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WHAT BEST TO PROTECT TRANSSEXUALS FROM DISCRIMINATION: USING CURRENT LEGISLATION OR ADOPTING A NEW JUDICIAL FRAMEWORK

S. Elizabeth Malloy

INTRODUCTION

"Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and of soul."1 This quote, taken from the autobiography of transsexual pioneer Mario Martino,2 reflects the feelings of confusion and inadequacy that affect transsexual individuals throughout the United States and around the world. In addition to this ongoing agony as a result of being "trapped in the wrong body," transsexuals have suffered a great deal of discrimination in employment, health care, and education from a society that is still affixed to traditional notions of sex and gender.3 American society enforces a rigid, binary sex/gender system; there exists no room for those who do not conform to societal notions of male/female or man/woman.4 As a result of this lack of acceptance and understanding,

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2 Id. at 1342.
3 Although there are no exact figures as to the number of transgender individuals in America, estimates range from between 1 in 10,000 to 1 in 500. See GORDENE OLGA MACKENZIE, TRANSGENDER NATION 16 (1994). Studies in smaller European countries show that "roughly 1 per 30,000 adult males and 1 per 100,000 adult females seek sex reassignment surgery," although these figures do not include transgender individuals who do not seek surgery. MILDRED L. BROWN & CHLOE ANN ROUNSLEY, TRUE SELVES: UNDERSTANDING TRANSSEXUALISM—FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS 9 (1996).
4 See Mandi Bierly, Johnny Weir Responds to Commentators Who Questioned His Gender, Example He Sets, ENTERTAINMENT WEEKLY (Feb. 25, 2010, 3:53 PM), http://popwatch.ew.com/2010/02/25/johnny-weir-olympics-gender-example/. During the 2010 Winter Olympics, two sports commentators suggested that Johnny Weir, the American figure skater, may have
transsexuals are victims of discrimination in virtually every aspect of their lives. Socially, they are outcast because they do not fit into traditional notions of gender. Legally, they are subject to a variety of obstacles that the average person would never have to face. In thirty-four states, transsexuals are unable to change their birth certificate to accommodate their gender identity and expression, which, in turn, can lead to difficulty obtaining a driver’s license or passport. They are unable to obtain marriage licenses, which can affect intestacy and child custody rights. They even face discrimination based on their decision to use either a “male” or “female” restroom. To date, existing anti-discrimination laws have been largely ineffective in remedying the injustices and difficulties that transsexual individuals face.

This article specifically examines the issues and controversies that transsexual individuals have encountered as a result of their lack of protection under anti-discrimination laws, particularly the Americans with Disabilities Act (ADA) and Title VII. Part I is an overview of our society’s binary sex/gender system and how this system serves to exclude and disenfranchise transsexuals. Part II examines the relationship between disability law and transsexuals, both explaining why they were excluded from the ADA and how state disability laws have provided more

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Even my gender has been questioned. I want that to be public because I don’t want 50 years from now more young boys and girls to have to go through this sort of thing and to have their whole life basically questioned for no reason other than to make a joke and to make people watch their television program. I hope more kids can grow up the same way that I did and more kids can feel the freedom that I feel to be themselves and to express themselves. I think as a person you know what your values are and what you believe in, and I think that’s the most important thing.

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6 Id. at 523 (citing In re Ladrach, 513 N.E.2d 828 (Ohio 1987)).

7 Id. at 524 (citing In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002)).

8 Id. (citing Christian v. Randall, 516 P.2d 132 (Colo. App. 1973)).

9 Id. at 523 (citing Goins v. West Group, 635 N.W.2d 717 (Minn. 2001)).

10 See Cain, supra note 1, at 1354 (“In sum, there is virtually no protection under Title VII for transsexuals”); Sandra Fluke & Karen Hu, Twelfth Annual Review of Gender and Sexuality Law: Employment Law and Health Care Access Chapter: Employment Discrimination Against LGBTQ Persons, 12 Geo. J. Gender & L. 613 (2011) (“Another category of individuals confronted by sexual orientation discrimination are those who challenge traditional notions of gender identity, especially transgender individuals. Additionally, while gay and lesbian persons have been successful at raising Title VII claims when the harassment they experienced was due to their nonconformity with gender norms, they have been less successful in cases in which they were harassed because of their perceived sexual orientation. Many states exempt employee benefit discrimination from their anti-discrimination statutes, undercutting LGBTQ employees’ benefit claims.”).
protection. Part III discusses how transsexuals have fared under a Title VII sex discrimination approach. This section also analyzes whether Title VII, or sex discrimination laws in general, are appropriate remedies for discrimination against transsexuals. Finally, Part IV suggests the need for a separate category prohibiting discrimination against transsexuals. This category would be difficult to achieve because it requires the reconstruction of American society's beliefs, assumptions, and norms associated with the binary sex/gender system. However, this protection is necessary to provide transsexuals with the legal recognition that would allow them to gain fair and equal treatment. Part V concludes that the creation of such a category could achieve new protections against transsexuality-based discrimination.

I. THE BINARY SEX/GENDER SYSTEM AND ITS ERASURE OF TRANSGENDER PEOPLE

A. Language Issues: Defining and Explaining

Sex, gender, and sexual orientation are distinct concepts. They are not always indicative of one another and are not necessarily congruent. Sex refers to one’s biological categorization as either female or male. Gender, however, refers to a socially constructed set of mannerisms, preferences, and attitudes generally associated with a specific sex. In mainstream society, only female/feminine and male/masculine are recognized and accepted genders. The binary sex/gender system in American society assigns females the gender of female/feminine and males the gender of male/masculine. However, the binary sex/gender system fails to accept that gender is much more complex than our societal conceptions of women and men. Rather, gender consists of two distinct concepts: gender identity and gender expression. Gender identity refers to a person’s internal sense of maleness, femaleness, or something in between. One’s “gender identity is internal and personally defined.” In contrast, gender expression encompasses “external characteristics and behaviors that are socially defined as either masculine or feminine.” These may include dress, mannerisms, and social behaviors; “gender expression is external and

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11 Milton Diamond, Sex and Gender Are Different: Sexual Identity and Gender Identity Are Different, 7 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 320, 321 (2002), http://ccp.sagepub.com/content/7/3/320.
12 Id.
13 See Cain, supra note 1, at 1355.
14 See deManda, supra note 5, at 512.
16 Id.
17 Id.
18 Id.
Sexual orientation describes a person's preference of sexual partners. Heterosexuality, preference for the "opposite" sex, is the socially accepted norm. Society also recognizes, without necessarily condoning, homosexuality and bisexuality. Similar to society's rigid definition and conception of gender, sexual orientation is rigidly defined as well. If one is biologically male and interested in other males sexually, he is homosexual; if one is biologically female and interested in females, she is homosexual.

Transsexuals challenge this rigidity by often defining themselves as heterosexuals who are attracted to those of the same biological sex. This is because transsexual and transgender individuals feel their biological sex is not congruent with their internal gender; while a transsexual may be biologically male, she may ultimately feel that her sex, as her gender, should be female. Transsexuals often feel that they were just born with the wrong genitalia. Thus, after sex reassignment surgery (SRS), the majority of male-to-female (MTF) transsexuals pursue male partners, and the majority of female-to-male (FTM) transsexuals pursue female partners.

Transsexuals, as the most visible people transgressing the gender line, serve as a good demographic for the law to begin addressing gender protection issues. Discrimination against another human being based on immutable characteristics is held as morally wrong; the more immutable the characteristic is considered, the more urgently the law must intervene. Transsexuality is considered immutable because those who fall into this category feel they have no choice as to their gender; they simply were born as the incorrect biological sex. By their mere existence, transgender

19 Id.
21 See id. at 209. Kramer argues that just as white individuals are viewed as "not having a race . . . because privilege functions to obscure whiteness," heterosexuals are similarly "seen as not having a sexual orientation." Id. at 229. Because of this "paradox of privilege," the courts often presume heterosexuality in claims of sex discrimination. Id. at 228. Kramer, however, advocates that the courts reorient their approach in a two-step method: first, acknowledge orientation, whether heterosexual or otherwise; and then assert the Title VII claim. This will help prevent the courts' too-frequent suspicion of a plaintiff "bootstrapping" homosexuality to sex discrimination claims. Id. at 235-36.
22 See id. at 217.
24 Ellis & Eriksen, supra note 23, at 289.
25 Id.
26 CROOKS & BAUR, supra note 23, at 130.
28 Id.
29 See Ellis & Eriksen, supra note 23, at 289.
individuals call into question the binary sex/gender system, and are consequently primary targets for discrimination. “The term transgender arose in the mid-1990s from the grassroots community of gender-different people. Unlike the term ‘transsexual,’ it is not a medical or psychiatric diagnosis.”30 In its broadest, most inclusive sense, the term “transgender” “encompasses anyone whose identity or behavior falls outside of stereotypical gender norms.”31 Leslie Feinberg explains that “transgender” is colloquially used as “an umbrella term to include everyone who challenges the boundaries of sex and gender.”32 The term is necessary to allow individuals to define themselves, because the language of the binary sex/gender systems excludes and erases transgender experience. The multiplicity and variance of transgender experience truly transcend the current usage and definitions of sex and gender.33

B. Societal Oppression Fueled by the Binary Sex/Gender System

As a society, our lives are dominated by performing our binary gender roles and observing the gender performances of others.34 Judith Butler referred to our gender performances as a “ritual social drama” where we “regularly punish those who fail to do their gender right.”35 Minutes after a new baby is born, society assigns it a socially accepted gender role; its first gender performance begins when it dons its pink or blue cap.36 Every time


31 [T]ransgender” has become an umbrella term that is used to describe a wide range of identities and experiences, including but not limited to: pre-operative, post-operative, and non-operative transsexual people; male and female cross-dressers (sometimes referred to as “transvestites,” “drag queens” or “drag kings”); intersexed individuals; and men and women, regardless of sexual orientation, whose appearance or characteristics are perceived to be gender atypical.

32 Id.

33 LESLIE FEINBERG, TRANSGENDER WARRIORS: MAKING HISTORY FROM JOAN OF ARC TO RUPAUL, at x (1996).

34 Id.

35 LESLIE FEINBERG, TRANS LIBERATION: BEYOND PINK OR BLUE 5 (1998) [hereinafter TRANS LIBERATION] (“We are a movement of masculine females and feminine males, cross-dressers, transsexual men and women, intersexed individuals, many other sex and gender-variant people, and our significant others. All told, we expand understanding of how many ways there are to be a human being.”).

36 See Kristen Schilt & Catherine Connell, Do Workplace Gender Transitions Make Gender Trouble?, 14 GENDER, WORK & ORG. 596, 600 (2007) (“[I]ndividuals are always doing gender, as gender is a social process that is constantly negotiated, rather than something innate to men or women.”).


we use a public restroom, we must choose a binary gender role to perform by selecting the door bearing the appropriate identifying silhouette. Professor Ruth Colker writes that “[o]ur entire Western system of thought is based on binary opposition; we define by comparison, by what things are not.”

Oppression based on sex, gender, and sexual orientation preserves the binary sex/gender system that perpetuates the status quo. Gender-differentiation rules are second nature to most people. Many people have never thought twice about choosing a restroom door or which box to check for their driver’s license. Further, there is little debate over whether to shave or wear makeup and high heels. Yet, this does not mean that binary gender-differentiation rules are any less socially constructed. In fact, historically, many societies have not embraced a solely binary concept of sex and gender. Cross-gender behavior “ha[s] been present in all societies from the earliest times, and . . . [these] behaviors and those who exhibit them have been positively acknowledged by many cultures.”

