

## CROSSING THE GREAT SEXUAL DIVIDE: TRANSSEXUALS SEEKING REDRESS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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### INTRODUCTION

It might surprise one to learn that man's scientific achievements in the twentieth century far exceeded those he achieved in all previous centuries combined.<sup>1</sup> This is especially true in the field of medicine—where procedures such as organ transplants<sup>2</sup> and *in vitro* fertilization<sup>3</sup> would have been deemed feasible only in the realm of science fiction just half a century ago.

These are just two examples of the major advances witnessed in the field of medical science in recent decades. However, the very same advances that promise an enhanced quality of life can often present society, and the law in particular, with unforeseen

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<sup>1</sup> See, e.g., David L. Stocum, *Regenerative Biology and Medicine: An Overview*, CELLSCIENCE (2004), [http://www.cellscience.com/Reviews1/Regenerative\\_Biology\\_and\\_Medicine.html](http://www.cellscience.com/Reviews1/Regenerative_Biology_and_Medicine.html); David H. Bailey, *Welcome to the 21<sup>st</sup> Century: The Uncharted Future Ahead* (2005), <http://www.dhbailey.com/papers/dhb-future-tech.pdf#search=%22medical%20advances%20%26%2020th%20century%20%26%20exponential%20growth%20%26%20greater%20than%20centuries%20before%22>; Ray Kurzweil & Terry Grossman, M.D., *You Can Live Long Enough To Live Forever* (2006), <http://www.enotalone.com/article/4493.html>.

<sup>2</sup> See Gloria J. Banks, *Legal & Ethical Safeguards: Protection of Society's Most Vulnerable Participants in a Commercialized Organ Transplantation System*, 21 AM. J.L. & MED. 45, 56–57 n.93 (1995) (indicating major developments in organ transplant history, which was once limited to organs harvested from blood relatives, but now includes organs originating from non-related third parties).

<sup>3</sup> See *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1537–38 (1990) (“*In vitro* fertilization involves removing a ripe egg from a woman's body and combining that egg with sperm in a petri dish. If fertilization occurs, the fertilized egg is permitted to divide until it is multicellular and is then implanted into a woman's womb.”).

challenges.<sup>4</sup> These challenges often impact a small, but not insignificant, group of people whose hopes for a better life may be frustrated by out-of-date legal standards and social mores.<sup>5</sup> One such group that has within its reach the opportunity for a more fulfilling life due to advances in medicine, but which has not been protected from marginalization, is transsexuals.<sup>6</sup>

Transsexualism is a medically recognized condition where an otherwise physically normal person is not comfortable with their particular sex. Specifically, a transsexual does not identify with the gender characteristics of their biological sex. As a result, they have a profound desire to become a member of the opposite sex.<sup>7</sup> An individual recognized by the medical community as a transsexual is diagnosed with Gender Identity Disorder ("GID").<sup>8</sup> This disorder is a psychological condition acknowledged by the American Psychiatric Association and American Medical Association.<sup>9</sup> Persons diagnosed with GID usually hope to transform themselves physically so as to conform fully to the physical characteristics of their desired gender.<sup>10</sup>

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<sup>4</sup> See Megan Bell, Comment, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1709 (2004) ("The legal system is an overarching, organizing principle that oozes into every aspect of life, functioning as a governing discourse. . . . [a]s such an encompassing discourse, the legal system carries serious implications for the individual.").

<sup>5</sup> See Thomas Ling, Recent Development, *Smith v. City of Salem: Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277, 277 (2005) (characterizing the law of "sex equality" as one of denial, where the courts have been reluctant to accept that Congress could have possibly intended equality on the basis of sex and gender roles).

<sup>6</sup> See Robert J. Nobile & Leonard Colonna, *Transgender Employees: Dealing with the Restroom Dilemma*, 11 HR Advisor: Legal & Practical Guidance 8 (Sept. 2005) ("To date, transgender rights proponents have been largely unsuccessful in their attempts to secure civil rights protection at the federal level.").

<sup>7</sup> See Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 725 (2005).

<sup>8</sup> See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537 (4th ed. 1994). The medical definition of Gender Identity Disorder is as follows: "A strong and persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex)." *Id.* The disorder's symptoms are manifested by "a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex." *Id.*

<sup>9</sup> See The American Medical Association, *Encyclopedia of Medicine* 478 (Charles B. Clayman ed., 1989).

<sup>10</sup> See Romeo, *supra* note 7, at 725.

Transsexuals are viewed as sex/gender non-conformists, because they do not conform to society's traditional norms of sex and gender. If a gender non-conformist has been diagnosed with GID he/she has met the medical criteria to undergo treatment resulting in transformation to the opposite sex: the gender with which the patient identifies.<sup>11</sup> Following diagnosis, treatment of GID includes psychological care, hormone therapy, eventually culminating in sexual reassignment surgery.<sup>12</sup> Among the conditions to be met successfully before surgery is approved and performed is a "real life test" for approximately twelve months before the surgery.<sup>13</sup> As part of this test, surgical candidates will assume the look of the opposite gender, living and working as a member of the opposite sex in order to facilitate the process of realigning their sex to conform with their perceived gender.<sup>14</sup>

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<sup>11</sup> See Leslie Pearlman, Comment, *Transsexualism as a Metaphor: The Collision of Sex and Gender*, 43 BUFF. L. REV. 835, 842 (1995) (noting that through the surgery the transsexual individual attains a physical illustration of the gender to which they best identify, and at the same time "challenges the societal assumption that biological male grows to be masculine and a biological female grows to be feminine.").

Sex Reassignment Surgery results in the person having the apparent anatomical structures and function typical of the new sex. See Sex Reassignment Surgery, <http://www.answers.com/topic/sex-reassignment-surgery>, (last visited Nov. 30, 2005). For transwomen, (male to female), typical surgery involves the enhancement of breasts, re-shaping of facial features, or surgery to lift the voice. See *id.* For transmen (female to male), the removal of female breasts and the shaping of a male contoured chest is often the only surgical procedure that the transsexual will undergo. See *id.* Additionally, continuing hormone replacement therapy is necessary to maintain muscle and bone integrity and characteristic form. See *id.*

<sup>12</sup> See Romeo, *supra* note 7, at 725. Many transsexuals undergo a full process of treatment, which involves a life divided into three separate phases; A) before treatment, B) diagnosis through surgery (also considered the transition phase), and C) post-treatment, when they assume their new sex. See Sex Reassignment Surgery, <http://www.answers.com/topic/sex-reassignment-surgery>, (last visited Nov. 30, 2005). It should also be noted that transsexuals who undergo sex reassignment surgery will continue with hormone and often psychiatric therapy throughout their lifetimes. The former treatment is a requirement to maintain the attributes of the adopted gender; the latter treatment provides ongoing support for the individual. *Id.* Although transsexuals are faced with legal issues in the pre- and post-treatment phases, it is during the transition phase where they are most vulnerable and, due to the very nature of their disorder and its treatment, often find themselves in a legal quandary. After treatment, transsexuals may be able to fall into one category of sex. During the treatment phase, transsexuals have the anatomical details of one sex, yet their treatment requires that they adopt the gender characteristics of the sex to which they are transitioning. See Pearlman, *supra* note 11, at 842.

<sup>13</sup> See Pearlman, *supra* note 11, at 842.

<sup>14</sup> See *id.*

Due to the complex physical and psychological aspects of their medical condition, transsexuals must not only grapple with the symptoms of their disorder, but they also often become victims of stereotyping, ridicule, and dehumanization.<sup>15</sup> The social marginalization suffered by transsexuals has included the denial of educational and housing opportunities, employment, and health care benefits.<sup>16</sup> Denial of these basic opportunities often results in transsexuals being affected and disadvantaged by poverty.<sup>17</sup> In addition, and in part due to the stigma attached to their condition, transsexuals have been denied the full protection of the law.<sup>18</sup> This is especially true in the area of employment discrimination.

