EMPLOYER PERCEPTIONS OF TRANS WOMEN'S SEX AND BEHAVIOR IN TITLE VII SEX STEREOTYPING CLAIMS: THE CASE FOR READING *PRICE WATERHOUSE V. HOPKINS* AS A BLANKET PROHIBITION OF GENDER POLICING BY EMPLOYERS

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INTRODUCTION

Trans people[1] in all walks of life face intense and widespread discrimination in American society,[2] even within the sphere of feminist and queer academia.[3] The working world is no less hostile a place for trans people. According to a nationwide survey conducted by the National Center for Transgender Equality (NCTE), 90% of trans respondents reported facing harassment or discrimination at work, or feeling that they had to hide their gender variance, 47% reported an adverse employment outcome as a result of their gender variance, and 26% reported having lost a job for this reason.[4] Compounding this problem is the consistent failure of state and federal judiciaries to recognize trans identities and gender variance beyond a binary conception of gender in virtually all areas of the law, forcing trans people to take often expensive and difficult routes to obtain institutional recognition of their identities before being treated by the law as their self-identified gender.[5] Some courts treat gender on a biologically

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1 In an effort to balance inclusive language with unencumbered writing, I will use the term "trans" broadly to refer to the entire spectrum of transgender, transsexual, genderqueer, androgyne, agender, neutrois, and other gender non-conforming people. Though this Note is focused on cases involving trans women (many of whom identified as transsexual or were assumed to so identify by the court), to whom I will refer by female pronouns unless directly quoting another source, I will use "them," "they," and "their" as singular gender-neutral pronouns for all subjects whose preferred gender pronouns are not explicitly stated or reasonably inferable.

2 JAIME M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., EXECUTIVE SUMMARY, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 2 (2011), *available at* http://transequality.org/PDFs/Executive_Summary.pdf.

3 JULIA SERANO, WHIPPING GIRL: A TRANSSEXUAL WOMAN ON SEXISM AND THE SCAPEGOATING OF FEMININITY 196 (2007).

4 GRANT ET AL., *supra* note 2, at 3.

5 *See* Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 772 n.207 (2008) [hereinafter *Documenting Gender*] ("Judicial opinions vary broadly in [the arena of defining gender], sometimes using chromosomes, sometimes birth status, sometimes surgery."); Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 17–18 (2003) [hereinafter *Resisting Medicine*] ("In almost every trans-related case, whether it be about the legitimacy of a trans person's marriage, the custody of hir children, hir right not to be discriminated against in employment, hir right to wear gender appropriate clothing in school

essentialist basis, positing assigned birth sex as the only "true" gender and thereby excluding a significant portion of trans people from protection, while other courts use a medical conception whereby specific medical interventions, particularly sterilizing genital surgery, or combinations of other interventions are required of trans people in order to establish the validity of their asserted gender identity.[6] The latter model of judicial cognizance systematically overburdens and excludes those in poverty and those who do not desire medical intervention;[7] this is a problem of particular significance in light of the NCTE finding that trans respondents were "nearly four times more likely" to live in poverty than similarly situated cisgender[8] people, which becomes a sobering poverty statistic when trans status intersects with racial minority status.[9]

Legislation is scarcely more hospitable to trans people than the courts. A minority of states—sixteen and the District of Columbia—and major cities have statutes that protect against discrimination in employment on the basis of gender identity and expression, which cover virtually all forms of gender variance.[10] Still, the vast majority of states and municipalities do not have such statutes, among them New York State.[11]

At the federal level, Title VII of the Civil Rights Act prohibits employers from discriminating against individuals "because of . . . sex."[12] Initially, courts read this language to exclude trans and gender non-conforming people from protection.[13] In the aftermath of the Supreme Court's recognition of discrimination on the basis of sex stereotyping in *Price Waterhouse v. Hopkins*,[14] the status of trans identities and expressions under Title VII has once again been thrown into question. Circuit courts and district courts have interpreted Title VII post-*Price Waterhouse* in three different ways in reference to claims brought by trans women who identified as transsexual.[15] Some courts

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or foster care, hir rights in prison, or whatever other context brings hir to court, medical evidence will be the cornerstone of the determination of hir rights." (footnotes omitted)).