The Siberian Chukchi people have seven gender categories, including types of men, women, and those in between. In India, there are two separate gender categories for transsexuals born as men and transsexuals born as women. Many Native American cultures honored individuals who identified themselves with the gender opposite their biological sex. Referred to as the berdache, the cross-gender behavior of these individuals did not threaten the gender system because Native American

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Bodies that Matter: On the Discursive Limits of Sex 7-8 (1993)) (“Consider the medical interpellation which (the recent emergence of the sonogram notwithstanding) shifts an infant from an ‘it’ to a ‘she’ or a ‘he,’ and in that naming, the girl is ‘girled,’ brought into the domain of language and kinship through the interpellation of gender. But that ‘girling’ does not end there; on the contrary, that founding interpellation is reiterated by various authorities and throughout various intervals of time to reinforce or contest this naturalized effect. The naming is at once the setting of a boundary, and also the repeated inculcation of a norm.”).

38 See L. Camille Hébert, Transforming Transsexual and Transgender Rights, 15 WM. & MARY J. WOMEN & L. 535 (2009). Professor Hébert offers some insight into society’s oppressive attitudes and treatment of transsexuals:

Men, even those who do not hold negative views of women, may find it incomprehensible that transsexual women are willing and even eager to give up their penises. And some men may also feel that transsexual men are merely “passing” as men and therefore seeking a status and privileges to which they are not entitled; sometimes these feelings are expressed in the form of sex-based violence and rape. Similarly, some women may view transsexual women as interlopers and not true women and transsexual men as traitors.

Id. at 565-66.

39 Ellis & Eriksen, supra note 23, at 291.
40 See deManda, supra note 5, at 519.
41 Id. at 520.
42 Id. at 519.
tribes lived without strict gender definitions.\textsuperscript{44} However, as the ideology of the Native American tribes changed and conformed to the dominant ideology of Western culture, the cross-gendered acceptance of these tribes suffered its final demise.\textsuperscript{45}

Western society's binary sex/gender system is based on an assumption that there is a correct, "natural," and easily ascertainable definition of what it means to be a "real" man and a "real" woman.\textsuperscript{46} These definitions are explained through the gender stereotypes that make up society's gender norms. While each of us knows that we do not fit these definitions perfectly, they are drilled into our minds through education and popular culture until they are accepted—"[t]hese gender messages play on and on in a continuous loop in our brains, like commercials that can't be muted."\textsuperscript{47}

\textbf{C. Challenges Facing Transgender Individuals}

Transsexual individuals are discriminated against because they do not, and cannot, fit into these narrow social norms. They cannot accurately check the "M" or "F" box on their driver's license application because neither option adequately describes them.\textsuperscript{48} They do not conform to society's binary sex/gender system. Transsexual individuals routinely suffer "police harassment, ... sexism, high unemployment, low wages, job insecurity, homelessness, [and] lack of health care."\textsuperscript{49} This discrimination is compounded by the lack of protection transsexuals have received under existing anti-discrimination laws.\textsuperscript{50}

In addition to discrimination in health care and employment, transsexual individuals encounter hostility and systemic discrimination in other areas. Transsexuals interested in becoming foster parents are often declared unsuitable placements for youths because due to their gender identity.\textsuperscript{51} Because of false stereotypes about transsexual parents,\textsuperscript{52} foster

\textsuperscript{44} See id. at 28-29.
\textsuperscript{45} Id. at 28.
\textsuperscript{46} TRANS LIBERATION, supra note 33, at 3.
\textsuperscript{47} Id. at 4; Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 COLUM. L. REV. 392, 415 (2001).
\textsuperscript{48} See TRANS LIBERATION, supra note 33, at 20. Feinberg points out that even the "M" and "F" boxes are ambiguous; do they mean "male" and "female," or "masculine" and "feminine"? This point emphasizes the mandatory assumption by the binary sex/gender system—that the two are one and the same. Transgender individuals, however, are proof that they are not. See id.
\textsuperscript{49} Id. at 135-36. See also Norman P. Spack et al., Children and Adolescents with Gender Identity Disorder Referred to a Pediatric Medical Center, 129 PEDIATRICS 418, 422 (2012), available at http://pediatrics.aappublications.org/content/129/3/418.full.html (noting that the lack of medical centers for treating children and adolescents with gender identify disorder leads to later harms and delayed diagnoses).
\textsuperscript{50} See discussion infra Parts II, III.
\textsuperscript{51} See Jessica Breslin ed., Family Law: Adoption and Foster Care, 10 GEO. J. GENDER & L. 673, 701-02 (2009).
children may be removed from homes after child welfare personnel discover that a foster parent is a non-heterosexual individual. Transsexual parents stand to lose either custody or all parental rights entirely.

As a result of the lack of understanding and legal protection against discrimination, transsexual individuals have confronted tremendous obstacles while trying to obtain proper medical care. Many private insurance companies exclude sex reassignment surgery and hormone treatments from their coverage, often maintaining that these procedures are cosmetic or experimental. In some cases, insurers have denied entire medical plans as soon as they are informed of a person’s transsexuality. Transsexual prisoners face additional challenges when seeking medical care. They are often subject to violence and rape because of their gender identity.

Along with this callous indifference on the part of some doctors and insurers concerning their major needs, the transsexual individual faces numerous other difficulties involving everyday inconveniences, such as using public restrooms. Indeed, if a company wants to fire a transsexual employee, the restroom issue is the least controversial way of doing so. For example, the Minnesota Supreme Court has supported objections to a transsexual employee’s change in restroom use. Recently, courts have even invalidated the marriages of transsexual litigants to avoid designating them as surviving spouses.

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54 See Daly v. Daly, 715 P.2d 56, 56-60 (Nev. 1986) (finding that termination of a transsexual’s parental rights were in the “child’s best interests”).
56 Id. See also Spack, supra note 49, at 419, 422 (describing the harmful effects of failure to timely diagnose gender identity disorder, including depression, suicide, and drug abuse).
59 See COLKER, supra note 37, at 112.
60 See Goins v. West Group, 635 N.W.2d 717 (Minn. 2001) (finding that an employer’s designation of restrooms by biological gender did not constitute sexual discrimination against a male transsexual employee wishing to use the female restroom).
61 Id.
II. DISABILITY LAW AS AN AVENUE OF PROTECTION FOR TRANSSEXUAL INDIVIDUALS

A. Are Transsexual Individuals Disabled?

When analyzing the protection of transsexual plaintiffs under disability law, the first question that invariably arises is whether transsexual individuals should be considered disabled. Societal notions about disabled individuals include people with physical infirmities, such as paraplegics and muscular dystrophy patients, and those with severe emotional and psychological disorders. Although transsexuals are not "disabled" in the traditional sense—they are not infirm, nor are they impaired from performing physical tasks—they are considered disabled within the medical community.63 This classification has generated a great deal of controversy.

Gender identity disorder (GID) is an important method of bringing transsexual individuals under the scope of state disability laws. The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) classifies transsexualism as a gender identity disorder.64 To be diagnosed with GID, individuals must demonstrate several criteria,65 the most important of which are persistent cross-gender identification and evidence of discomfort about one’s assigned sex.66 GID “is applied to children who feel dissonant with their assigned anatomic gender and display gender dysphoria,”67 and its onset typically occurs during a child’s preschool years.68 Common examples of such behavior include “[a] boy who insists on wearing makeup and women’s clothing,” or a girl who “refuse[s] to wear dresses[] [and] idolize[s] male superheroes.”69

GID is not without its limitations. While many transsexuals recall similar childhood experiences as these, many children who suffer from

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65 Ellis & Eriksen, supra note 23, at 290 (“[T]o be diagnosed with GID, individuals must demonstrate four or more of the following criteria: ‘(1) a repeatedly stated desire to be, or insistence that he or she is, the other sex, (2) in boys, preference for cross-dressing or simulating female attire; in girls, insistence on wearing only stereotypical masculine clothing, (3) strong and persistent preferences for cross-sex roles in make believe play or persistent fantasies of being the other sex, (4) intense desire to participate in the stereotypical games and pastimes of the other sex, (5) strong preference for playmates of the other sex.”’).
68 Id. at 4.
69 Id. at 3.
GID as children “do not mature into adults with gender identity disorder.”

Further, due to the strict criteria required for a GID diagnosis, many adult transsexuals cannot be diagnosed with GID “when they are no longer experiencing distress over their gender identity—either because they are living as the gender they feel themselves to be or because they have had sex reassignment surgery.” The diagnostic criteria are “rife with gender stereotypes” in its classifications for “normal” male and female behavior. For example, boys may have an affinity for “play[ing] with Barbie dolls,” while girls may be opposed to “wear[ing] dresses or other feminine attire.” These classifications clearly endorse a binary system of sex and gender.

The benefit of a GID diagnosis, however, is that GID constitutes a disability in several states, which qualifies transsexual individuals for medical coverage and brings them under the protection of state disability discrimination provisions. Further, a GID diagnosis is often required before transsexuals can undergo the “ultimate step” of sex reassignment surgery. The procedure is lengthy and costly, involving “two years of preparation before the operation[,] . . . three months of psychotherapy[,] . . . [and] liv[ing] 24 hours a day in the target gender for a period of one to two years while continuing hormone therapy.” These expenses may cost as high as $50,000. Thus, being diagnosed with GID is necessary for many transsexual individuals seeking medical care, sex reassignment surgery, or protection under state disability laws.

An illustration of the courts’ recognition of GID as a disability is the pre-ADA federal case of Doe v. United States Postal Service. In this case, a transsexual individual’s employer allegedly had violated the Rehabilitation Act by firing her after learning of her plans to undergo sex reassignment surgery. The plaintiff argued that she was protected under the Act because of her “medically and psychologically established need for [SRS]. First, the court reasoned that her transsexualism rose to the level of a physical or mental impairment substantially limiting a major life

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70 Green, supra note 23, at 26-27.
71 Ellis & Eriksen, supra note 23, at 290.
72 Hébert, supra note 38, at 553 n.104.
73 Id.
74 See discussion infra Part II.C.
75 Levy, supra note 64, at 146 (quoting Terry S. Kogan, Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other”, 48 HASTINGS L.J. 1223, 1227 (1997)).
76 Id.
77 Id.
80 Id. at *1.
81 Id. at *2.
activity.82 Further, the court found that her transsexualism constituted an impairment that “substantially limited at least her major life activity of ‘working.’”83 Since one can be disabled because others merely regard her as having an impairment, the plaintiff was allowed to bring her claim under the Rehabilitation Act.84

B. Exclusion from the ADA

Congress enacted the ADA in 1990 to address the pervasive discrimination against disabled individuals in areas such as health care, education, employment, and public services.85 Finding that 43 million Americans had one or more physical or mental disabilities, Congress designed the Act so that, as one advocate explained, “persons [would be] judged by their abilities and not on the basis of their disabilities.”86

However, in proceeding to eliminate legal boundaries against the disabled, the Act simultaneously erected new boundaries on a wide group of individuals, including transsexuals. The ADA excludes from coverage “homosexuality and bisexuality,”87 as well as “transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders.”88 The deliberate exclusion of transsexual individuals is particularly questionable, considering that the ADA drafters referenced the DSM,89 which classifies GID as a disorder.90 Furthermore, the Act was intended to cover a broad range of impairments, from “anxiety caused by heavy traffic to borderline personality disorder.”91