Title VII of the Civil Rights Act of 1964 was meant to address and prevent sex discrimination in the workplace, precisely the discrimination from which transsexuals have suffered.<sup>19</sup> Many courts, unfortunately, have failed to afford transsexuals redress under Title VII, especially those undergoing pre-surgery treatment for their condition. In large part, courts have insisted that the type of workplace discrimination to which transsexuals are subjected to is not based on their "biological sex," rather it is due to a deliberate choice on their part to take on the characteristics of another sex. They contend that Title VII was enacted to address the former, but not the latter. Contrary to this belief, the adverse treatment from which transsexuals suffer is in fact a less familiar form of "gender discrimination."

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<sup>15</sup> Julie A. Greenberg, *What Do Scalia and Thomas Really Think About Sex? Title VII and Gender Nonconformity Discrimination: Protection for Transsexuals, Intersexuals, Gays, and Lesbians*, 24 T. JEFFERSON L. REV. 149, 152 (2002) (discussing the disproportionate effect on transsexuals of hate crimes and discriminatory employment actions and decisions); see also Dean Spade, *Resisting Medicine, Re-Modeling Gender*, 18 BERKELEY WOMEN'S. L. J. 15, 17 n.5 (2003) (recounting an incident in which he was harassed for using a gender-neutral bathroom as a transsexual); Abigail W. Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?* 20 BERKELEY J. GENDER L. & JUST. 150, 194 (2005) (recalling the brutal beating, strangulation, and murder of a 17 year old transsexual in California in 2003, in a world where violence and discrimination against them is commonplace).

<sup>16</sup> See Romeo, *supra* note 7, at 714; Bell, *supra* note 4, at 1710 (pointing out that transsexuals lives have been "circumscribed" as they frequently face obstacles in obtaining employment, harassment, and other hindrances in their everyday life).

<sup>17</sup> See Romeo, *supra* note 7, at 714.

<sup>18</sup> See Melinda Chow, Comment, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Meaning of Sex Discrimination Under Title VII*, 28 HARV. J. L. & GENDER 207, 207 (2005).

<sup>19</sup> See *id.*

As such, it should be no more permissible than any other form of discrimination, under the law as defined by Title VII.

This Note provides a summary of the history of discrimination against transsexuals, and the legal rulings handed down by various courts—with strongly varied positions—over the course of twenty-five years.

Part I introduces Title VII of the Civil Rights Act of 1964 and its purpose. Part II outlines rulings handed down by federal courts over the last two and a half decades. In large part, these decisions have refused to afford protection to transsexuals when affected by discrimination in the workplace. Increasingly, however, courts are finding in favor of transsexuals, recognizing the gravity of their medical condition, and that the discrimination they suffer is a form of gender discrimination, prohibited by law.

Part III demonstrates Congress's true intent in passing Title VII of the Civil Rights Act in 1964, and how they could have meant to protect a unique group of individuals, such as transsexuals. It will be argued that it is the courts' discomfort and unfamiliarity with the medical and social conditions faced by transsexuals, which has caused them to disallow redress for discrimination under Title VII, rather than a proper reading of the law with Congress's intent in mind. As a result of the treatment they have to undergo for their medical condition, transsexuals are being discriminated against and the law should be construed to offer them protection.

#### I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964 provides that:

[I]t shall be an unlawful employment practice for an employer . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .<sup>20</sup>

In order to establish a *prima facie* case of employment discrimination pursuant to Title VII in federal court, the plaintiff must show that: “(1) he is a member of a protected class; (2) he suffered an adverse employment action; (3) he was qualified for

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<sup>20</sup> 42 U.S.C. § 2000e-2 (2000).

the position in question; and (4) he was treated differently from similarly situated individuals outside his protected class.”<sup>21</sup>

When the Civil Rights Act of 1964 was enacted, Congress's primary goal was to address issues of race discrimination.<sup>22</sup> Even so, sex and other classes were included in Title VII.<sup>23</sup> Congress added sex as a basis of discrimination the day before it voted on the Act, without conducting any prior hearing or debate. This seemingly precipitous inclusion has resulted in some courts alleging that the addition of the word sex was just a ploy to “scuttle adoption of the [Act].”<sup>24</sup> Nevertheless, the additions were built-in to the Act and there was a demonstrable and clear need for their inclusion. By including “sex” as a category, Congress was attempting to address the heretofore disparate treatment of women in the workplace.<sup>25</sup>

The last minute inclusion of “sex”—and the resulting dearth of debate, research, and discussion on the purpose for its inclusion—has resulted in the courts having to define Congress' intent.<sup>26</sup> It is, therefore, in the absence of any evidence of concrete legislative intent to include sex in the Act that the Supreme Court, as well as lower courts, have interpreted and defined its purpose. The Supreme Court has stated that Section 2000e-2 “evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment.”<sup>27</sup> The Court has also noted that a major purpose of the statute was to create employment opportunity, stating that “Congress was certainly not blind to the stigmatic harm which comes from being evaluated by a process which treats one as an inferior by reason of one's race or sex.”<sup>28</sup> Despite these compelling reasons for including sex as a protected category in the Civil Rights Act, some federal courts have clung to an

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<sup>21</sup> *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004).

<sup>22</sup> *See Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

<sup>23</sup> *See supra* note 20.

<sup>24</sup> *See, e.g., Ulane*, 742 F.2d at 1085.

<sup>25</sup> *See Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977).

<sup>26</sup> *See, e.g., Ulane*, 742 F.2d at 1084 (“[O]ur responsibility is to interpret this congressional legislation and determine what Congress intended when it decided to outlaw discrimination based on sex.”).

<sup>27</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

<sup>28</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228, 265 (1989).

extremely narrow interpretation of the term, possibly frustrating Congress's true intent.<sup>29</sup>

#### A. *Sex Versus Gender Under Title VII*

When addressing the issues faced by transsexuals who are claiming discrimination under Title VII, it is important to note the legal definition of "sex," and how this differs from the legal meaning of "gender."

While Title VII specifically prohibits discrimination on the basis of sex, it is a common practice to use the terms "gender" and "sex" interchangeably. "Gender" refers to the cultural and behavioral qualities that are characteristic of members of a particular sex; whereas "sex" is the designation of male or female based on anatomical, physiological and biological factors.<sup>30</sup> Despite the different legal definitions of "sex" and "gender", courts, legislators, and administrative agencies will often use the terms interchangeably in interpreting Title VII of the Civil Rights Act.<sup>31</sup>

In any case, both "gender" and "sex" discrimination have been deemed prohibited by the Supreme Court under the Civil Rights Act of 1964. The Court has granted protection against discrimination based on the fact that one is a male or female, *as well as* discrimination due to failure to conform to gender norms attributed to an individual's biological sex.<sup>32</sup>

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<sup>29</sup> See *Holloway*, 566 F.2d at 663; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Ulane*, 742 F.2d at 1086; *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003), *aff'd* 98 F. App'x 461 (6th Cir. 2004).

<sup>30</sup> See Greenberg, *supra* note 15, at 150 (defining sex and gender).

<sup>31</sup> *Id.*; Pearlman, *supra* note 11, at 864 (recognizing that "current legal thought has not settled on a single definition of sex and gender" and both terms are used interchangeably in the legal community); see also *Price Waterhouse*, 490 U.S. at 239–40.

<sup>32</sup> Due to the fact that the Supreme Court has held that both "sex" and "gender" discrimination is prohibited by Title VII in *Price Waterhouse v. Hopkins*, the definitional distinction and understanding is not extremely significant for purposes of the law. See *Price Waterhouse*, 490 U.S. at 239–40. It is the author's position that because of this, the courts have not found it crucial to distinguish between the two, and have used them interchangeably.

## II. SEX, GENDER, AND THE LAW: THE TRANSEXUAL'S QUANDARY

Various federal courts have been reluctant to afford protection specifically to transsexuals under Title VII of the Civil Rights Act for employment discrimination on the basis of sex. These courts have denied this protection despite recent decisions in other courts that have expanded coverage to transsexuals, allowing them legal redress under the auspices of "gender discrimination."<sup>33</sup> Additionally, some state legislators have seen fit to offer transsexuals local redress, having recognized that transsexuals are offered treatment for a valid medical condition.<sup>34</sup> In a recent decision in April 2005, the Federal District Court for the District of Utah stated that transsexualism was a "drastic action" and one that represents a "profound disturbance of the individual's sense of identity with regard to maleness or femaleness,"<sup>35</sup> thereby marginalizing transsexuals, and denying them protection under the law. This decision demonstrates a reluctance to acknowledge the issues faced by transsexuals due, in part, to the delicate nature of the transsexual's condition, not to mention a course of treatment that some would consider unnatural, even offensive, to the laws of nature.