6 *See* Franklin H. Romeo, Note, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 724, 726–27 (2005).

7 *Id.* at 730–31.

8 Non-trans. *See infra* Part I.A.

9 GRANT ET AL., *supra* note 2, at 2.

10 *Non-Discrimination Laws that Include Gender Identity and Expression*, TRANSGENDER L. & POL'Y INST., http://www.transgenderlaw.org/ndlaws/index.htm#jurisdictions (last updated Feb. 1, 2012).

11 *Id.*

12 42 U.S.C. § 2000e-2(a)(1) (2012).

13 *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748 (8th Cir. 1982); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978).

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

15 *See infra* Part II.A.

have held that those who transition from male to female, or from female to male are per se unprotected under Title VII.[16] Other courts have similarly foreclosed Title VII claims for discrimination on the basis of transsexual status, but entertain sex-stereotyping claims brought by trans plaintiffs for discrimination based on failing to meet the employer's stereotypes of their assigned sex at birth.[17] Still other courts, and with its decision in *Mia Macy v. Eric Holder*,[18] the Equal Employment Opportunity Commission (EEOC), read "sex stereotyping" claims to include discrimination on the basis of any gender non-conformity, including transsexual status.[19]

This Note argues that federal circuit courts and the EEOC currently interpret Title VII and *Price Waterhouse* too narrowly in light of their purpose, with the result of allowing discrimination on the basis of being "too stereotypical," and that such interpretations ill-prepare the federal courts for dealing with the increasing visibility of gender diversity in American society and our legal system. This Note further contends that the inherent subjectivity of the meaning of the word "sex," the absence of an intent requirement vis-à-vis Title VII's protection of "sex" as evidenced by the legislative history, and considerations of public policy, dictate interpreting *Price Waterhouse* to protect against all forms of employer policing of gendered traits.

Part I of this Note provides a brief overview of the issues in play in trans people's identities and expressions, and traces the development of Title VII and *Price Waterhouse* and its progeny. Part II lays out the three overarching theories of the application of *Price Waterhouse* and Title

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16 *See* Brown v. Zavaras, 63 F.3d 967, 968, 972 (10th Cir. 1995) (Transsexual prisoner "Mr. Brown," claiming disparate treatment based on transsexual status, was not protected under the 14th Amendment, and therefore "his" § 1983 claim failed); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984) ("[E]ven if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.").

17 *See* Myers v. Cuyahoga Cnty., Ohio, 182 F. App'x 510, 519 (6th Cir. 2006) ("Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their perceived sex or gender."); Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, [the plaintiff in *Smith*] stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."); Smith v. City of Salem, Ohio, 378 F.3d 566, 573–74 (6th Cir. 2004).

18 Mia Macy v. Eric Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *7 (Apr. 20, 2012) ("When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment 'related to the sex of the victim.'" (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000))).

19 *See* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) ("[D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."); *Schwenk*, 204 F.3d at 1202; Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (Rather than claiming that "disclosure of her gender dysphoria was the singular cause of her non-selection," the plaintiff "assert[ed] that she was discriminated against because, when presenting herself as a woman, she did not conform to [the employer's representative's] sex stereotypical notions about women's appearance and behavior.").

VII to employment discrimination claims brought by trans plaintiffs, and scholarly attempts to reconcile and explain the split among the circuits and the EEOC. Part III argues from the plain meaning of "sex," the purpose of Title VII, and by analogy to the "regarded as" provision of the Americans with Disabilities Act,[20] for the proposal that sex discrimination should be analyzed on the basis of the traits against which the employer discriminates, rather than whether an employee failed to conform to gender stereotypes or whether a given plaintiff's gender identity or biological sex were discriminated against directly. Part IV concludes by summarizing the analysis of discrimination "because of . . . sex" under Title VII and the proposed alternative interpretation.