When looking at the legislative history of the ADA, however, it is not difficult to discern why transsexuals were deliberately excluded from its protection. In the course of congressional debate on the legislation, Senator Jesse Helms engaged in a heated debate with Senator Tom Harkin as to whether HIV-positive individuals and transvestites should be covered by the Act.92 Helms had previously criticized case law under the Rehabilitation Act, which protected “transvestism and other compulsions or

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82 id. at *3.
83 id.
84 id.
89 See Levy, supra note 64, at 150-51.
90 id. at 145.
91 Hiegel, supra note 86, at 1471 (citations omitted).
92 See 135 CONG. REC. S10765-01 (1989). Interestingly, Helms apparently confused transvestites with transsexuals, although it is doubtful whether he would have voted differently had he comprehended this distinction.
addictions, which churches or religious schools might once have felt comfortable in regarding as moral problems.\footnote{RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 25 (2005).} At another point, Helms asked, “Do we really want to prohibit . . . private institutions from making employment decisions based on moral qualifications?”\footnote{COLKER, supra note 37, at 163.} Helms, therefore, sought to exclude the transsexual community from the ADA because of his moral disapproval, as well as the fear that Rehabilitation Act cases like Doe v. United States Postal Service would be applied to private companies.\footnote{See supra text accompanying notes 92-94.} This “unprincipled exclusion” is especially ironic, considering that the ADA was enacted precisely to eliminate bigotry against groups subjected to disability-based discrimination.\footnote{42 U.S.C. § 12101(b) (2010). See Paisley Currah & Shannon Minter, Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People, 7 WM. & MARY J. WOMEN & L. 37 (2000).} As will be discussed later on, some transsexual advocates have argued that this section of the ADA should be deemed unconstitutional for this very reason.\footnote{See infra text accompanying notes 148-54.}

Since its enactment, the ADA has faced much criticism for its failure to provide protection to many disabled Americans.\footnote{See Linda Hamilton Krieger, Introduction, in BACKLASH AGAINST THE ADA: REINTERPRETING DISABILITY RIGHTS 1, 5-14 (Linda Hamilton Krieger ed., 2003).} Much of this has been due to several Supreme Court cases that have narrowly defined the term “disability” under the law.\footnote{ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 § 2(a)(4)-(7) (codified as amended at 42 U.S.C. §§ 12101-12210 (2010)).} Accordingly, Congress has revisited the ADA in an effort to revitalize its scope.\footnote{ADA Amendments Act of 2008, § 2(a)(3), (b)(1)-(5).} The amendments attempt to restore the ADA’s original definition of disability.\footnote{See ADA Amendments Act of 2008, § 2(a)(1).} However, although the ADA Amendments Act was passed in 2008 with a new emphasis on covering more individuals, the provision denying coverage to transsexuals was not addressed.\footnote{See ADA Amendments Act of 2008.}

C. State Disability Laws

violated the dress code that prohibited "clothing which could be disruptive or distracting to the educational process or which could affect the safety of students." The complaint alleged that the school had violated Article CXIV of the Declaration of Rights of the Massachusetts Constitution. In its opinion, the court shrugged off the exclusion of transsexuals from the ADA, noting that Article CXIV did not specifically define which handicaps were protected. The court interpreted this to mean that persons "who were previously thought to be eccentric or iconoclastic (or worse)" by society may have physical and mental impairments that warrant protection from discrimination. As a result, the court accepted the plaintiff's claim that she was a "qualified handicapped individual" entitled to protection under Article CXIV.

Likewise, in Enriquez v. West Jersey Health Systems, the New Jersey Superior Court found that West Jersey Health Systems had violated the New Jersey Law Against Discrimination (LAD). The plaintiff, born a biological male, had practiced as a private physician in New Jersey for approximately twenty years before being hired by the defendant. Over the next two years, Enriquez began the transition process from male to female, including shaving her beard, sculpting and waxing her eyebrows,

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105 *Id.* at *1.
106 *Id.* at *7. Article CXIV of the Constitution of the Commonwealth of Massachusetts provides: "No otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." MASS. CONST. art. CXIV, available at http://www.malegislature.gov/laws/constitution.
107 *Doe ex rel. Doe v. Yunits*, No. 00-1060A, 2001 WL 664947, at *5 (Mass. Super. Ct. Feb. 26, 2001) (stating that "this Commonwealth has a proud and independent tradition in protecting the civil rights of its citizens, and will not follow in lock-step federal civil rights law.... Simply because the United States Congress chose, after enacting the Federal Rehabilitation Act, to exclude from the definition of an 'individual with a disability' those persons with 'gender identity disorders not resulting from physical impairments' does not mean that this Court must define a 'handicapped individual' under Article CXIV to exclude persons with these disorders.").
108 *Id.*
109 *Id.*
110 *Id.* See also Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (finding that Massachusetts may not "deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."). The *Goodridge* court echoed the *Doe ex rel. v. Yunits* decision, noting that “[t]he Massachusetts Constitution protects matters of personal liberty against government incursion as zealously, and often more so, than does the Federal Constitution, even where both Constitutions employ essentially the same language.” 798 N.E.2d at 959. Thus, in finding that “central to personal freedom and security is the assurance that the laws will apply equally to persons in similar situations,” the court opened the door not only for same-sex marriages, but also for transgender marriages as well. *Id.* at 959.
111 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001). See also M.T. v. J.T., 355 A.2d 204, 208-09 (N.J. Super. Ct. App. Div. 1976) (upholding the validity of a marriage between a husband and his wife, a post-operative MTF transsexual, and explaining that "there are several criteria... which may be relevant in determining the sex of an individual. ...[W]e disagree... that for adjudging the capacity to enter marriage, sex in its biological sense should be the exclusive standard.").
112 *Enriquez*, 777 A.2d at 380.
113 *Id.* at 367.
and growing breasts. The plaintiff was diagnosed with GID and, one month later, received a letter terminating her employment contract. She filed suit under the LAD, alleging discrimination based on disability, sexual orientation, and gender. The court found that her GID diagnosis fell under the "mental, psychological or developmental disability" provision of the LAD's definition of "handicap." The court noted that, unlike the ADA, the statute did not require the employee to be "substantially limit[ed] in any "major life activity." The mere fact that the plaintiff had been terminated because of a disability listed in the DSM-IV was enough to bring her under the LAD's protection.

_Doe ex rel. Doe v. Yunits and Enriquez v. West Jersey Health Systems_ are two of the more notable cases in which state courts, explicitly discounting the ADA's exclusionary definition of disability, acted to protect transsexual plaintiffs from employment discrimination. Most states have not followed the analysis in these cases, and have instead interpreted their state disability laws quite narrowly to exclude protection for transsexuals.

**D. Limitations of State Disability Laws**

_Yunits and Enriquez_, although undoubtedly encouraging, are also unique. Both Massachusetts and New Jersey have broad definitions of "handicap," and as these two cases demonstrate, their state courts are willing to apply anti-discrimination statutes broadly to protect transsexual
individuals. In most other states, courts have been consistently hostile towards transsexual plaintiffs. Two state court cases, Littleton v. Prangel and Doe v. Boeing Co., illustrate the thinly disguised animosity that transsexual litigants confront in less-hospitable states.

In Littleton, the plaintiff, an MTF transsexual, married a heterosexual male ten years after undergoing sex reassignment surgery. Upon her husband’s death, Littleton filed a medical malpractice suit against his doctor. In response, the defendant filed a motion asserting that Littleton was a man, and thus could not be the surviving spouse of another man under Texas law. The majority adamantly refused to determine whether the plaintiff was a female after her sex reassignment surgery, arguing that “such matters . . . are beyond this court’s consideration.” Since Littleton was a male on her birth certificate, the majority found that the marriage to her deceased husband was invalid under Texas law, which prohibited her from bringing a cause of action as his surviving spouse.

In Doe v. Boeing, the plaintiff employee had been hired while she “was a biological male and presented herself as such on her application.” Six years later, Doe began undergoing hormone treatments. Though Doe informed Boeing of her need to dress as a female to qualify for sex reassignment surgery, Boeing prohibited her use of women’s restrooms and dressing in feminine attire until after she had completed the surgery. Doe disregarded Boeing’s policy, and after Boeing had received several complaints, she was terminated.

Doe subsequently brought a handicap discrimination claim against Boeing under Washington’s Law Against Discrimination. The Washington Supreme Court, in determining whether Doe was handicapped, acknowledged that “[g]ender dysphoria is a medically cognizable and diagnosable condition.” Nevertheless, since Boeing had not terminated Doe because of her condition, the court found that Doe was not considered

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123 9 S.W.3d at 225.
124 Id.
125 Id.
126 Id. at 231.
127 Id. See also In re Estate of Gardiner, 42 P.3d 120 (Kan. 2002) (finding that an MTF transsexual’s marriage to a male was invalid, even though she had had her birth certificate amended to state that she was female).
129 Id.
130 Id.
131 Id. at 534.
132 Id.
133 Id. at 535.
handicapped and, thus, was not protected under the statute.\textsuperscript{134} In addition, the court found that Boeing had accommodated Doe's gender dysphoria by allowing her to wear unisex clothing to work, and that this accommodation was reasonable because Doe "had no medical need to dress as a woman at work in order to qualify for . . . [SRS]."\textsuperscript{135}

Littleton v. Prange and Doe v. Boeing highlight the unwillingness of many state courts to provide even the most basic legal protections for transsexual individuals. Even courts in states with transsexual-inclusive anti-discrimination laws have been reluctant to interpret these laws broadly. In Goins v. West Group,\textsuperscript{136} for example, female coworkers of an MTF transsexual had objected to her use of the female restroom.\textsuperscript{137} Their employer considered this a "hostile work environment concern," and thus "decided to enforce the policy of restroom use according to biological gender."\textsuperscript{138} Goins refused to abide by this policy and continued using the female restroom, eventually resigned, and brought suit.\textsuperscript{139} Although Minnesota's pioneering anti-discrimination statute appeared to cover transsexual plaintiffs,\textsuperscript{140} the state supreme court interpreted the statute very narrowly, concluding that it did not require employers to designate restrooms on the basis of gender self-image.\textsuperscript{141} The Goins court's highly restrictive interpretation of a seemingly broad anti-discrimination statute reflects the approach that other state courts have taken,\textsuperscript{142} and demonstrates why Yunits and Enriquez remain exceptions.