If the condition of transsexuals is medically recognized by doctors, why have judges been so reluctant to accept and accommodate these individuals? Is it not time for the law to confer the same rights and protections to transsexuals as it does other members of society?<sup>36</sup> Surely, a sophisticated society with rapidly advancing technology requires laws and a judiciary that are informed, enlightened, and progressive enough to meet the challenges posed by its expanding societal boundaries. Therefore, transsexuals should be given the full protection of our laws when subjected to "gender discrimination."

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<sup>33</sup> See *infra* notes 73–95 and accompanying text.

<sup>34</sup> See *infra* notes 96–99 and accompanying text.

<sup>35</sup> *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at \*5 (D. Utah June 24, 2005).

<sup>36</sup> Bell, *supra* note 4, at 1711 n.11 ("[I]t is possible to understand the legal system as being comprised of and created by individuals in the upper echelons of society with little room for the influence of those lacking social capital," i.e. transsexuals).

A. *Early Case Law: Ulane and its Progeny*

At the time transsexuals gained access to gender altering treatments, the law had not yet expanded to address the discrimination they now faced in the workplace. As a result, transsexuals experienced many dilemmas when attempting to fit into the protected category of sex under Title VII of the Civil Rights Act of 1964. In early federal cases, a long string of decisions denied transsexuals protection in the arena of sex discrimination claims under Title VII based mainly on a narrow interpretation of the congressional intent behind including “sex” in the Act.<sup>37</sup>

In 1984, in *Ulane v. Eastern Airlines*,<sup>38</sup> the Seventh Circuit Court of Appeals reversed the district court’s grant of protection to a transsexual airline pilot. Ulane was a diagnosed transsexual. Since a young age he felt he was female, despite his male genitalia.<sup>39</sup> After sex re-assignment surgery, and now a woman in all but chromosomes, she was fired by Eastern Airlines, at which time she brought a “sex” discrimination suit under federal law.<sup>40</sup> The court ruled that Title VII should be interpreted narrowly to understand the term “sex” to mean only a biological distinction, male or female.<sup>41</sup> Therefore, the Court held that Title VII did not apply to transsexuals as discrimination against them would be based on “sexual identity[,]” “sexual preference,” or even gender,<sup>42</sup> rather than

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<sup>37</sup> See Dee McAree, *Courts Still At Odds over Rights of Transsexuals: 6th Circuit Ruling Opened Door, But Others Say No*, 27 NAT’L L.J., Aug. 8, 2005, at 6 (“Traditionally, federal courts have denied that transsexuals are a protected class under Title VII of the 1964 Civil Rights Act, based on a strict reading of how Congress intended the term ‘sex’ to be applied.”).

<sup>38</sup> 742 F.2d 1081 (7th Cir. 1984).

<sup>39</sup> *Id.* at 1083.

<sup>40</sup> See *id.* at 1082–83.

<sup>41</sup> *Id.* at 1087. The court also noted that congressional intent showed that the statute was not meant to extend to such a broad class of individuals. Given the ordinary meaning of the word “sex[,]” the lack of legislative history, as well as Congress’s main purpose of eliminating race discrimination, the court concluded that Congress could not have even considered the term to apply to anything but its traditional concept. *Id.* at 1085. According to the Seventh Circuit, had Congress intended an “all-encompassing interpretation[]” of the statute, “surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals[.]” *Id.*

<sup>42</sup> Recall that the definition of gender is “to the cultural and attitudinal qualities that are characteristic of a particular sex.” Greenberg, *supra* note 15, at 150.

“biological” maleness or femaleness.<sup>43</sup> Courts before *Ulane* also denied protection to transsexuals, in all likelihood giving the *Ulane* court the basis for its ruling.<sup>44</sup>

In the case of *Holloway v. Arthur Andersen & Co.*,<sup>45</sup> the Court of Appeals for the Ninth Circuit also denied protection to a transsexual plaintiff under Title VII. The plaintiff, originally Robert Holloway, worked for the well-known accounting firm of Arthur Andersen. Holloway, a diagnosed transsexual, began taking hormones as part of his treatment before he underwent surgery to become a woman.<sup>46</sup> After notifying management that he was a transsexual, dressing in women’s clothing and jewelry, and wearing red lipstick and nail polish, Arthur Andersen terminated him.<sup>47</sup>

The court ruled that Holloway was not protected under the Civil Rights Act, given the plain meaning of the statute, Congress intended a “traditional” notion of “sex[,]” and as a result, transsexuals could not possibly be a class protected under Title VII.<sup>48</sup> In so doing, the court rejected the plaintiff’s argument that “sex” was synonymous with “gender[]” and therefore gender discrimination would include discrimination against transsexuals and would be actionable.<sup>49</sup> The court even went as far as equating transsexualism with sexual preference or sexual orientation. It also noted the reluctance of Congress to amend the Civil Rights Act to include those choosing an “alternate lifestyle” to be designated as protected classes, despite the introduction of numerous bills to offer gays and lesbians equal protection under the Act.<sup>50</sup> Based on this questionable

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<sup>43</sup> See *Ulane*, 742 F.2d at 1084, 1087 (disagreeing with the district court’s ruling that the term sex could include ones “sexual identity[,]” and striking down their broad interpretation of the statute to encompass psychological questions of how society perceives an individual’s sex).

<sup>44</sup> See *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam) (holding that Title VII does not extend to transsexuals); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (same).

<sup>45</sup> 566 F.2d 659 (9th Cir. 1977).

<sup>46</sup> *Id.* at 661.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 662–63.

<sup>49</sup> *Id.* at 662.

<sup>50</sup> *Id.* The court also stated, then in 1977, that there was no generally accepted definition for the word “transsexual.” *Id.* at 662 n.3. Now, however, there is such a definition and the medical world has recognized transsexualism as a disorder. See DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, *supra* note 8, at 532–33.

reasoning, the court dismissed the case, ruling that Holloway had not stated a claim upon which relief could be granted.<sup>51</sup>

In a strong dissenting opinion, Circuit Judge Goodwin agreed with the majority's belief that Congress probably never envisioned that Title VII could be applied to transsexuals. However, he also set forth his belief that the statute should still afford such persons protection.<sup>52</sup> The judge stated that Holloway was fired because he had decided to undergo a sex change, and whether he was born male or female was irrelevant.<sup>53</sup> More specifically, the dissent believed that plaintiff's employer fired him because he changed his sex, thereby constituting his sex discrimination.<sup>54</sup> The judge also noted that this was not a case of "sexual preference[.]" as the majority decision suggested, but was a case of "a person completing surgically that part of nature's handiwork which apparently was left incomplete somewhere along the line."<sup>55</sup> This dissenting opinion fully supports the idea that a transsexual's decision to undergo a sex change is not a random choice at which they arrive one day. Rather, it is a long course of treatment that they must undergo in order to achieve a cure for a medically recognized disorder.

A 1982 decision in *Sommers v. Budget Marketing, Inc.*<sup>56</sup> also had significant negative ramifications for transsexuals battling to gain redress in the employment discrimination arena.<sup>57</sup> In a short opinion, the Eighth Circuit rejected a Title VII claim brought by Timothy Cornish, a transsexual on his way to becoming Audra Sommers, who was an employee of Budget Marketing and performed clerical duties for the company.<sup>58</sup> The plaintiff was fired after he began dressing as a female. Issues surrounding whether he should use the men's or women's

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<sup>51</sup> *Holloway*, 566 F.2d at 664.

<sup>52</sup> *Id.* (Goodwin, J., dissenting).

