplace discrimination against gay and lesbian plaintiffs, and added needless urgency to calls for a legislative solution. A new

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194. See *Etsitty v. Utah Transit Auth. (Etsitty II)*, 502 F.3d 1215, 1220–24 (10th Cir. 2007).

195. *Id.*

196. See *id.* at 1221–22.

197. For a discussion of this issue, see Diana Elkind, *The Constitutional Implications of Bathroom Access Based on Gender Identity: an Examination of Recent Developments Paving the Way for the Next Frontier of Equal Protection*, 9 U. PA. J. CONST. L. 895, 896–97 (2007) (urging courts to recognize denial of bathroom access as discrimination against transgender individuals and legislatures to adopt protective laws).

198. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802–05 (1973). This case uses racial discrimination (rather than sex discrimination) to illustrate the “legitimate business reason” framework: “[t]he burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee’s rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire.” *Id.* at 802–03.

paradigm is needed so that the legal community can begin the arduous task of integrating transgender cases into the larger body of sex discrimination law and policy. There are two areas of discrimination law and policy in desperate need of guidance: the Title VII sexual orientation cases and the political debate surrounding ENDA.<sup>199</sup>

Hostility toward gay and lesbian plaintiffs continues to be a pervasive problem in American courts. Only the Ninth Circuit has found that sexual orientation discrimination implicates Title VII,<sup>200</sup> while the remaining circuits, even those that have supported transgender plaintiffs,<sup>201</sup> have refused to acknowledge such an expansion.<sup>202</sup> Recognizing that the courts have come to a consensus in favor of a trans-inclusive Title VII would provide helpful insights into these cases. Many of the sexual orientation cases rely on the severely discredited *Ulane II*.<sup>203</sup> Retiring *Ulane II* would have an immediate impact on these cases, allowing for a reexamination of the relationship between sex and sexual orientation just as the transgender consensus has broken down the legal conflation of sex and gender.<sup>204</sup> Recognizing that sex does not automatically coincide with a specific gender or sexual orientation is an essential part of battling the broad spectrum of sex discrimination and sex stereotyping that pervades our society and distorts the law.<sup>205</sup>

199. For a discussion of the political debate, see *supra* note 7.

200. See *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063–64 (9th Cir. 2002) (en banc); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001); see also *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1037 (N.D. Ohio 2012).

201. See *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006) (acknowledging *Smith* and *Barnes*, but concluding that those cases' logic does not apply to gay and lesbian plaintiffs).

202. See *EEOC v. Boh Bros. Constr. Co.*, 689 F.3d 458, 462 (5th Cir. 2012); *Wasek v. Arrow Energy Serv., Inc.*, 682 F.3d 463, 467–68 (6th Cir. 2012); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131 (10th Cir. 2005); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Spearman v. Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996).

203. See, e.g., *Spearman*, 231 F.3d at 1084; see also *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.").

204. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 16 (1995) (explaining that "there is no such thing as discrimination 'based' solely or exclusively on sexual orientation" and that "discrimination deemed based on sexual orientation also and necessarily is based on sex or on gender (or on both).").

205. Some commentators argue that sexual orientation is a sex stereotype; i.e., that the expectation that men have intimate relations with women and vice versa

On the policy front, many commentators suggest that the solution to sexual orientation-based workplace discrimination lies in the passage of the ENDA.<sup>206</sup> Unfortunately, ENDA suffered an enormous setback in 2007 from which it has yet to fully recover.<sup>207</sup> In 2007, it seemed that ENDA had a chance of passing for the first time; however, opponents objected to the inclusion of gender identity.<sup>208</sup> With passage in jeopardy, LGBT leaders in the House, with the support of the Human Rights Campaign (HRC), decided to support a “compromise” bill that would only include protection for sexual orientation as a first, albeit imperfect, step toward equal employment opportunity for LGBT individuals,<sup>209</sup> however, the transgender community did not see it this way, and the “compromise” encountered enormous resistance.<sup>210</sup> The non-inclusive ENDA passed the House, but eventually died in the Senate.<sup>211</sup> Democratic leaders and the HRC quickly went into damage-control mode and modified their position promising to

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is itself socially constructed. For a full explanation of that social construct, see generally Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (2004); Olivia Szwalbnest, *Discriminating Because of “Pizzazz:” Why Discrimination Based on Sexual Orientation Evidences Sexual Discrimination Under the Sex-Stereotyping Doctrine of Title VII*, 20 TEX. J. WOMEN & L. 75 (2010).