E. Weaknesses of the ADA

First and foremost, the ongoing discrimination that transsexual individuals face as a result of being excluded from the ADA demonstrates the Act's inherent weakness. Heralded as the most important civil rights

\textsuperscript{134} 846 P.2d at 536 ("Boeing discharged Doe because she violated Boeing's directives on acceptable attire, not because she was gender dysphoric. Doe was treated in a respectful way by both her peers and supervisors at Boeing.").
\textsuperscript{135} Id. at 537.
\textsuperscript{136} 635 N.W.2d 717 (Minn. 2001).
\textsuperscript{137} Id. at 721.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. ("The definition of 'sexual orientation' [in the Minnesota Human Rights Act] includes 'having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.'").
\textsuperscript{141} Id. at 723.
\textsuperscript{142} See also Cruzan v. Special Sch. Dist. No. 1, 294 F.3d 981, 983 (8th Cir. 2002) (stating that Minnesota statutory law "neither requires nor prohibits restroom designation according to . . . biological sex"). See also Littleton v. Prange, 9 S.W.3d 223, 231 (Tex. App. 1999) (finding that the determination of whether an MTF transsexual is "male" or "female" was "beyond this court's consideration"); Doe v. Boeing Co., 846 P.2d 531, 536 (Wash. 1993) (finding no discrimination because plaintiff's termination was due to violation of a dress code, not her gender dysphoria).
law since the 1960s,143 the ADA has instead served to legitimate discrimination against transsexual individuals, not only by deliberately excluding them from protection, but also by placing them in the same category as pedophiles, exhibitionists, and voyeurs.144 Not surprisingly, state courts have opportunistically used this categorization to deny transsexual plaintiffs protection under state disability and discrimination laws.145

The ADA’s exclusion of transsexual individuals was apparently driven by moral disapproval. As mentioned previously, Senator Helms argued during Senate deliberations that private employers should be allowed to discriminate against groups they consider morally objectionable.146 Of course, it is this precise type of ignorance on the part of employers and health care providers that the ADA was supposed to redress.147

As a result, some critics argue that the clause in the ADA excluding transsexuals should be declared unconstitutional for violating the Fourteenth Amendment’s equal protection clause.148 Even under a rational basis test, these critics maintain that the ADA’s exclusion of transsexual individuals is unconstitutional, since “it disadvantages a particular group of individuals and is neither a rational means nor a legitimate end of government action.”149

Here, an analogy between transsexual individuals and the gay and lesbian community is apt. In Romer v. Evans,150 the Supreme Court struck down an amendment to the Colorado Constitution that prohibited all executive, legislative, and judicial action to protect homosexuals from discrimination.151 Justice Kennedy argued that “the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”152 Expanding upon this logic, and with the support of legislative history, a transsexual litigant could persuasively argue that the ADA provision was inserted solely as a result of animus against transsexual individuals, thus failing the rational basis test.153 However, the likelihood of such a claim succeeding is doubtful, given the general hostility of federal courts towards transsexual plaintiffs. The Supreme Court recently denied certiorari of two cases

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145 See supra notes 121-142 and accompanying text.
146 See supra notes 92-95 and accompanying text.
147 See Hiegel, supra note 86, at 1468.
148 See Hong, supra note 78, at 124-25.
149 Id. at 125.
151 Id. at 633-36.
152 Id. at 632.
153 See Hiegel, supra note 86, at 1452-53; Hong, supra note 78, at 125.
involving transsexual plaintiffs, which may indicate either discomfort or disinterest in resolving legal issues affecting the transsexual community at large.

F. Controversy Within the Transsexual Community Concerning Use of Disability Laws

Perhaps the most controversial issue within the transsexual community with respect to disability anti-discrimination laws concerns whether they should be considered disabled at all. While the DSM-IV classification is necessary for transsexual patients who wish to undergo surgery or hormone treatments, or be reimbursed for transition-related medical care, transsexual advocates argue that the classification would perpetuate the stereotype that “transgendered people are inherently disturbed or unstable.” As transgender attorney and activist Dean Spade stated, “There is a gut reaction that occurs, where people feel that using disability law claims means we are arguing that we are somehow flawed people.”

This concern echoes the battles that gay activists fought over thirty years ago to remove the psychiatric stigma associated with homosexuality. In the early 1970s, gay activists and prominent psychiatrists began to challenge long-held assumptions about homosexuality as a mental disorder. The American Psychiatric Association, after conceding that “there was no valid data to link homosexuality and mental illness,” removed homosexuality from the DSM list of mental disorders in 1973. Although gays and lesbians still suffer discrimination, they no longer have to rely on medical diagnoses or disability discrimination laws to receive judicial protection.

The unwillingness to be considered disabled is especially relevant, considering that transsexual activists are working towards inclusion in anti-discrimination protections based on sexual orientation. Thus, if gay men and lesbians do not consider themselves disabled, some may question why

156 Dean Spade, Resisting Medicine, Re/modeling Gender, 18 BERKELEY WOMEN’S L.J. 15, 34 (2003).
158 Id.
160 See Minter & Frye, supra note 155.
transsexuals are obliged to classify themselves as such.\textsuperscript{161} These questions go to the very heart of what disability law represents, and what groups should be classified as disabled.

Some activists contend that this categorization is demeaning and stereotypical because it implies that transsexual individuals are not normal.\textsuperscript{162} In this regard, the transsexual community is not alone; individuals in existing disabled groups, such as paraplegics and the deaf, are also resistant to being characterized as such.\textsuperscript{163} This lingering resentment calls into question what function the “disabled” label serves in this age of heightened sensitivity and political empowerment.

Although many transsexual activists object to being labeled “disabled,” others argue that it is essential for transsexual individuals to retain this classification, even though it is a manifestation of societal discrimination rather than an actual medical disability.\textsuperscript{164} First, many transsexual patients would not have access to sex reassignment surgery or hormone treatments if they were not diagnosed with GID.\textsuperscript{165} Furthermore, in many states, retaining this classification is essential to guarantee that transsexuals who leave work to undergo SRS will not encounter discrimination in pay, advancement, or medical benefits when they return.\textsuperscript{166} Thus, whatever moral and philosophical reasons may exist for refusing the “disabled” classification, proponents maintain that pragmatic considerations are more important. Obviously, this debate is by no means over.

\textbf{G. Should Transsexual Individuals Be Included in the ADA?}

Ultimately, the question confronting the transsexual community is whether it is necessary, or even helpful, to receive ADA protection. Some critics argue that the stigma associated with being transsexual would not dissipate even under the ADA’s coverage, and thus, the disability rights framework should eventually be jettisoned altogether.\textsuperscript{167} Furthermore, both the Supreme Court and lower courts have developed an increasingly

\textsuperscript{161}See Levy, supra note 64, at 165-66.

\textsuperscript{162}See Hiegel, supra note 86, at 1451 (“When we call someone disabled, we make a statement... indicating something about our belief in his or her ability to fulfill a measure of human potential.”); Spade, supra note 151, at 34.

\textsuperscript{163}See, e.g., Kim E. Nielsen, \textit{Deaf History and the U.S. Historical Narrative}, 31 \textit{REVIEWS AM. HIST.} 596, 599-600 (2003) (reviewing \textit{Susan Burch, Signs of Resistance: American Deaf Cultural History, 1900 to 1942} (2002)) (explaining that the designation of deaf individuals as disabled persons “left a highly stigmatized status that undermined social legitimacy,” which they resisted by “claiming they were not disabled but simply communicated differently.”).

\textsuperscript{164}See Hong, supra note 78, at 107. When homosexuals were classified as disabled, they were all classified as such, and thus, the discrimination stemmed from their actual disability. In contrast, only some transsexuals are diagnosed with GID. Levy, supra note 64, at 165. Since a finding of disability-based discrimination depends on a medical diagnosis, individuals who suffer societal prejudices but do not seek medical treatment are effectively excluded. See id. at 165.

\textsuperscript{165}Hong, supra note 78, at 96 n.32.

\textsuperscript{166}Id. at 107.

\textsuperscript{167}See Minter & Frye, supra note 155.
narrow interpretation of the scope of the ADA.\textsuperscript{168} Thus, legitimate questions persist as to whether ADA protection would even be helpful to transsexual litigants.

However, those who support including transsexual individuals under the ADA could plausibly argue that this classification would be helpful, irrespective of success in the courts. Along with more benefits, such as allowing preoperative transsexuals to receive proper medical care, the ADA can serve as a vital catalyst to change long-held societal prejudices against the transsexual community. While this is still widely debated, it is a theory that offers hope for transsexuals under the ADA.

III. TRANSSEXUALS AND TITLE VII SEX DISCRIMINATION CLAIMS

A. History

Transsexual litigants who experience discrimination in employment may also look to Title VII’s prohibition against sex discrimination as an avenue for protection. Under Title VII, it is unlawful 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.”\textsuperscript{169}

In \textit{Holloway v. Arthur Andersen & Co.},\textsuperscript{170} the Ninth Circuit first dealt with Title VII’s application to transsexual plaintiffs.\textsuperscript{171} The plaintiff, Ramona Holloway, was an MTF transsexual who had transitioned while employed at Arthur Andersen.\textsuperscript{172} A company official responded to her transition by “suggesting that [she] would be happier at a new job where her transsexualism would be unknown.”\textsuperscript{173} Holloway was fired shortly after she had changed her personnel records to reflect her new first name.\textsuperscript{174} She sued under Title VII, alleging that Arthur Andersen had discriminated against her because of her transsexuality.\textsuperscript{175} The Ninth Circuit rejected Holloway’s argument that the term “sex” as used in Title VII was synonymous with “gender,” and that “gender” should be understood to include transsexuals.\textsuperscript{176} Instead, it found that Title VII was

\textsuperscript{168} See, e.g., Sutton v. United Air Lines, Inc., 527 U.S. 471, 490-94 (1999) (finding that vision-impaired individuals must be substantially limited in their ability to work in order to qualify for ADA protection); Murphy v. United Parcel Service, Inc., 527 U.S. 516, 521-22 (1999) (finding that an individual’s disqualification for one job does not constitute a substantial limitation in “the major life activity of working”); Albertson’s, Inc. v. Kirkinburg, 527 U.S. 555, 562-65 (1999) (finding that only impairments that substantially limit a major life activity are protectable under the ADA).


\textsuperscript{170} 566 F.2d 659 (9th Cir. 1977).

\textsuperscript{171} See Dunson, \textit{supra} note 30, at 470.

\textsuperscript{172} 566 F.2d at 661.

\textsuperscript{173} \textit{Id}.

\textsuperscript{174} \textit{Id}.

\textsuperscript{175} \textit{Id}.

\textsuperscript{176} \textit{Id} at 662.
meant “to place women on an equal footing with men,” and “had only the traditional notions of ‘sex’ in mind.”

Ultimately, the Holloway court did not have to analyze Holloway’s Title VII claim under the context of either sex discrimination or gender discrimination, because it framed the issue as one of whether an employer may fire an individual for initiating the process of changing her sex. The court held that “an individual’s decision to undergo sex reassignment surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII.”

Under the Holloway court’s reasoning, “for the purposes of equality law, a transitional transsexual such as Ramona Holloway can be defined as neither a man nor a woman,” but rather “as a transsexual for whom there is no Title VII protection.” This reasoning casted Holloway and other transitioning transsexuals as “neither male nor female but as a third sex—the sex that changes sex.” Because transsexual litigants are not easily slotted into “sex” categories, they would not be entitled to Title VII protection under this approach.

After Holloway, other circuit courts followed the Ninth Circuit’s lead in denying Title VII protection to transsexual individuals. The pre-operative MTF plaintiff in Sommers v. Budget Marketing, Inc. was fired just two days after she was hired because she had allegedly misrepresented herself as a female on her job application. Budget argued that this misrepresentation was disruptive because female employees had threatened to quit if the plaintiff had been allowed to use the women’s restroom. Refusing to address the plaintiff’s “psychological makeup,” the court found that, for Title VII purposes, plaintiff was male because she was anatomically male. Then, relying on Holloway, the court found that plain meaning should be given to the term “sex,” absent clear congressional intent to do otherwise. Because Congress had not shown such intent, the court held that “discrimination based on transsexualism” was beyond the purview of Title VII.