<sup>53</sup> *Id.* Although this is not the position subsequent courts have taken to afford protection to transsexuals, it evidences some understanding and concern of judges for the dilemmas faced by transsexuals in their medical quest to change sexes.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> 667 F.2d 748 (8th Cir. 1982) (per curiam).

<sup>57</sup> Nobile & Colonna, *supra* note 6, at 8 (citing *Ulane*, *Holloway*, and *Sommers* to show that all of the early courts that directly addressed the issue of whether Title VII includes protection from discrimination against transsexuals have concluded that Congress's use of the term "sex" was not intended to reach such individuals).

<sup>58</sup> *Sommers*, 667 F.2d at 748.

restroom appeared to be at the heart of the termination.<sup>59</sup> The court refused—as others had done before it—to extend protection beyond the biological meaning of “sex[.]”<sup>60</sup> The court bolstered its argument by contending that Congress had in mind a narrow meaning of sex because it has refused to amend the statute to include discrimination based upon “sexual preference” in the years since 1964. Significantly though, the court did note a difference between sexual preference and the present case of a transsexual undergoing treatment.<sup>61</sup>

Unfortunately, the *Sommers*, *Ulane*, and *Holloway* line of cases created precedent that prevented transsexuals from gaining full legal redress that would allow them to assimilate into society.

B. *The Supreme Court's Decision in Price Waterhouse v. Hopkins—Does It Overrule Ulane?*

The *Ulane*, *Holloway*, and *Sommers* decisions were all handed down prior to the monumental 1989 Supreme Court ruling in *Price Waterhouse vs. Hopkins*,<sup>62</sup> where the Supreme Court addressed whether Title VII included “gender discrimination” for the first time. It is possible that the decisions reached by the *Ulane* court and its progeny were influenced by the dearth of ruling on this issue from the highest court in the land.

In *Price Waterhouse*, a female employee was denied a promotion because she was considered too “macho” by the firm’s management.<sup>63</sup> She was told that she could increase her chances of attaining partnership if she took “a course at charm school,” and that she should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair

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<sup>59</sup> *Id.* at 748–49.

<sup>60</sup> *Id.* at 750.

<sup>61</sup> *Id.* It is important to note that at the close of the court’s opinion, the majority expressed that it was mindful of the problems that Ms. Audra Sommers faced, but stated that the remedy was beyond their control. *Id.* If true, where were transsexuals supposed to turn? This statement tends to put transsexuals in a separate category, beyond the reach of the law.

<sup>62</sup> 490 U.S. 228 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, § 107 (1991), *as recognized in* Landgraf v. USI Film Prod., 511 U.S. 244, 251 (1994). Throughout the opinion the court tends to use the terms “sex” and “gender” interchangeably, but does note that discrimination of both types is prohibited.

<sup>63</sup> *See id.* at 233–35 (describing the partners’ evaluations of the plaintiff).

styled, and wear jewelry.”<sup>64</sup> The Supreme Court ruled that this constituted gender discrimination as Title VII bars not only discrimination based on sex, but also “sex stereotyping”—discrimination based on the failure of a woman to act as femininely as a particular society’s norms dictates.<sup>65</sup> The Court deemed that discrimination based upon the failure to conform to gender stereotypes is actionable as it would not occur “but for” the victim’s sex.<sup>66</sup> The Court ultimately held that Price Waterhouse discriminated against Hopkins on the “basis of sex” by consciously giving consideration and weight to management’s comments that were a product of “sex stereotyping.”<sup>67</sup>

In *Price Waterhouse*, the Supreme Court made it clear that employment discrimination based on one’s “gender” is forbidden under the statute.<sup>68</sup> It reasoned that Congress’s intent appeared clearly on the face of the statute: “[G]ender must be irrelevant to employment decisions.”<sup>69</sup> In its ruling, the Supreme Court stated, “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . .”<sup>70</sup> The decision made it clear that the rulings in cases such as *Ulane* and its progeny were in error. These cases had been dismissed based on the assumption that Congress had intended only a narrow reading of “biological sex.” According to *Price Waterhouse*, the Supreme Court held that “gender” discrimination is actionable.

### C. Disregard for the Supreme Court’s Decision

Despite the Supreme Court’s binding decision in *Price Waterhouse*, recent cases in other circuit courts have continued to rely on *Ulane* and its progeny to rule that Title VII did not bar discrimination against transsexuals because they were not a protected class.<sup>71</sup> In a 2004 case, *Johnson v. Fresh Mark, Inc.*<sup>72</sup>,

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<sup>64</sup> *Id.* at 235.

<sup>65</sup> *See id.* at 255–58 (discussing “sex stereotyping” and its role in the plaintiff’s evaluations).

<sup>66</sup> *See id.* at 258.

<sup>67</sup> *See id.* (concluding that gender discrimination violates Title VII).

<sup>68</sup> *See id.* at 239–40.

<sup>69</sup> *Id.* at 240.

<sup>70</sup> *Id.* at 251.

<sup>71</sup> *See Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1068, (7th Cir. 2003) (Posner, J., concurring) (distinguishing sex stereotyping from sex discrimination); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000)

the Sixth Circuit upheld the district court's ruling that a pre-surgical transsexual woman was not protected against discrimination by Title VII, given that every circuit had denied such claims and that the American Disabilities Act has explicitly excluded them from statutory protection.

In much the same vein, the Seventh Circuit in *Spearman v. Ford Motor Co.*,<sup>73</sup> decided in 2000, dismissed a transsexual's sexual harassment claim because he was not seen to have been discriminated against based on his "sex."<sup>74</sup> The court reached this decision by interpreting Congress's intent narrowly, and finding that sex discrimination is that which takes place against only a "biological male or biological female."<sup>75</sup>

The aforementioned decisions either completely ignored the *Price Waterhouse* ruling or held that the case was inapplicable because the claims at issue had nothing to do with "sex-stereotyping."<sup>76</sup> Many of the defendants in these cases claimed that the employer's actions at issue were allegedly caused by the transsexual's failure to reveal his/her "real sex," or in turn, based on "restroom issues."<sup>77</sup> These restroom issues were concerns over which restroom the transsexual was supposed to use and fear of potential liability if women or men were offended when sharing a restroom with a member of the opposite sex. In addition, courts seeking to deny transsexuals rights under Title VII have noted as the basis of their decisions the continued denial of Congressional Bills where groups would be afforded recognition and protection on the basis of affectional or sexual orientation.<sup>78</sup> The courts have cited this absence of legislative action to support the position that transsexuals should not be afforded protection under the Civil Rights Act.<sup>79</sup> Yet, these particular courts have

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(dismissing a transsexual's sexual harassment claim because he was not discriminated against based on his "sex", as Congress meant only for discrimination against a "biological male or biological female" to be actionable); *Dillon v. Frank*, No. 90-2290, 1992 WL 5436, at \*9-10 (6th Cir. Jan. 15, 1992).

<sup>72</sup> 98 F. App'x 461 (6th Cir. 2004).

<sup>73</sup> 231 F.3d 1080 (7th Cir. 2000).

<sup>74</sup> *Id.* at 1087.

<sup>75</sup> *Id.* at 1084.

<sup>76</sup> See *Hamm*, 332 F.3d at 1062; *Spearman*, 231 F.3d at 1085.

<sup>77</sup> See *infra* notes 113-27 and accompanying text.

<sup>78</sup> See *Spearman*, 231 F.3d at 1084; *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*4 (E.D. La. Sept. 16, 2002).

<sup>79</sup> *Oiler*, 2002 WL 31098541, at \*4 (holding that a cross-dressing male diagnosed

failed to distinguish between discrimination based on an individual's *affectional* or *sexual orientation* and something very different, *gender discrimination*. There exists a significant legal and societal distinction between the two forms of discrimination. The former concerns the sex to which an individual is attracted. The latter, the form of discrimination against transsexuals, occurs when an individual does not conform to gender stereotypes and roles assigned to sexes by society. The failure to recognize this significant difference between the two types of discrimination has resulted in an unjust denial of protection to transsexuals under the Civil Rights Act of 1964.