206. See, e.g., Dunson, *supra* note 160, at 501; Ems, *supra* note 4, at 1360; Tan, *supra* note 160, at 581.

207. ENDA has cycled through many incarnations over the years, and some version of the Act (either as amendment to Title VII or as a stand-alone law) has been put forth regularly since the Civil Rights Act of 1964. For the most recent submissions, see S. 815, 113th Cong. (2013); S. 811, 112th Cong. (2011); H.R. 1397, 112th Cong. (2011); H.R. 3017, 111th Cong. (2009); H.R. 2981, 111th Cong. (2009); S. 1584, 111th Cong. (2009); H.R. 3685, 110th Cong. (2007) (causing controversy for excluding protection for “gender identity”); H.R. 2015, 110th Cong. (2007) (including, for the first time, protection for “gender identity”).

208. Gabrielle Russon, *Gay-Rights Milestone Draws Transgender Activists’ Outcry*, CHI. TRIB., Oct. 18, 2007, at C8.

209. *Id.* at C8 (quoting Rep. Barney Frank, “[y]ou protect people when you can . . . . The notion you don’t do anything until you do everything is self-defeating.”). But see Katrina C. Rose, *Where the Rubber Left the Road: the Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397 (2009) (challenging the argument that LGBT rights have been achieved by small steps).

210. See Murray, *supra* note 7, at A23 (reporting that over three hundred organizations had signed a letter to Speaker Pelosi opposing the non-inclusive version of ENDA).

211. See 153 CONG. REC. 30,353–92 (2007) (recording the House vote as 235 to 184, with fourteen abstaining).

never again support a non-inclusive ENDA.<sup>212</sup> As a result of this position, ENDA is not likely to become law in the near future.<sup>213</sup>

Transgender inclusion under Title VII offers progressive lawmakers an alternate path. It is now clear that the federal courts are willing to take transgender claims of employment discrimination seriously under Title VII, making the need for legislation to protect gender identity less immediate.<sup>214</sup> On the other hand, gay and lesbian individuals have been almost uniformly denied protection under Title VII, making the need for legislative action to protect them much more pressing. A two-pronged campaign that emphasizes protection for gays and lesbians through legislative action and protection for transgender individuals through judicial action may permit a timely resolution to these issues in a politically practical manner. In the end, legislative action is desirable for both groups; however, to address the immediate needs of these groups, a two-path solution may be more practical.

## Conclusion

These pressing issues illustrate that adopting a trans-inclusive Title VII paradigm will help resolve many other legal and policy concerns. This is not a premature step; if anything, it is long overdue. It has been more than twenty years since *Price*

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212. See HRC Board ENDA Policy, HUMAN RIGHTS CAMPAIGN, Sept. 1, 2011, available at <http://web.archive.org/web/20110901015144/http://www.hrc.org/issues/workplace/12346.htm> ("We made a one time exception to our policy in 2007 because we strongly believed that supporting this vote would do more to advance inclusive legislation. We will not support such a strategy again."); MOVING AMERICA FORWARD: 2012 DEMOCRATIC NATIONAL PLATFORM, <http://www.democrats.org/democratic-national-platform> ("We support the Employment Non-Discrimination Act because people should not be fired based on their sexual orientation or gender identity.").

213. See William C. Sung, *Taking the Fight Back to Title VII: a Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 506–08 (2011) (suggesting that because efforts to pass a standalone bill are unlikely to bear fruit and too prone to destructive compromises, advocates should try to amend Title VII instead).

214. National LGBT groups have largely ignored or misrepresented these developments, focusing instead on doomed efforts to pass national legislation. Dana Beyer, Executive Director of Gender Rights Maryland, points out that this strategy has left the trans community in "fear and paralysis" when they should be actively enforcing their rights in court. See Dana Beyer, *Burying the Lede: the LGBT Community's Deafening Silence on Federal Transgender Employment Protections*, THE BLOG (THE HUFFINGTON POST) (Sep. 17, 2013, 1:11 PM), [http://www.huffingtonpost.com/dana-beyer/burying-the-lede-federal-transgender-employment-protections\\_b\\_3937357.html](http://www.huffingtonpost.com/dana-beyer/burying-the-lede-federal-transgender-employment-protections_b_3937357.html).

*Waterhouse* changed the face of sex discrimination law, yet cases such as *Ulane II*, which run directly counter to that decision, continue to cause controversy. It is past the time to retire those decisions. Sex discrimination law has developed to a point where a new trans-inclusive paradigm can and must be adopted. Sex discrimination continues to be a serious issue, and permitting outdated decisions to distract from contemporary concerns will only reinforce that discrimination. It is time for judges and scholars to recognize and adopt a bold new trans-inclusive Title VII paradigm, and to begin the task of integrating the transgender cases into the larger sex discrimination jurisprudence.