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177 Id.
178 566 F.2d at 661. See Dunson, supra note 30, at 469-70.
179 566 F.2d at 664.
181 Id. at 60.
182 Id.
183 667 F.2d 748 (8th Cir. 1982).
184 Id. at 748.
185 Id. at 748-49.
186 Id. at 749-50.
187 Id. at 750.
188 Id.
The Seventh Circuit came to a similar conclusion in Ulane v. Eastern Airlines, Inc.\textsuperscript{189} The plaintiff in Ulane was a pilot who had taken a leave of absence to undergo sex reassignment surgery.\textsuperscript{190} Shortly after her return, she was discharged; she then brought suit under Title VII.\textsuperscript{191} The Seventh Circuit overturned a favorable district court ruling that had reinstated her with full seniority, back pay, and attorneys’ fees.\textsuperscript{192} Previously, the district court had concluded that the term “sex” in Title VII did comprehend “sexual identity.”\textsuperscript{193} The court had also reasoned that “‘sex is not a cut-and-dried matter of chromosomes,’ but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual.”\textsuperscript{194} The Seventh Circuit rejected the district court’s approach and applied a plain-meaning construction of “sex” to deny Ulane relief.\textsuperscript{195} The court held that “if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual—a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female.”\textsuperscript{196}

The federal courts’ narrow reading of “sex” in the Title VII context began to change with the Supreme Court’s groundbreaking 1989 decision in Price Waterhouse v. Hopkins.\textsuperscript{197} The plaintiff, Ann Hopkins, was a female senior manager who alleged that she had been denied partnership and subjected to harassment by other employees because of her lack of femininity.\textsuperscript{198} Her coworkers continually made disparaging remarks about her appearance, including advice to “take a course at charm school” and “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry” if she wanted a chance at a promotion.\textsuperscript{199} Hopkins sued, arguing that she was a victim of discrimination on the basis of sex.\textsuperscript{200}

\textsuperscript{189} 742 F.2d 1081 (7th Cir. 1984).
\textsuperscript{190} Id. at 1082-83.
\textsuperscript{191} Id. at 1082-84.
\textsuperscript{192} Id. at 1082.
\textsuperscript{193} Id. at 1084.
\textsuperscript{194} Id. (quoting Ulane v. Eastern Airlines, Inc., 581 F. Supp. 821, 825 (N.D. Ill. 1983)).
\textsuperscript{195} 742 F.2d at 1085 (“The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder, i.e., a person born with a male body who believes himself to be female, or a person born with a female body who believes herself to be male; a prohibition against discrimination based on an individual’s sex is not synonymous with a prohibition against discrimination based on an individual’s sexual identity disorder or discontent with the sex into which they were born.”).
\textsuperscript{196} Id. at 1087.
\textsuperscript{197} 490 U.S. 228 (1989).
\textsuperscript{198} Id. at 235.
\textsuperscript{199} Id.
\textsuperscript{200} Id. at 232.
In construing Title VII, the Court found that “gender must be irrelevant to employment decisions.”

Justice Brennan continued:

As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”

The Court found that Hopkins had been the victim of unlawful sex discrimination under Title VII. Price Waterhouse marks the Court’s first acknowledgement that discriminating against employees, based on assumptions of how they should dress and act in conjunction with their gender, is sex discrimination.

The Supreme Court chipped further away at the rigidity of the definition of sex discrimination in Oncale v. Sundowner Offshore Services, Inc. The plaintiff in Oncale had been subjected to repeated episodes of sexual harassment and brutality by his male coworkers for not being a “real” man. Justice Scalia wrote the opinion for a unanimous Court, recognizing a Title VII cause of action for same-sex sexual harassment, despite the lack of any showing in Title VII’s legislative history that would have suggested congressional intent for same-sex harassment coverage.

The Court recognized that “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.”

Professor Grenfell argues that, based on Price Waterhouse and Oncale, “Title VII’s sex discrimination prohibitions must be construed broadly to cover ‘reasonably comparable evils’ such as discrimination involving same sex harassment and sex stereotyping.” Further, she argues that “Congressional intent [in interpreting Title VII] is only relative in the face of such ‘evils.’” Under this approach, the narrow definition of “sex” used in Title VII, predicated on a plain meaning construction of congressional intent, is inconsistent with Title VII’s goals. Rather, the

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201 Id. at 240.
202 Id. at 251 (quoting L.A. Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).
203 490 U.S. at 258.
204 Id. at 250.
206 Id. at 77 (stating that plaintiff’s coworkers “called him a name suggesting homosexuality”).
207 Id. at 79.
208 Id.
209 See Grenfell, supra note 180, at 64 (quoting Oncale, 523 U.S. at 76).
210 Id.
definition of sex should be construed broadly so that Title VII can be effective in combating the "reasonably comparable evil" of discrimination against transsexual individuals.\textsuperscript{211}

In \textit{Schwenk v. Hartford},\textsuperscript{212} the Ninth Circuit extended the breadth of the definition of sex, and thus offered a ray of hope for transgender plaintiffs. In \textit{Schwenk}, a pre-operative MTF inmate of a male prison brought a claim under the Gender Motivated Violence Act (GMVA), alleging that a prison guard had attempted to rape her on account of her gender.\textsuperscript{213} The Ninth Circuit found that the GMVA was distinguishable from Title VII because the GMVA used the term "gender" rather than "sex."\textsuperscript{214} In addressing the defendant's argument that he had been motivated by her transsexuality, rather than her gender,\textsuperscript{215} the court considered the use of the terms "sex" and "gender" in cases such as \textit{Holloway} and \textit{Ulane}.\textsuperscript{216} The court departed from the traditionally narrow Title VII jurisprudence: "The initial judicial approach taken in cases such as \textit{Holloway} has been overruled by the logic and language of \textit{Price Waterhouse}."\textsuperscript{217} The court went on to find that the term "sex" under Title VII encompassed both biological sex and gender.\textsuperscript{218} Therefore, discrimination based on one's failure to conform to socially prescribed gender expectations should be found in violation of Title VII.

A few state courts have also refused to follow the \textit{Holloway} and \textit{Ulane} line of cases. In \textit{Maffei v. Kolaeton Industry, Inc.},\textsuperscript{219} the court found that the ruling in \textit{Ulane} was "unduly restrictive" and refused to follow it.\textsuperscript{220} The court instead stated that the plaintiff, an FTM transsexual,\textsuperscript{221} was a member of a "subgroup of men," and broadly construed the New York anti-discrimination statute to apply to him.\textsuperscript{222}

After \textit{Price Waterhouse}, \textit{Oncale}, and the Ninth Circuit's decision in \textit{Schwenk}, it seems increasingly likely that a transsexual plaintiff may prevail under a Title VII gender-stereotyping theory. The Third Circuit, in \textit{Bibby v. Philadelphia Coca Cola Bottling Co.},\textsuperscript{223} stated that "a plaintiff may be able to prove ... [a sex discrimination claim] by presenting

\textsuperscript{211}Id.
\textsuperscript{212}204 F.3d 1187 (9th Cir. 2000).
\textsuperscript{213}Id. at 1194.
\textsuperscript{214}Id. at 1200-01.
\textsuperscript{215}Id. at 1200.
\textsuperscript{216}Id. at 1201-02.
\textsuperscript{217}Id. at 1201.
\textsuperscript{218}See 204 F.3d at 1202. See also Glenn v. Brumby, 724 F. Supp. 2d 1284, 1299 (N.D. Ga. 2010) ("This Court concurs with the majority of courts that have addressed this issue, finding that discrimination against a transgendered individual because of their failure to conform to gender stereotypes constitutes discrimination on the basis of sex.").
\textsuperscript{219}626 N.Y.S.2d 391 (1995).
\textsuperscript{220}Id. at 394-95.
\textsuperscript{221}Id. at 391.
\textsuperscript{222}Id. at 396 (finding that transsexuals can assert a sex discrimination claim under the New York anti-discrimination statute).
\textsuperscript{223}260 F.3d 257 (3rd Cir. 2001).
evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.” 224 Similarly, in Doe ex rel. Doe v. City of Belleville, 225 the Seventh Circuit found that the sexual harassment of a male employee who wore an earring was actionable under Title VII, since the harassment was due to behavior that did not comply with gender norms. 226 Much of the existing negative Title VII case law relied on Holloway as precedent, which Price Waterhouse effectively overruled. 227 Most federal cases, however, did not exclusively involve transsexual individuals, and the courts have not specifically ruled on whether discrimination against transsexual individuals constitutes sex-based discrimination. 228 Federal courts have yet to rule that transsexual individuals are entitled to protection under Title VII based on their transsexualism, and the language in Schwenk discussing sex, gender, and Title VII remains only dicta. 229

Many other federal district court cases have not followed Price Waterhouse, and excluded transsexuals as an unprotected class. In James v. Ranch Mart Hardware, Inc., 230 the court held that the plaintiff, who had been advised by an employer against dressing as a woman at work, could not bring a claim under Title VII or the Kansas Act Against Discrimination based on his transsexualism alone. 231 Additionally, in Oiler v. Winn-Dixie Louisiana, Inc., 232 the court found that a biologically male employee, who had occasionally presented himself as a woman outside the workplace and had been fired for his lifestyle choices, had not stated a valid Title VII claim. 233 The court distinguished Oiler’s case from Price Waterhouse, stating that Oiler had not been fired because he had refused “to conform to a gender stereotype,” but rather because he had “disguised himself as a person of a different sex and presented himself as a female for stress

224 Id. at 262-63. See also Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (finding that “sex stereotyping may constitute evidence of sex discrimination”); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1069 (9th Cir. 2002) (Pregerson, J., concurring) (stating that gender stereotyping harassment is actionable under Title VII); Jones v. Pacific Rail Servs., No. 00 C 5776, 2001 WL 127645, at *2-3 (N.D. Ill. Feb. 14, 2001) (finding that discrimination based on a man’s effeminacy is sufficient to state a Title VII claim).
225 119 F.3d 563 (7th Cir. 1997).
226 Id. at 580-81.
228 See Grenfell, supra note 180, at 68-69.
229 See Schwenk, 204 F.3d at 1201-02.
230 881 F. Supp. 478 (D. Kan. 1995). See also Creed v. Family Express Corp., No. 3:06-CV-465RM, at *6 (N.D. Ind. Jan. 5, 2009) (“Although discrimination because one’s behavior doesn’t conform to stereotypical ideas of one’s gender may amount to actionable discrimination based on sex, harassment based on sexual preference or transgender status does not.”).
231 881 F. Supp. at 481.
233 Id. at *5-6.
relief.”234 The court found a major difference between an employee of one sex exhibiting characteristics associated with the opposite sex, and an employee who assumes the role of the opposite sex.235 The former was protected by Title VII; the latter was not.236 The court placed transsexualism and GID in the same category as sexual orientation and sexual preference, the categories unprotected by Title VII.237 The Oiler decision has been criticized for its interpretation of Title VII.238 As Professor Hébert stated:

>T]he court may be saying . . . that while non-transgendered individuals are entitled to wear clothing associated with the other gender, transgendered persons are not. Alternatively, the court may be saying that while women are allowed to dress in stereotypically male clothing, men who dress in stereotypically female clothing are not protected from discrimination.239

Either message could constitute discrimination on the basis of sex or gender.240

Jespersen v. Harrah’s Operating Co.241 created a loophole to the Price Waterhouse framework, where the court held that a bar’s grooming and appearance policy was not a violation of Title VII.242 The policy required women to wear makeup, their hair down and styled, stockings, nail polish, and lip color at all times, and for men to keep their hair short and fingernails trimmed and unpolished.243 The court found that the policy would have violated Title VII if it had imposed unequal burdens on men and women, or if it had enforced an impermissible sex stereotype.244 The court distinguished Price Waterhouse on the basis that the policies applied