*D. A Ground Breaking Decision: Equal Rights for Transsexuals*

After much disappointment, proponents of the rights of transsexuals finally gained a measure of success in obtaining legal recognition and protection against discrimination under Title VII of the Civil Rights Act. In 2004, the Sixth Circuit broke new ground in *Smith v. City of Salem*<sup>80</sup> expressly providing that transsexuals may state Title VII claims upon which relief can be granted. It relied on the 1989 Supreme Court decision in *Price Waterhouse* that extended protection to a plaintiff suing under the Civil Rights Act of 1964 for employment discrimination based upon "sex," which included gender discrimination, and prohibited "sex stereotyping."<sup>81</sup> The *Smith* court used this reasoning to extend Title VII protection to a transsexual firefighter. The firefighter in question had been harassed and discriminated against because he started dressing and acting in a feminine manner.<sup>82</sup> His conduct did not conform to his employer's and co-workers' perceived notions of "sex stereotypes," that is, how a man should look and act.<sup>83</sup> The Court stated that,

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with Gender Identity Disorder, who dressed as a female to relieve stress and conform to his gender identity, was not fired for failing to conform to a gender stereotype, but rather because he was completely assuming the role of the opposite sex, a practice which was not protected by Title VII due to Congressional intent).

<sup>80</sup> 378 F.3d 566 (6th Cir. 2004).

<sup>81</sup> *Id.* at 571, 573–75.

<sup>82</sup> *See id.* at 568.

<sup>83</sup> *See id.* at 572. His employer and co-workers were unwilling to accept changes in his look and behavior, despite the fact that they were a direct result of medical treatment he was undergoing after being diagnosed with Gender Identity Disorder. *See id.* at 568, 571.

[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination . . . . 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>84</sup>

The Sixth Circuit also noted that the approaches used in *Ulane*, *Holloway*, and *Sommers* have been eviscerated by *Price Waterhouse*, in which the Supreme Court prohibited discrimination based on gender and expanded Title VII protection based on their interpretation of congressional intent.<sup>85</sup> Therefore, it follows that the recent decisions previously noted, which rely on *Ulane* and its progeny to exclude protection to transsexuals for gender discrimination, lack sound legal basis.<sup>86</sup>

The Sixth Circuit also reinforced its position in *Smith* in *Barnes v. City of Cincinnati*,<sup>87</sup> where it upheld a Title VII employment discrimination claim brought by a transsexual.<sup>88</sup> Philip Barnes was a police officer who was training for promotion to sergeant.<sup>89</sup> Barnes had also commenced the medical processes of changing sex and spent his personal time living as a woman.<sup>90</sup> Barnes, who had worked in the department since 1981, ranked 18th out of 105 officers who took the sergeant's exam. Despite his exemplary service, the department refused to promote Barnes.<sup>91</sup> Barnes filed suit in 2003 in the U.S. District Court for

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<sup>84</sup> *Id.* at 574. It is probable that the court recognized that Smith was only following international medical protocols in treating his Gender Identity Disorder, and to be fired for such a course of action would "have been unjust in its eyes." See Johnny Lo, Case Note, 11 WASH. & LEE RACE & ETHNIC ANC. L. J. 277, 282 (2005).

<sup>85</sup> See *Smith*, 378 F.3d at 572-74.

<sup>86</sup> It has been noted that there is great tension between the *Ulane* and *Price Waterhouse* decisions, and whether they can co-exist. See *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003). The Ninth Circuit, however, has noted that "the initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*." *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000).

<sup>87</sup> 401 F.3d 729 (6th Cir. 2005).

<sup>88</sup> See *id.* at 733, 735. There is a need to "eliminate out-of-date gender classifications and preserve liberty of self-identity in our 21st Century world." Lo, *supra* note 84, at 282.

<sup>89</sup> *Barnes*, 401 F.3d at 733.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* The department cited "a litany of professional errors and shortcomings" in refusing to promote Barnes, in an attempt to mask their discrimination. See Nathan Carlile, Court May Take Up Transsexual Case; Cincinnati Police Officer Sues

the Southern District of Ohio, claiming he suffered discrimination based on his “sex” under Title VII. A jury ultimately found that Barnes had been subjected to sex discrimination, awarding him \$320,000 in damages.<sup>92</sup> The verdict was later upheld by the U.S. Court of Appeals for the Sixth Circuit.<sup>93</sup>

Most recently, in *Schroer v. Billington*<sup>94</sup> the District Court for the District of Columbia recognized the legal and scientific complexity of such cases and rightly found that disparate treatment of transsexuals based on their gender non-conforming behavior is actionable.<sup>95</sup> In *Schroer* a male-to-female transsexual was hired by the Library of Congress while representing himself as a male.<sup>96</sup> Once he received the position he informed his supervisor that he suffered from gender dysphoria and would soon be presenting himself as a female, as it was a pre-requisite for his sex-reassignment surgery.<sup>97</sup> Schroer’s supervisor responded to this news by stating that “she had ‘really given [her] something to think about.’”<sup>98</sup> Shortly thereafter, Schroer received a phone call from the Library of Congress expressing concerns about his employment and that “‘for the good of the service’” he was no longer a “‘good fit’” for the job.<sup>99</sup> The district court found that this sudden action could be considered discrimination based upon “sex”, more specifically, discrimination based upon gender stereotypes, and demanded that the case be decided on a more thorough factual record. The court first criticized all decisions which have given a narrow interpretation to the term “sex” in Title VII of the Civil Rights Act, reasoning that, “those arguments, perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history. Supreme Court decisions subsequent to *Ulane*, indeed,

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Department Over Alleged Discrimination Based on Desire to Switch Genders, LEGAL TIMES, Oct. 31, 2005.

<sup>92</sup> See Carlile, *supra* note 91.

<sup>93</sup> See *Barnes*, 401 F.3d 729.

<sup>94</sup> 424 F. Supp. 2d 203 (D.D.C. 2006).

<sup>95</sup> See *id.* at 212, 213.

<sup>96</sup> See *id.* at 205–06.

<sup>97</sup> See *id.* at 206.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

have applied Title VII in ways Congress could not have contemplated.”<sup>100</sup>

In addition to these important opinions, various appeals courts since *Price Waterhouse* have allowed discrimination claims based upon gender non-conformity to be heard. As a result, protection has been afforded to transsexuals under various laws. For example, in *Nichols v. Azteca Restaurant Enter., Inc.*,<sup>101</sup> an effeminate male employee sued and recovered for sexual harassment and retaliation, also alleging a hostile work environment because he did not conform to his co-workers' views of a “male stereotype.”<sup>102</sup> In *Schwenk v. Hartford*,<sup>103</sup> a pre-operative transsexual prisoner who was sexually assaulted by a prison guard was granted protection under the Gender Motivated Violence Act, which the court found applied “with equal force to both men and women,” and extended its protection to transsexuals.<sup>104</sup> In 2000, in *Rosa v. Park West Bank & Trust Co.*,<sup>105</sup> the First Circuit Court of Appeals applied Title VII and prior case law to an Equal Credit Opportunity Act case, and allowed a biologically male loan applicant to state a claim against the bank which denied him an opportunity to apply for a loan when he entered the premises of the bank in traditional female attire.<sup>106</sup> All of these cases have interpreted Congress's intent

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<sup>100</sup> *Id.* at 212.

<sup>101</sup> 256 F.3d 864 (9th Cir. 2001).

<sup>102</sup> *Id.* at 869–70.

<sup>103</sup> 204 F.3d 1187 (9th Cir. 2000).

<sup>104</sup> *Id.* at 1200.

<sup>105</sup> 214 F.3d 213 (1st Cir. 2000).

<sup>106</sup> *Id.* at 214. Other decisions in various circuits have recognized gender discrimination claims by transsexuals as well as homosexuals, evidencing a trend towards protecting these individuals through the law. *See Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1069 (9th Cir. 2002) (providing a homosexual male who acted effeminate protection under Title VII for sexual harassment—a type of “sex stereotyping”); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) (stating that a plaintiff could prove sex discrimination by showing he was harassed, and the motivating factor of the harassment was a belief that he did not conform to the perceived stereotypes of his gender); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997), *vacated*, 523 U.S. 1101 (recognizing that “a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in *some other respect* he exhibits his masculinity in way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of his sex'”) (emphasis added); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (stating that there is no difference between discrimination against a woman who failed to act as a woman, and discrimination against a male who did not meet male stereotypical expectations).

when enacting the Civil Rights Act to be to provide assurance that all individuals, of any sex, be treated equally in the workplace. The same courts have deemed it necessary and appropriate to protect individuals discriminated against based on how they are “supposed” to look or act, whatever the basis for the supposition.

The Circuit and District Court rulings granting transsexuals protection under various laws are not the only arenas where transsexuals have recently found a legal haven. Local governments have enacted legislation protecting transgender individuals from discrimination in the workplace, demonstrating the emergent trend in the law to extend civil rights protections to transsexuals.<sup>107</sup> While these laws are more the exception than the rule in America, they are increasing in number, as well as in the scope of the protection they afford transsexuals.<sup>108</sup> Legislative bodies in eighty-four cities, counties, and states have enacted laws that prohibit discrimination on the basis of gender identity or expression.<sup>109</sup> California, Illinois, Maine, Minnesota, New Mexico, and Rhode Island are among the states that have adopted laws protecting transsexuals from discrimination in both the private and public sectors.<sup>110</sup> New York City is one of the seventy-four cities that offer protection to transsexuals, and three of the eleven counties which prohibit transgender discrimination are in New York.<sup>111</sup>

*E. Etsitty: Transgression for Transsexuals*

Despite the Sixth Circuit Court’s ground breaking ruling in *Smith v. City of Salem*, some lower courts have chosen to disregard what is now considered a valid interpretation of the law—possibly due to discomfort with transsexuals, or a perception that such individuals are both biologically and socially aberrant. By ignoring rulings that protect transsexuals, however, these courts are only hampering the forward momentum essential to the relevance of any judicial system, and

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<sup>107</sup> See Nobile & Colonna, *supra* note 6.

<sup>108</sup> Lloyd, *supra* note 15, at 193.

<sup>109</sup> Transgender Law & Policy Institute, *Non-Discrimination Laws that Include Gender Identity and Expression*, <http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions> (last visited Aug. 5, 2006).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

turning a blind eye to the progress that is essential to the growth of any society and ignoring precedent.<sup>112</sup>

In *Etsitty v. Utah Transit Authority*,<sup>113</sup> a district court judge in Utah sitting in the Tenth Circuit—stating that the issue was one of first impression—would not accept other courts' attempts to extend Title VII of the Civil Rights Act to transsexuals, as he did not deem them a recognized protected class under the law.<sup>114</sup> The Plaintiff was Krystal Etsitty, originally known as Michael Etsitty, a transsexual bus driver diagnosed with GID. As part of his treatment, he was taking female hormones which had affected his appearance.<sup>115</sup> Krystal was terminated after arriving at work in traditional women's attire on a number of occasions. As a reason for her termination, Utah Transit Authority's management cited concern over what restroom she should properly be using, and potential ensuing liability.<sup>116</sup> The court erroneously relied on *Ulane* and its progeny, rulings and rationale which have been eviscerated by the Supreme Court in *Price Waterhouse*. As *Price Waterhouse* held discrimination based on gender, that is, when transsexuals are discriminated against based on their failure to conform to society's perceived gender norms, is no longer permissible.<sup>117</sup>

The district court disagreed with certain courts, most specifically, the Sixth Circuit Court of Appeals, which have afforded protection to transsexuals based on "sex stereotyping" or gender discrimination.<sup>118</sup> While recognizing that the Supreme Court has allowed claims based on gender discrimination as part of discrimination on the basis of "sex" under Title VII, the Utah court attempted to redeem itself, and distancing itself from *Ulane*, by claiming that the demeanor and appearance of a transsexual is far different from a woman who does not behave as femininely as her employer would wish.<sup>119</sup> The court felt that this was even more so the case because the transsexual had been

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<sup>112</sup> McAree, *supra* note 37 (stating that some district court judges "are having a hard time feeling that they can really embrace the [Sixth] Circuit ruling").

<sup>113</sup> No. 2:04CV616 DS, 2005 WL 1505610 (D. Utah June 24, 2005).

<sup>114</sup> *See id.* at \*2–\*5.

<sup>115</sup> *Id.* at \*1.

<sup>116</sup> *Id.* at \*1 –\*2.

<sup>117</sup> *See id.* at \*4.

<sup>118</sup> *See id.* at \*4–\*5.

<sup>119</sup> *Id.*

diagnosed with a disorder.<sup>120</sup> The court actually labeled transsexualism and gender reassignment a “drastic action,” and one that represents a “profound disturbance of the individual’s sense of identity with regard to maleness and femaleness.”<sup>121</sup> This major difference, according to the Tenth Circuit, shows that transsexualism is more than just a failure to conform to stereotypical sex roles.<sup>122</sup> As such, it ruled that transsexuals are certainly not a class that Congress would have intended to protect from unlawful employment practices.<sup>123</sup>

The *Etsitty* court also equated the type of discrimination that the transsexual plaintiff faced with harassment based solely upon a person’s sexual preference or orientation, and not based on “sex.” To strengthen its argument, the court noted that “sexual orientation” and “sexual preference” are specific categories that Congress has refused to add to Title VII.<sup>124</sup> As the basis for its ruling, the district court erroneously equated transsexualism with sexual orientation. This is a common failure to recognize that transsexuals have a *medical* condition involving their sex/gender identity: a problem with determining their true sexual identity.<sup>125</sup> Additionally, the issue of sexual orientation has nothing to do with the transsexual’s gender before, during, or after treatment. Rather, sexual orientation is the clearly stated preference for an individual’s choice of sexual partner.<sup>126</sup>

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<sup>120</sup> See *id.* at \*5.

<sup>121</sup> *Id.* (citing the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 564 (4th ed. 1994)).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender That is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253, 270 (2005).

<sup>126</sup> See *id.* The defendants in *Etsitty* also claimed that they terminated the plaintiff’s employment because they were concerned over issues arising from the use of restroom facilities, and ensuing potential liability. *Etsitty*, 2005 WL 1505610, at \*1–2. The court accepted this precept. See *id.* at \*6. The Court stated further, that even if *Price Waterhouse* did apply here the plaintiff was not fired for failure to conform to a gender stereotype. *Id.*

However, a reading of the opinion handed down by the court allows one to form the opinion that the decision was based partly on general perceptions, exacerbated by the generally acknowledged discomfort with the concept of transsexualism. If that was, in fact the case, the employers should have made accommodations for the employee as a transsexual with special needs, just as the requirements of disabled persons and other people with special needs are addressed and accommodated. See

Unfortunately, the *Etsitty* decision demonstrated disregard for the evolving nature of the law as illustrated by *Price Waterhouse*, followed by *Smith* and other recent cases. The Utah court handed down a position for a transsexual plaintiff discriminated against on the basis of his “sex”—or lack of clear definition thereof—and resultant appearance and conduct. This can only be regarded as an inaccurate reading of the law, as well as, a misinformed interpretation of the facts of the case. The Utah court appears to have placed transsexuals in an entirely separate sexual classification, thereby denying them legal recourse when discriminated against because of their “drastic” non-conformity to “normal” sexual stereotypes. The court may have been implying that there are degrees of non-conformity, some “drastic,” ergo marginalized, while others are acceptable, and thereby protected. Be that as it may, the position of the Utah court cannot reasonably be considered a judicious reading, interpretation, and application of the law.<sup>127</sup>

### III. DID THE 1964 CONGRESS INTEND TO EXTEND PROTECTION TO TRANSSEXUALS?

Nearly two hundred years after the birth of the American nation and its legal system, one of the most significant pieces of legislation was enacted in the form of the Civil Rights Act of 1964.<sup>128</sup> The Civil Rights Act was designed to right long-ignored social injustices, by providing equal legal protection to all, regardless of circumstance of birth, social standing, economic advantage, or physical limitation.<sup>129</sup> Although it is believed that the primary thrust of the Act was to address race discrimination,<sup>130</sup> Congress had the foresight to include language

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Nobile & Colonna, *supra* note 6. The employer should respond sensitively to restroom needs to avoid litigation. This requires “empathetic consideration . . . and perhaps expenditure of some money.” Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRAND. L. J. 145, 163 (2005).