234 Id. at *5.
235 Id. at *6.
236 Id.
237 Id. (“Title VII’s prohibition of discrimination on the basis of sex . . . has not been interpreted to include sexual identity or gender identity disorders.”).
238 See, e.g., Hébert, supra note 38, at 563-64.
239 Id. at 563.
240 Id. at 564. See also Julie A. Seaman, The Peahen’s Tale, or Dressing Our Parts at Work, 14 DUKE J. GENDER L. & POL’Y 423, 462 (2007) (“[T]he notion that dress rules that facially differentiate on the basis of sex do not give rise to a prima facie case of sex discrimination is, ironically, an embodiment of exactly the negative sex stereotyping that the law otherwise condemns”); Chinyere Ezie, Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny, 20 COLUM. J. GENDER & L. 141, 168 (2011) (“By designating which bodies and identities are deserving of protection, law’s role in the construction of sex serves to define the concept of humanity itself.”).
241 444 F.3d 1104 (9th Cir. 2006).
242 Id. at 1106.
243 Id. at 1107.
to all bartenders, and Jespersen had not been singled out as Ann Hopkins had been in *Price Waterhouse*.245

*Jespersen* generated much controversy, as many critics argued that the makeup policy *did* impose an unequal burden on women and, more importantly, had been based upon sex stereotypes reinforced through dress code.246 While dress policies may appear “benign,” they “carry hidden dangers of unconscious discrimination and retrenchment of invidious gender stereotypes.”247 Harrah’s “Personal Best” Policy supported stereotypes of sexual attractiveness and assumptions about gender, and challenged the transgender notion of dress. As Professors Glazer and Kramer noted, “Transgenderism is not a fashion choice. Even though transgender people must make complicated decisions about how they will present themselves to the world, their identities cannot be reduced to the decisions they make about their wardrobe.”248 Jespersen felt “sick, degraded, exposed, and violated” while wearing makeup at work.249 In this regard, Jespersen was “punished” for her lack of gender conformity.250

Courts applying the bona fide occupational qualification (BFOQ) provision view sex as an “immutable characteristic.”251 The court in *Jespersen* neglected to consider that “mutable characteristics can be crucial to one’s identity,” and that “policies regulating mutable characteristics can damage one’s self-esteem in profound ways.”252 Transsexuals view their clothing as an “essential element” of their identity.253 Critics of the *Jespersen* decision contend that courts should subject employers’ policies to higher scrutiny.254 McCarthy suggests a two-tier test to determine whether such policies violate Title VII: “(1) whether the particular job under consideration requires that the worker be of one sex only, and if so, (2) whether that requirement is reasonably necessary to the ‘essence’ of the employer’s business.”255

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245 444 F.3d at 1111.
247 Id. at 462.
249 Jesperson v. Harrah’s Operating Co. (*Jespersen II*), 392 F.3d at 1076, 1077 (9th Cir. 2004).
250 See Lifson-Leu, *supra* note 244, at 857.
252 Id. at 964.
253 See id.
254 See id.
B. Sixth-Circuit Interpretation of Title VII After Price Waterhouse

In Smith v. City of Salem, the Sixth Circuit expanded on the protections afforded by Price Waterhouse to transsexuals. In Smith, the plaintiff had served as a lieutenant at the Salem Fire Department for seven years without incident. However, after he was diagnosed with GID, he began dressing and acting more feminine. The department heads planned to force him out by requiring Smith to undergo three psychological evaluations, which were not a normal part of lieutenant evaluation. After Smith had been informed of the plan and obtained legal representation, he was suspended for an alleged policy infraction. Smith brought suit under Title VII, alleging that the suspension had been given in retaliation for obtaining legal representation, and that he had been discriminated against on the basis of sex stereotyping—just as the plaintiff in Price Waterhouse had been. The district court found that Smith was being discriminated against primarily due to his transsexuality, not his employer’s alleged sex stereotyping. Since transsexuals were an unprotected class, Smith could not be afforded Title VII protection.

On appeal, the Sixth Circuit took a different view and reversed the prior decision. The court emphasized that “sex stereotyping” was not merely a “term of art” used in Price Waterhouse to describe a certain type of sex discrimination, but rather a new category of Title VII protections. The court also found that, though transsexuality itself was not a protected category under Title VII, “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior.” Title VII prohibited discrimination based on gender performance, regardless of whether an individual was transsexual. Citing more recent precedent, the court accepted the expansion of Title VII protections set forth in Price Waterhouse. Most importantly, the court blatantly rejected the logic of cases such as Oiler, which had placed transsexual individuals into an unprotected “transsexual” category and then used the categorization to legitimize discrimination.

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256 378 F.3d 566 (6th Cir. 2004).
257 Id. at 568.
258 Id.
259 Id. at 568-69 (stating that the defendant employer did not follow state procedures for disciplinary action).
260 Id. at 569.
261 Id.
264 Id.
265 378 F.3d at 578.
266 Id. at 575.
267 Id.
268 See id.
269 Id. at 574.
based on gender non-conformity. Instead, the court pointed out that “a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”

Following the Smith analysis, another transsexual litigant was successful under the Price Waterhouse sex stereotyping approach in Barnes v. City of Cincinnati. In Barnes, Philecia (then Phillip) Barnes sued the City of Cincinnati under Title VII’s prohibition against sex discrimination after the Cincinnati Police Department (“CPD”) had demoted him from sergeant to police officer. Barnes, an MTF transsexual, had served as a police officer for eighteen years. She then sat for a promotional test, placed eighteenth out of 105 officers, and was promoted to the rank of sergeant. Following her promotion, Sergeant Barnes began a standard probationary period. Despite her high score on the exam and long record on the force, Barnes was intensely scrutinized, much more so than other probationary sergeants, and was given harsh evaluations and unfavorable assignments. Eventually, Sergeant Barnes failed probation and was demoted to the rank of officer.

Throughout this period, Barnes had been subjected to repeated comments about her sexuality and feminine appearance. A lieutenant colonel had raised the issue of Barnes’ appearance and lack of masculinity when he demoted Barnes. Barnes’ evaluations reported that she “lacked command presence” and had “failed to comply with grooming and uniform standards.” In addition, the sergeant assigned to supervise Barnes during her probation “repeatedly discussed sexual topics with [Barnes]... asking about oral and anal sex and whether [he] himself was a ‘pretty motherfucker.’” Barnes alleged in her complaint that she had been “treated differently by [the CPD] because it viewed him to be insufficiently masculine to be a sergeant in the CPD.” In her own words, Barnes

\[\text{References}\]

[270] id.
[271] 378 F.3d at 574.
[272] 401 F.3d 729 (6th Cir. 2005).
[273] id. at 733-35.
[274] id. at 733.
[275] id.
[276] id.
[277] See id. at 734-35.
[278] 401 F.3d at 735.
[279] Barnes v. City of Cincinnati, No. C-1-00-780, 2002 U.S. Dist. LEXIS 26207, at *8 (S.D. Ohio Mar. 8, 2002) (stating that a lieutenant colonel, who had seen Barnes “wearing pink lipstick, opaque pink nail polish, and... eyebrow pencil” at work, had “ordered [Barnes] to stop wearing makeup, cut his nails, and cut his hair and told him that he needed to maintain a more masculine image.”).
[280] id. at *9.
[281] id. at *7.
[282] id. at *9.
[283] id. at *14.
stated, “I was discriminated against because I was a transsexual who did not fit the masculine type of average male supervisor.”

The district court in *Barnes* relied on *Ulane* and *Sommers* in concluding that Title VII did not protect against discrimination on the basis of transsexuality. However, the court did apply the *Price Waterhouse* rationale in recognizing that “Title VII prohibits discrimination against a man because he fails to conform to the stereotypes associated with being male.” Therefore, the court denied summary judgment to the City, finding that there was a genuine issue of material fact as to whether Barnes’ failure to conform to sexual stereotypes had been a motivating factor in her demotion. At trial, the jury awarded Barnes $150,000 in compensatory damages.

The case was then appealed to the Sixth Circuit. The City claimed that Barnes had not established a claim of sex discrimination because she was not a member of a protected class, and had “failed to identify a similarly situated employee” who had not been demoted after probation. However, the court found that Barnes *was* a member of a protected class under *Smith*—a class for those who were discriminated against for failure to conform to sex stereotypes, “whether as a man or a woman.” The court directly followed its previous holding in *Smith*, stating that being transsexual was not fatal to a Title VII claim. In regards to the City’s claim that Barnes had not found someone similarly situated with whom she could compare her situation, the court found that since Barnes was the only sergeant to fail probation from 1993 through 2000, she did not need to find someone who had been in her exact position. The court ultimately denied each of the City’s claims of error, and affirmed the decision of the lower court.

Though several circuits have followed the lead of *Price Waterhouse*, the Sixth Circuit Court of Appeals has recently narrowed that decision in regards to transgender discrimination. In *Vickers v. Fairfield Medical Center*, the court found that “a gender stereotyping claim should not be

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284 Id. at *14-15.
286 Id. at *14.
287 Id. at *17-18. Having defeated the City of Cincinnati’s summary judgment motion, Barnes proceeded to trial, where she prevailed. *Barnes v. City of Cincinnati*, 401 F.3d 729, 733 (6th Cir. 2005).
288 401 F.3d at 735.
289 Id.
290 Id. at 737.
291 Id. at 739.
292 Id.
293 Id. at 737.
295 453 F.3d 757 (6th Cir. 2006).
used to bootstrap protection for sexual orientation into Title VII.”296 In Vickers, a private police officer brought suit against his employer, alleging repeated episodes in which coworkers had called him a “fag,” made lewd remarks, “shove[d] a sanitary napkin in [his] face,” and implied that he experienced menstruation cycles.297 The court affirmed the prior dismissal of the plaintiff’s claims because he had “failed to allege that he did not conform to traditional gender stereotypes in any observable way at work,” and instead had alleged discrimination based on sexual orientation, which was not protected by Title VII.298 In his dissenting opinion, Judge Lawson noted that he had “no quarrel with the proposition that a careful distinction must be drawn between cases of gender stereotyping, which are actionable, and cases denominated as such that in reality seek protection for sexual-orientation discrimination, which are not.”299

The difficulty in discerning whether a discriminatory comment is based on sex stereotyping or sexual orientation should not be a hurdle that prohibits a plaintiff from defeating a motion to dismiss. Acts of discrimination based on sex stereotyping and sexual orientation intertwine often, and the courts must find a way to address both issues. Perhaps the court should not have to draw a line between the two categories, and Congress instead should define discrimination to include both sex stereotyping and sexual orientation. Until then, the courts should continue to read precedent more expansively, instead of narrowing sex-stereotyping claims to those that involve discrimination based solely on one’s mannerisms and outward characteristics.