<sup>127</sup> McAree, *supra* note 37 (noting that the appeal of this case is headed for the 10th Circuit and quoting a transgender law proponent who stated “either the circuits are going to get in line behind Smith or they are going to split . . . [i]f the circuits split it may well be an issue headed for the U.S. Supreme Court”).

<sup>128</sup> 42 USC § 2000e-2 (2000).

<sup>129</sup> *See id.*

<sup>130</sup> *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (noting that the main purpose of the enactment of Title VII of the Civil Rights Act of 1964 was eliminating race discrimination).

that would address inequalities affecting important issues in the lives of all members of American society.

A. *The Underlying Intent of the Act Justifies the Protection of Transsexuals*

Title VII was included in the Civil Rights Act to ensure legal protection to all individuals in the workforce.<sup>131</sup> In large part, the inclusion of the word sex in the Civil Rights Act was an attempt by Congress to address the economic inequalities faced by the majority of women in the work force at the time.<sup>132</sup> Therefore, some courts contend that the statute should be applied narrowly to protect primarily against discrimination experienced by women in the workforce.<sup>133</sup> However, as applied in the years since 1964, Title VII has not limited its protection to just the female of the species. Evidently the courts have—quite correctly—interpreted the intent of Congress to provide protection to men as well as women against forms of gender bias.<sup>134</sup>

It is unlikely that in 1964 legislators could have foreseen the medical advances that make diagnosis and treatment of transsexualism possible today. However, given the spirit of the Civil Rights Act, Congress would have intended to ensure equal opportunity in the workplace and treatment to all individuals regardless of their sex or gender. As previously stated, the Supreme Court has held that Section 2000e-2 of the Civil Rights Act “evinces a congressional ‘intent to strike at the entire spectrum of disparate treatment of men and women’ in employment.”<sup>135</sup> Therefore, discrimination due to a female not acting how a woman “should” act or a transsexual male not dressing how a man is “supposed” to dress, would create disparate treatment of the man and the woman. Such treatment would only enforce harmful stereotypes of the sexes, and should therefore be prohibited.

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<sup>131</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243–44 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

<sup>132</sup> *Holloway v. Arthur Andersen*, 566 F.2d 659, 664 (9th Cir. 1977) (Goodwin, J., dissenting).

<sup>133</sup> See *id.*

<sup>134</sup> See, e.g., *Price Waterhouse*, 490 U.S. at 228 (holding that discrimination based on one’s sex is no different than discrimination based on perceived stereotypes as a result of an individual’s gender).

<sup>135</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

By enacting Title VII of the Civil Rights Act, Congress also wanted to “deter conduct which has been identified as contrary to public policy and harmful to society as a whole.”<sup>136</sup> Transsexuals suffer widespread social stigmatization and “disparate treatment” in the workplace leading many of them to a life of poverty, and for many, a life of criminal activity.<sup>137</sup> Turning a blind eye to these conditions certainly could not have been the intent of Congress when drafting Title VII of the Civil Rights Act. Rather these injustices are precisely what Congress intended to eliminate.<sup>138</sup> The original legislators of the Act hoped to eliminate the economic deprivation of *any* class of individuals in our society, which resulted directly from employment discrimination.<sup>139</sup> Therefore, the legal protection of a class of individuals, such as transsexuals—who are plagued by discrimination based on their gender non-conformity and the resulting economic hardships—is implicit in the legislation.<sup>140</sup> The entirety of society must include those on its margins—such as transsexuals—and society’s laws must aspire to protect them.

*B. Interpreting the Law to Meet Society’s Needs and to Keep Pace with Medical Advances*

Even though Congress may not have foreseen the precise medical advances that have allowed for sex-reassignment surgery, they must have envisioned an evolving society with correspondingly changing legal needs. In 1971, just seven years after the enactment of the Civil Rights Act, a Fifth Circuit court handed down a forward thinking interpretation of the law. The court noted the intent of Congress in its decision in *Rogers v. EEOC*,<sup>141</sup> stating that Title VII:

[E]vinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstructive, knowing

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<sup>136</sup> *Price Waterhouse*, 490 U.S. at 264 (O’Connor, J., concurring).

<sup>137</sup> *See* Romeo, *supra* note 7, at 714.

<sup>138</sup> “There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself.” *Price Waterhouse*, 490 U.S. at 265.

<sup>139</sup> *See* Lo, *supra* note 84, at 282.

<sup>140</sup> “Title VII was written to protect people from the debilitating effects of discrimination.” *Id.*

<sup>141</sup> 454 F.2d 234 (5th Cir. 1971).

that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow . . . today employment discrimination is far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory practices are no longer confined to bread and butter issues.<sup>142</sup>

If one is to agree that Title VII of the Civil Rights Act was intended to be interpreted as broadly as possible when applied in cases of work discrimination,<sup>143</sup> then one can safely conclude that the scope of its to protection is meant to extend—possibly, especially so—to those who fall outside the “accepted normal” of society.

One group that falls outside the “accepted normal” and exists on the outskirts of modern American society is transsexuals. Over the last four decades, advances in medical technology have refined the diagnosis and treatment of transsexuals offering them heretofore unavailable avenues of treatment. It has been estimated that 1 person in 37,000 suffers from Gender Identity Disorder, with biological males diagnosed with the disorder more often than females.<sup>144</sup> Of those patients diagnosed as transsexuals, many choose to undergo some type of treatment in an effort to achieve a better quality of life.<sup>145</sup> Assuredly, as both diagnosis and treatment techniques become more refined and treatment options become more sophisticated, a greater number of individuals will choose to undergo treatment resulting in a sex change.<sup>146</sup> The result of this will be that more transsexuals will

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<sup>142</sup> *Id.* at 238.

<sup>143</sup> *Id.* The court also labeled the Act “broad-gauged innovation legislation” and one that should be interpreted liberally. It is also an accepted practice that a remedial statute should be construed liberally. *See* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984). If there is a dearth of legislative history limiting the statute’s application, the courts’ have a duty to interpret not only the explicit intent of Congress but also the implicit purpose of the statute, and hand down rulings that meet the changing needs of individuals in our society.

<sup>144</sup> Pearlman, *supra* note 11, at 841 n.21.

<sup>145</sup> *Id.* at 866 (pointing out that the medical community views sex reassignment surgery as *necessary* to treating transsexualism and the only successful form of treatment); *see also* David France, *An Inconvenient Woman*, N.Y. TIMES, May 28, 2000, (Magazine), *available at* <http://www.pfc.org.uk/news/2000/calp-nyt.htm> (“While one in 30,000 men and one in 100,000 women eventually initiate treatment for sex-change operations.”).

<sup>146</sup> *See* France, *supra* note 145 (“At the University of Minnesota’s Program in Human Sexuality, one of the largest transsexual centers in the country, administrators now routinely admit patients who take only half the journey from one sex to the other, choosing hormones without surgery, or surgery without

suffer gender discrimination in the workplace due to the treatment that they must undergo to achieve a better life. If it is true, as proposed by the court in *Rogers*, that Congress recognized that “constant change” is inevitable in our society, it is safe to assume that they would protect the growing number of transsexuals from the “nefarious practices” which could be deemed the “injustices of tomorrow.”

In *Schroer v. Billington*, the recent district court case in the District of Columbia, the court’s main reason for advocating to allow redress to transsexuals in the area of employment discrimination rested on the scientific observation that in this day and age, sex is no longer a “cut-and-dried matter of chromosomes”:<sup>147</sup>

Without good reasons to oppose it, and with numerous courts now joining its conclusion—albeit under the Price Waterhouse framework—it may be time to revisit . . . [the] conclusion . . . that discrimination against transsexuals because they are transsexuals is ‘literally’ discrimination ‘because of . . . sex.’ That approach strikes me as a straightforward way to deal with the factual complexities that underlie human sexual identity. These complexities stem from real variations in how the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological—interact with each other, and in turn, with social, psychological, and legal conceptions of gender.<sup>148</sup>

The court was correct in noting that sex is no longer a “cut and dried” issue. In attempting to address the problems faced by transsexuals, contemporary medicine provides treatment that often creates individuals who can fall temporarily into a grey area—in the physical, as well as legal, sense. While medical and psychological assistance is available for these individuals, often in practice they are denied legal recognition and protection due to a narrow interpretation of the word “sex.” Those courts have chosen to dismiss the claims citing the plaintiff’s failure in establishing they have been discriminated against based on their born or “biological sex,” because in fact they are being discriminated against because they are assuming the opposite

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hormones, says Bean Robinson, Ph.D., the associate director. ‘We see there’s a lot more complexity to the world’ ”).