C. Is Title VII the Way to Approach Transsexual Discrimination Claims?

Based on these recent cases, the Price Waterhouse sex stereotyping approach appears well tailored for transsexual claims against discrimination.300 It is a method by which transsexuals may be protected under existing anti-discrimination law. However, although the broad

296 Id. at 764 (quoting Dawson v. Bumble, 398 F.3d 211, 218 (2d Cir. 2005)).
297 Id. at 768-69.
298 Id. at 764.
299 Id. at 767 (Lawson, J., dissenting).
300 See Grenfell, supra note 180, at 67-69. See also Angela Clements, Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII and an Argument for Inclusion, 24 BERKELEY J. GENDER L. & JUST. 166, 195, 206 (2009) (“There are three primary concerns, each of which reflects growth and change either within the LGBT movement or societal change that the movement itself set in motion: 1) intuitively and pragmatically, gender nonconformity does not belong under a sexual orientation-only framework; 2) a broader antidiscrimination framework is needed in light of generational shifts because LGBT youth increasingly hold gender identity and sexual orientation as equally important identities; 3) settling on a sexual-orientation only framework undermines the stated goals of the LGBT movement . . . A gender identity-inclusive [Employment Non-Discrimination Act] may hold hope for a new vision of LGBT antidiscrimination law by definitively connecting gender identity with sexual orientation, so that gender identity protections are understood as protecting all workers, not just transgender individuals.”).
definitions of sex and gender stereotyping have proven successful for some, drawbacks also remain.

By forcing transsexual litigants into the anti-male/-female Title VII framework, society reinforces the binary sex/gender system that the trans-movement struggles to deconstruct. By adopting the gender stereotyping approach, society gives credence to and reinforces the dual nature of societal gender norms. While such use of Title VII provides much-needed protection to females who exhibit masculine traits and males who exhibit feminine traits, it also may work to undermine the recognition of transsexual individuals outside the current construction of sex and gender. By using a binary anti-discrimination framework, a framework based on the notion of opposites, society fails to explain and explore, let alone remedy, the discrimination that transsexual individuals truly suffer. Even though this framework may protect an individual transsexual claimant, it ignores the complexity and multiplicity of transgender identity as a whole.301

Indeed, Price Waterhouse itself may be interpreted to reemphasize the binary sex/gender system in noting that Title VII was intended to prohibit discrimination against “men and women.”302 On the other hand, Price Waterhouse may also be interpreted as a significant step towards dismantling the binary way in which most people think about sex and gender.303 Price Waterhouse, Smith, and Barnes all implied that when employers discriminate on the basis of gender, they are subject to claims under Title VII.304 As these cases showed, gender is not narrowly defined as only “male” or “female,” but may be displayed by some in ways that are not strictly male or female, somewhere on the spectrum of human gender.305 Though framed in the narrow terms of “gender stereotyping,” implying only “male” and “female” stereotypes and nothing broader, this is ultimately a forward step in deconstructing binary ideas of sex and, thus, dismantling the binary system. By first deconstructing the stereotypes that created this binary system of thought, society can then begin to dismantle the binary system as a whole.

Professor Hébert argues that discrimination against transgender employees is “classic sex discrimination.”306 She argues that transsexuals, “as men and women,”307 are presumably entitled to protection from sex-based discrimination.308 However, transsexual people may not describe

301 See, e.g., deManda, supra note 5, at 508.
303 See deManda, supra note 5, at 508.
304 See Price Waterhouse, 490 U.S. at 250-51; Smith v. City of Salem, 378 F.3d 566, 574 (2004); Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005).
305 See deManda, supra note 5, at 517.
306 See Hébert, supra note 38, at 537.
307 Id. at 548.
308 Id. at 548-49.
themselves as "men" or as "women." They also may not describe themselves as "men who act like women," or "women who want to be men." Not everyone can be reduced to such simple labels. As long as we use the binary labels woman/man, female/male, or feminine/masculine to describe the experiences and discrimination against transsexual individuals, we confuse and erase their true identities and reinforce a system in which they have no space to exist, legally or socially. When society can understand who transsexual individuals are, as well as the definitions and terms that they use, it will have constructed a new labeling system for something that it struggles to understand. The issue is not reducing individuals to simple labels; it is that new labels are needed to fit new situations.

D. Tension Between Disability Law and Discrimination Law

The struggles that transsexual plaintiffs encounter also demonstrate the tension between disability law and discrimination law. At first glance, these two fields appear to be complementary, as many state anti-discrimination statutes cover disability. However, transsexual advocates increasingly argue that relying on their disabled status to litigate claims actually comes at the expense of their rights under discrimination laws. Specifically, some advocates worry that relying on the DSM-IV diagnosis of GID, although helpful for many transsexuals, serves to over-medicalize their condition, so that transgender individuals who do not have access to medical care, particularly the low-income and the young, are left without any legal protection. Thus, because relying on disability discrimination is under-inclusive, one critic calls this strategy "an injurious Band-Aid." For example, in *Enriquez*, a significant part of the court's ruling concerned the plaintiff's gender dysphoria diagnosis. The language in the opinion limited protection to transsexuals seeking medical treatment for their condition, and did not cover transsexual individuals who do not pursue medical treatment and face discrimination simply because they do not conform to stereotyped gender roles. This "injurious Band-Aid," of course, is not limited to the employment context.

309 See TRANS LIBERATION, supra note 33, at 5.
310 See Spade, supra note 156, at 34.
311 See id. at 33.
312 Levy, supra note 64, at 165-67.
314 Levy, supra note 64, at 165.
315 See Minter & Frye, supra note 155 ("Accepting the notion that we are mentally ill in order to gain some limited protections on the basis of disability will not protect transgendered parents who are denied custody or the right to adopt on the basis that they have a mental impairment which renders them unsuitable parents.")
Thus, relying on disability claims, although helpful to GID-diagnosed transsexuals, may actually harm the legal rights of non-diagnosed transsexuals who would be denied protection under disability and discrimination law. By relying on a “medicalized and pathologizing approach to gender difference,” courts may be tempted to continue favoring disability claims while ignoring broader and more appropriate claims of gender discrimination. As a result, the disability rights model should be abandoned in favor of a more comprehensive civil rights agenda that protects all transsexual individuals from discrimination, regardless of whether they are diagnosed with GID.

IV. A BETTER APPROACH

A. Changes at the State Level

To date, transsexual individuals have struggled to protect themselves from discrimination by “fitting” themselves into existing anti-discrimination frameworks, such as disability and sex discrimination law. This has been necessary because there is no comprehensive legal protection for them. One reason for this problem is that we, as a society, lack sufficient language to describe transsexual experience. Without describing it, we cannot understand it, and we cannot recognize it. Leslie Feinberg urges us to expand our “concepts and language of gender possibilities.” For her, this includes the use of gender-neutral pronouns such as s/he, pronounced “sea.” Until the law recognizes that there are many shades of gender, it will continue to use existing gender labels to describe transsexual individuals. By doing so, it perpetuates a narrow concept of gender possibility that is unable to accurately describe trans-people, which consequently reinforces the binary sex/gender system. Because the law cannot describe, understand, or recognize trans-people, it will remain a largely ineffective tool in supporting their individual rights.

Two basic theories have emerged on how to solve the complex issue of redefining gender to include those who fall outside of the current system. Professor Kogan quotes Martine Rothblatt, who argues that gender should be seen on a “sexual continuism,” without exclusive male and female characteristics. Rothblatt posits that society should discontinue labeling children as male or female the instant they leave the womb, and embrace a more sociological construction of sex and gender rather than a biological one, allowing individuals to change their gender identities as they become

316 See Spade, supra note 156, at 35-36.
317 See Minter & Frye, supra note 155.
318 Trans Liberation, supra note 33, at 29.
319 Id. at 71.
influenced by society.\footnote{Id. at 1240.} Kogan, however, disagrees and suggests instead that we place members of sex/gender minorities into a distinct third category of sex/gender.\footnote{Id. at 1245-47.} This "other" category would encourage society to deny traditional notions of binary sex and gender, and embrace the differences of individuals who are not "male" or "female."\footnote{Id. at 1245.} He believes that a theory of gender as a "continuum," as Rothblatt suggests, would require a complete deconstruction of "male" and "female" altogether.\footnote{Id. at 1250.}

Since the vast majority of society identifies comfortably with either male or female, it is essential, Kogan believes, that we keep these ideas intact while still accommodating those who do not fit into either category.\footnote{Id. at 1251-52.} Gender should be conceptualized like a color spectrum—for example, there is solid definition as to what "blue" is, but a range of colors that can be considered blue. Similarly, there should be fluidity in the expression of gender.\footnote{See Ellis & Eriksen, supra note 23, at 289-90.} This strategy serves to stretch Western society's current system of binary thought rather than completely overhauling that system. The real solution is to find a way to fit transgender individuals into our binary system by thinking of gender as a spectrum, with masculine males at one end and feminine females at the other.\footnote{See Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 ARIZ. L. REV. 265, 327 (1999) (arguing that sex and gender should "range across a spectrum," with "male" and "female" at each end). See also Schilt & Connell, supra note 34, at 601 (quoting Silvia Gherardi, GENDER, SYMBOLISM AND ORGANIZATIONAL CULTURES 4 (1995)) ("If we are to escape the gender trap, if we are to free ourselves of the idea that there exist two and only two types of individuals, if we are to ensure that social differentiation is no longer based on sexual differentiation, we must destabilize all thought which dichotomizes.").} All individuals could benefit from a change in the binary conception of sex and gender, by which all individuals would be free to express themselves fully, without fear of harassment or discrimination.\footnote{See Gilden, supra note 36, at 85 ("Gender fluidity does not entail a wholesale erasure of gender differentiation, but it does require the elimination of a conceptual hierarchy between the gender roles we do acknowledge. It does not look to biology or anatomy as necessary determinants of gender roles, but it does acknowledge bodily difference as a potentially material component of gender construction.").}

The bottom line remains that once we are able to describe and to understand transgender individuals, we can begin to recognize the space they occupy in our society. To reach this conceptualization from a legal standpoint, it is necessary to create a new trans-jurisprudence—a comprehensive set of anti-discrimination laws that explicitly protect transgender individuals in all aspects of their lives. Once transgenderism becomes a distinct category recognized by law, transgender individuals will have an avenue to express their collective and individual struggles, and to
be accepted and treated equally in society. Kogan’s theory of placing individuals who fall outside of the norm in a category labeled “other” may be the best way to encourage the law to create transgender-protective legislation.\textsuperscript{329} Since the law is seemingly based on definitions and attempts to categorize various terms and groups of people,\textsuperscript{330} Kogan’s theory may allow legislators, judges, and politicians to better understand why transgender individuals need the law’s protection. Many times, when the law cannot define a category, it is excluded from legal protection.\textsuperscript{331} If the law could change to understand that there are not merely two gender choices, male and female, but a third option outside of the two, then it may begin to accommodate that third choice. Additionally, the judicial system and state and federal legislatures must fundamentally alter their attitudes towards sex, gender, and identity. This will be a lengthy and demanding task, but without this opportunity, transsexual individuals will never be perceived as truly equal before the law.

Some evidence does exist that we may be well on our way to accomplishing the task of protecting transgender employees. Many major private companies are beginning to protect transgender individuals in the workplace.\textsuperscript{332} In 2005 alone, BP, Ernst & Young, Microsoft, Viacom, Toys"R"Us, Chevron, and Merrill Lynch instituted anti-discrimination policies for transgender employees.\textsuperscript{333} Today, over 200 companies have transgender human resources policies.\textsuperscript{334} “[A]nalysis of U.S. employers with transgender policies shows that their policies were usually adopted prior to any transgender anti-discrimination laws in their home state.”\textsuperscript{335} This implies a developing trend in transgender legislation. Since the law will likely follow the private sector’s efforts at transgender protection, as transgender policies in private companies increase, state legislation may change as well.