<sup>147</sup> 424 F. Supp. 2d 203, 211 (D.D.C. 2006) (citing *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983)).

<sup>148</sup> *Id.* at 212–13 (citing *Ulane*, 581 F. Supp. at 825).

sex.<sup>149</sup> The failure lies in certain courts' intransigence and unwillingness to recognize transsexuals as individuals with a sexual identity—albeit one in transition—who are subjected to gender discrimination in the workplace. As a result, the decisions that are handed down are based on “legal categories constructed along lines of traditional notions of sex and gender.”<sup>150</sup> The courts' creation of these strict categories has inflicted great suffering on many transsexuals in transition, when they fail to conform to the gender stereotypes assigned to their biological sex.

In both fact and law this has been deemed an actionable form of discrimination. It is incumbent upon society, with the law in the forefront, to provide individuals undergoing treatment for a medically recognized condition redress when subjected to this type of gender discrimination.<sup>151</sup>

### C. *Smith: An Interpretation to Which We Should Aspire*

The Court of Appeals for the Sixth Circuit has recognized and accepted the different needs of transsexuals in a modern, ever-changing society. It has interpreted the Civil Rights Act of 1964 in a judicious manner.<sup>152</sup> The *Smith* Court correctly noted that other courts that have dismissed transsexuals' claims have only superimposed the classification of “transsexual” on plaintiffs in order to put them in an unprotected class of individuals and legitimize discrimination as a result of their gender non-conformity.<sup>153</sup> It is vital to recognize that gender discrimination against a female and that against a transsexual male are not different forms of discrimination, therefore the former is no more permissible.<sup>154</sup> As stated in *Smith*, “[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, regardless of the cause of that behavior; a label

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<sup>149</sup> See Pearlman, *supra* note 11, at 839.

<sup>150</sup> *Id.* at 838–39.

<sup>151</sup> Romeo, *supra* note 7, at 726–27 (emphasizing that only a few courts have been willing to recognize the gender identity of transsexual litigants who have been able to show that they were in the process of changing from one gender to another in compliance with the “medical model of gender”).

<sup>152</sup> Various federal courts have allowed claims of transsexuals under the Gender Motivated Violence Act, the EEOC, as well as for claims of sexual harassment and Hostile Work Environment claims. See *infra* note 106, and accompanying text.

<sup>153</sup> *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004).

<sup>154</sup> See *id.*

such as 'transsexual' is not fatal to sex discrimination claims where the victim has suffered discrimination because of his or her gender non-conformity."<sup>155</sup> Additionally, *Price Waterhouse* did not make gender discrimination conditional on one's "sexuality" or give any reason why Title VII should not protect sex-stereotypical discriminatory behavior against a person just because he or she is a transsexual.<sup>156</sup> It is clear that the discrimination against a transsexual plaintiff in transition would not have occurred "but for" his biological sex of male, and his inability to conform to perceived masculine gender norms most commonly associated with a male.<sup>157</sup>

Many courts have not reached the reasonable outcome that the *Smith* court did. These courts have been reluctant to accept the "gender-non-conformity" of transsexuals and to allow them redress based upon their failure to conform to the gender that is considered a representation of their biological sex, despite the fact that they are acting this way as part of their treatment for Gender Identity Disorder. As part of the transsexual's treatment he/she is encouraged and required to adopt a male/female persona, in order to more closely conform to the gender with which they identify. If harassed, fired, or refused a promotion during this period because of his failure to act how a male "should be acting," he has suffered gender discrimination just as any other individual may have.<sup>158</sup> The courts failure to recognize this discrimination is likely due in part to the very nature of transsexualism, lack of knowledge about that treatment regimen for GID, and the steps that must be undertaken by the transsexual as a part of that treatment.<sup>159</sup> The law should not

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<sup>155</sup> *Id.* at 575.

<sup>156</sup> *See id.* at 574-75.

<sup>157</sup> In addition, if "the very purpose of the statute is to promote hiring on the basis of job qualifications, rather than on the basis of race or color, [or any protected class]" transsexual individuals who are diligent and highly qualified workers should not be fired or discriminated against based on their "unusual" gender non-conformity. 110 CONG. REC. 7247 (1964).

<sup>158</sup> *See Vade, supra* note 125, at 309-10 (noting that discrimination against a transsexual who is biologically male but whose gender non-conformity is that he acts and dresses as a female is analyzed similarly to the situation where discrimination occurs against a non-transgender woman who is gender non-conforming because she has short hair).

<sup>159</sup> Lloyd, *supra* note 15, at 158 ("By casting transgender bodies as monstrous and unnatural, the law contributes to the 'felicitous self-naturalization' of its vision of the normal man and woman."); The unfamiliarity of their condition in the law and lack of understanding outside the medical world should not mean that this class of

distinguish between the reasons why the actions, appearance, and dress of individuals may not conform to their sex. It provides protection to those in the mainstream who elect to do so as a matter of personal choice, and the very same principles should be applied to transsexuals under Title VII. After all, the transsexual is not choosing to act or dress as the opposite sex, but is encouraged to do so as part of his/her medical treatment regimen.<sup>160</sup> Such a finding under the law would be analogous to denying legal protection to an individual who has chosen to undergo treatment for depression and who suffers discrimination due to resultant behavior from that medical treatment. Is the case for transsexuals undergoing medical treatment any different? And, if it is not, why should it cause them to forfeit their legal rights? The only reasonable answer to the latter question is that it emphatically should not.

#### CONCLUSION

Determination of a transsexual's sex, after the individual has undergone the full range of treatment—and whether it is based on chromosomes, anatomical details, or a combination of both—is best left to the experts in the medical community. The experts in the legal community however, are responsible for interpreting the laws when considering cases of gender discrimination involving transsexuals that are in transition or, in other words, have one “biological sex” but are conforming to the gender characteristics of the other. To do this equitably, these courts need to acknowledge that at any given time during their treatment if transsexuals are subjected to discrimination based on their gender non-conformity, they are entitled to redress under Title VII of the Civil Rights Act.

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individuals is outside of the law's bounds. Rather, it should call for the courts to aspire to meet the goals and intent of the Civil Rights Act of 1964, and protect “transgender people [who] are human, vulnerable, and eminently worth protecting.” *Id.* at 195.

<sup>160</sup> Romeo, *supra* note 7, at 721. This author notes that by framing gender non-conformity of transsexuals as a matter of choice, courts have been able to characterize discrimination against them as beyond the protection of Title VII as it is an unfortunate consequence of a decision they had made. *Id.* This characterization incorrectly views a transsexual's expression of their gender identity as something they have chosen to do themselves, rather than a legitimate medical treatment to enable them to express who they truly are.

The American founding fathers had enough foresight to create a judiciary system that could be as relevant in the twenty-first century as it was in the eighteenth. They understood that the law is a living, growing entity: as society evolves, so shall its laws keep pace. The Civil Rights Act of 1964 was a momentous step in the evolutionary journey of American jurisprudence. When Congress drafted the Civil Rights Act, they were making a statement that all people regardless of race, color, and sex were to be afforded equal protection under the law. The intent of that law was not to limit it to one sex or another, one race or another, or one religion or another. When medical science enables the treatment and subsequent emergence of a group of people, the law should protect them as fully as any other members of society. It is incumbent upon our courts to be ever-mindful of this evolving legacy, even more so, perhaps, because the marvels of modern science and technology will continue to pose an increasing challenge to existing laws and embedded mores.