\textbf{B. Changes on a Federal Statutory Level}

Throughout the past forty years, federal laws such as the Civil Rights Act of 1964,\textsuperscript{336} the Fair Housing Act,\textsuperscript{337} and the Gender Motivated Violence Act\textsuperscript{338} have sought to protect the constitutional rights of minority

\begin{itemize}
  \item \textsuperscript{329} See Kogan, supra note 320, at 1245-47.
  \item \textsuperscript{330} See Grenfell, supra note 180, at 52.
  \item \textsuperscript{331} See id. at 52-53.
  \item \textsuperscript{333} Id.
  \item \textsuperscript{334} Jillian T. Weiss, Adoption of Transgender HR Policies in US Employers (2004), http://phobos.ramapo.edu/~jweiss/metrics.htm.
  \item \textsuperscript{335} Id.
  \item \textsuperscript{337} 42 U.S.C. §§ 3601-3619 (2010).
  \item \textsuperscript{338} 42 U.S.C. § 13981 (2010).
\end{itemize}
groups, and to a great extent, have succeeded. A decade and a half after its passage, the ADA has also proven to be an effective tool for a broad range of disabled groups to gain redress for discrimination. For transsexual litigants, however, the struggle to gain equal rights in the post-ADA era has not only remained daunting, but has largely become even more difficult, since their exclusion from the ADA was effectively a codification of the legal system’s hostility towards them.339 Removing the onerous provision from the ADA, while a necessary first step, is not sufficient. Although state and local governments have successfully passed legislation specifically banning discrimination against transsexuals, it appears unlikely that Congress will be able to enact such an anti-discrimination statute. Congress withdrew support for the inclusion of transsexuals in the Employment Non-Discrimination Act (ENDA) of 2007.340

In her article, “Twenty-First Century Equal Protection: Making Law in an Interregnum,”341 Professor Hunter examines Justice O’Connor’s Equal Protection Clause argument in her concurring opinion in Lawrence v. Texas342 and proposes a means of utilizing that opinion to change social norms in the future.343 Justice O’Connor notes an “institutional dilemma” in the court system, a “tension between its extraordinary power to

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340 The Employment Non-Discrimination Act of 2007 was an effort to include transgender individuals as members of a protected class within the framework of current anti-discrimination laws. H.R. 3685, 110th Cong. § 4 (2007). Though ENDA passed in a 235-184 vote at the House of Representatives, dissenter criticized the bill for removing gender identity, thus leaving the bill “woefully incomplete.” See Hébert, supra note 38, at 544 (citation omitted). They argued that such exclusion was done for fear that protecting transgendered individuals would “jeopardize the bill’s chances for clean passage on the House floor.” Id. Thus, an amendment to protect individuals against discrimination based on gender identity was withdrawn. Id. at 553; Bill Summary & Status: 110th Congress (2007-2008), H.AMDT.884, LIBRARY OF CONGRESS THOMAS (2007), http://thomas.loc.gov/cgi-bin/dquery/z?d110:HZ884:. Many of the sentiments expressed by Senator Jesse Helms were reinvigorated by those opposed to an amendment to include gender identity. Hébert, supra note 38, at 546 n.66, 547 n.68. Representative Souder stated:

This is the start of a move that many of us who just simply don’t approve of the lifestyle, there are many different things we don’t approve of, but this is a deeply held position of faith by millions of Americans. And this is an attempt, a start, of what’s likely to be an increasing effort to have sexual liberties trump religious liberties.

Id. at 547 n.68.

Still, hope lies beneath the surface of the failed vote. Representative Baldwin, the sponsor of the amendment to include gender identity, stated that transgendered individuals “have not been forgotten and Congress’s job will not be finished until they too share fully in the American Dream.” Id. at 546. Many supporters expressed their frustration that the bill did not include gender identity, and that they would have supported the amendment. Id. In fact, the debate over the inclusion of transgendered individuals in ENDA demonstrates an “increasing awareness of the widespread injustices wrought by mainstream understandings of sex and gender.” See Gilden, supra note 36, at 84.

343 See Hunter, supra note 342, at 141-44.
invalidate laws adopted by democratic processes and its duty to protect minorities from abusive policies.”

In order to affect change, “social minorities use the litigation of constitutional claims as one of the early strategies for legal reform.” Judicial action can often lead to the passage of legislation protecting such minorities, but the point in between such action has been termed by Hunter as “a kind of legal-political interregnum.” Additionally, Hunter argues that “constitutional equal protection arguments succeed or fail based in part on an assessment of whether they are likely to succeed politically.” A minority group tends to gain momentum and legitimacy when the Supreme Court uses a standard of heightened review in an equal protection claim. Justice O’Connor made favorable headway for future equal protection claims by homosexuals in her concurring opinion, since she regarded “objectives, such as ‘a bare... desire to harm a politically unpopular group,’ are not legitimate state interests.” Hunter argues that to determine whether a heightened rational basis test should be applied, the court should look at three questions:

Is the disadvantaged group politically unpopular?

Can the court reasonably infer that animus (either a desire to harm or moral disapproval) toward this group infected the adoption or application of the law?

Can the defending state actor demonstrate that a rational reason or legitimate policy objective, other than animus, actually motivated the challenged classification?

Hunter’s analysis advocates for homosexuals gaining greater legal and political rights, but her objectives apply as well to transgender individuals. In order to affect change, the social minority of transgender individuals must bring constitutional claims and attempt to shift the interregnum towards a heightened rational basis review. Like homosexuals, transgender individuals would greatly benefit from a test of increased scrutiny. Just as many laws morally disapprove of homosexuals, the same is true for the transgender population. By bringing such claims to the judiciary’s attention, this social minority may be able to affect social, political, and judicial change. Instead of being labeled as disabled, transgender

344 Id. at 144.
345 Id. at 145.
346 Id. at 146.
347 Id.
348 Id. at 147.
350 Hunter, supra note 342, at 150.
individuals could attempt to change the way the courts and society view their claims of discrimination.

Professor Feldblum looks specifically at what the Supreme Court opinion in *Lawrence* could mean for the future of the transgender population. She examines the role that government should play in securing the rights and “liberty interest[s]” of the transgender population. *Lawrence* indicated that a right to sexual privacy existed, but did not label that right as fundamental. By protecting sexual privacy, the Court allowed those individuals to engage in a “protected liberty activity.” However, Feldblum argues that sexual privacy should be a fundamental right: “A person’s sexual anatomy, and hence that person’s sense of sexual self, is core to an individual’s self-definition. Similarly, one’s sense of gender is core to one’s sense of self.”

Feldblum asserts that “we have collectively decided as a society to adopt certain norms that make certain members of our society live ‘on a tilt.’” For example, buildings are built without access for the handicapped, bathrooms are segregated by gender, and marriage is denied to homosexuals. In order to correct this “tilt,” the government must be actively engaged. Feldblum argues that “if the particular tilt at issue is related to a person’s core, essential self-definition, then the government has a constitutional obligation to rectify any tilt created by background social norms.” Instead of focusing on the negative rights imposed by the Constitution, there exists “a positive obligation to rectify tilts created by society.” For example, the government should ensure that individuals who have chosen to change their genders “are not punished for that decision through the loss of a job, the denial of housing, or the denial of goods and services.” In addition, the government should facilitate the ability for transgender individuals to obtain personal documentation and identification that reflect their presenting gender, as well as the ability to choose whichever restroom they associate with their gender identity. In doing so, the government can attempt to rectify social attitudes.

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352 Id.
353 Id. at 119.
354 Id. at 124.
355 Id.
356 Id. at 129 (quoting Chai R. Feldblum, *Rectifying the Tilt: Equality Lessons from Religion, Disability, Sexual Orientation and Transgender*, 54 ME. L. REV. 159, 181 (2002)).
357 Feldblum, *supra* note 352, at 129.
358 See id. at 129-30.
359 Id. at 130.
360 Id.
361 Id. at 137.
362 Id. at 137-38.
363 Feldblum, *supra* note 352, at 137-38.
Thus, taken together, Hunter and Feldblum’s theories may prove effective for the transgender population. As Hunter articulates, the Equal Protection Clause may be a powerful tool for social minorities that could lead to political change.364 The transgender population may now bring suit based on Justice O’Connor’s concurring opinion in Lawrence, and lobby for a heightened rational basis application in Equal Protection Clause cases. Feldblum’s theory of governmental involvement in rectifying the “tilt” further helps social minorities, like the transgender population, in gaining access to their personal liberty interests, autonomy, and self-definition.365 Instead of being labeled as “disabled” or “different,” transgender individuals may be able to affect change that allows them to have the same liberty and social interests as those who do not share their lifestyle or identity.

V. CONCLUSION

The purpose of this article is to recognize the hardships faced by transsexual individuals as a result of our society’s binary sex/gender system, and to identify potential ways in which we can work towards ending this marginalization. Our society’s binary sex/gender system serves to exclude transsexual individuals in many ways, including employment discrimination, police harassment, sexism, low wages, job insecurity, fewer adoption opportunities, and less accessible medical care. Transsexual individuals remain excluded from the ADA, and while some state disability laws have provided more protection, we are still far away from anything resembling comprehensive disability protection for transsexual individuals. Furthermore, attempting to end transsexual discrimination through the basis of disability laws is an implicit admission that transsexual individuals are somehow flawed, which many would not concede even in the face of obvious pragmatic advantages.

The Supreme Court’s decision in Price Waterhouse v. Hopkins and subsequent Sixth Circuit decisions give transsexuals hope that Title VII of the Civil Rights Act may be an avenue for discrimination relief in individual circumstances. However, while this framework might protect an individual transsexual claimant, it ignores the complexity and multiplicity of transgender identity as a whole. Title VII relief also reinforces the same binary sex/gender system that transgender individuals wish to reconstruct, since Title VII was intended to prohibit discrimination against “men and women.” Thus, neither disability law nor Title VII is the most appropriate remedy for transgender discrimination.

It would be ideal to create a new trans-jurisprudence that reconstructs our beliefs and norms related to the binary sex/gender system, and protects

364 See Hunter, supra note 342, at 141-42.
365 See Feldblum, supra note 352, at 127-30.
transgender individuals in all aspects of life by helping the law to understand that there are not only two gender choices, but a third category of "others." This approach, however, may not be immediately feasible, and is at least temporarily unrealistic. Ending transgender discrimination by altering the binary sex/gender system is unlikely because society has long followed this system, and the majority sees no problem with it.

Thus, the method of change that is most appropriate and practical for ending transgender discrimination is through challenges using the Equal Protection Clause, as homosexuals did in *Lawrence v. Texas*. A minority group can gain momentum and legitimacy when heightened review is given in regards to equal protection claims. Heightened review should be applied to equal protection claims when the disadvantaged group is politically unpopular, and the law was possibly applied or enacted due to animus against the group. Many laws that discriminate against transsexual individuals are of a moral nature. By bringing these claims, transgender equality could be triggered by the judiciary rather than through legislation, and as a result, society could begin to treat transsexuals equally, without identifying them as disabled or flawed individuals. Once the judiciary and society become aware of and receptive to the need to end discrimination against transgender individuals, the government could then rectify the law to coincide with these new social norms.

Currently, sixteen states and one hundred forty-three cities and counties366 have enacted laws prohibiting discrimination on the basis of gender identity or expression, covering over 25% of the U.S. population.367

As more states adopt transgender legislation, the federal government may very well follow. Equal Protection Clause challenges can notify the judiciary of existing inequality, and may inspire even more change. Let us hope that it is only a matter of time before the transgender minority can share the same rights and opportunities as the majority. Though there is a long road to travel, it seems possible that transgender individuals could be a part of the majority before too long.