I. BACKGROUND

A. *Definitions*

A precise treatment of the distinctions between sex and gender, gender identity and gender expression, and trans and cis, has eluded sociologists and psychologists. Trans writers themselves disagree on terms.[21] This Section lays out working definitions and conceptions of what it means to be trans, and specifically a trans woman, on which definitions I base the following analysis and proposal. Definitions held by others can, and do, differ. This Note is primarily concerned with balancing inclusive language while remaining cognizant of meaningful distinctions between groups.

The concept of "gender identity" refers to identification or non-identification with the socially-defined identity of "man" or "woman."[22] "Gender presentation" refers to the social role one attempts to emulate in interacting with the outside world on a daily basis. A transgender person may consider herself a woman, but present as a "man" in the world for various practical or comfort-based reasons.[23] "Gender expression" refers to the gender presentation of an individual in a particular instance, as a drag queen's gender expression during a performance is as a caricature of a woman.[24] "Assigned sex" is what in common parlance is referred to as a person's "biological sex." It is the sex ascribed to infants by medical professionals when they are born, "based [primarily, among a host of other less-than-objective

20 Americans with Disabilities Act, 42 U.S.C. § 12102(1)(C) (2012).
21 SERANO, *supra* note 3, at 23.
22 *Id.* at 25.
23 *Id.* at 25–26, 95–96.
24 *Id.* at 95–96.

observational criteria,] on the presence or the absence of a penis," and one's assigned sex is normally the sex on one's birth certificate (unless one takes myriad administrative steps to change this designation).[25] There are two major situations in which one may not "fit" their birth sex, which are not mutually exclusive. The first is an intersex condition, wherein one has secondary or primary sex characteristics other than those associated with that person's sex at birth.[26] The other is when a person's gender identity or "subconscious sex" (the way they feel their own sexed body should look and function) is not aligned with the gender and/or physical characteristics associated with their assigned sex.[27]

This Note uses the term "trans" to refer to any individual with a gender identity, or whose gendered behavior they consider to be a part of their personal identity, that varies from societal expectations of gender.[28] There are various non-binary gender identities held by individuals who do not necessarily identify as either a "man" or a "woman" as society defines the role, and who may or may not perceive themselves to be trans.[29] "Cisgender" and "cis" are terms that describe those whose gender identities are in alignment with the gender associated with their assigned sex and whose subconscious sex is in alignment with their assigned sex.[30]

There are two major social forces enforcing the devaluation and marginalization of trans people in American society. The first is "cisnormativity," which demands that all individuals have a gender identity in accordance with their assigned sex at birth. "Cissexism" is the assumption that a cis person's subconscious sex and gender identity are unequivocally more valid than those of a trans person.[31]

In referring simply to "sex," this Note takes the position that the word in its plainest sense refers to gender presentation, since it is virtually impossible to know with certainty, and at a glance, a stranger's chromosomes, genitals, or exact secondary sex characteristics, or even upon detailed examination in some cases, and methods of classifying these criteria are imprecise and heavily based in culture rather than anything empirical or immutable.[32]

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25 *Id.* at 24.

26 *Id.* at 25.

27 *Id.* at 27.

28 SOMATECHNICS: QUEERING THE TECHNOLOGISATION OF BODIES 17 n.2 (Nikki Sullivan & Samantha Murray eds., 2009).

29 SERANO, *supra* note 3, at 27–29.

30 *Id.* at 12.

31 *Id.*

32 *Id.* at 24.

B. *History of Title VII Sex Discrimination and Suits Brought by Transsexual Plaintiffs Before* Price Waterhouse

42 U.S.C. § 2000e-2, also known as "Title VII" of the Civil Rights Act of 1964, provides, in relevant part, that

> [i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .[33]

Prior to the Supreme Court's decision in *Price Waterhouse*, the circuit courts interpreted "sex" strictly to refer to discrimination based on the victim's status as a man or a woman.[34] However, in *Price Waterhouse*, Justice Brennan's opinion (with a majority of justices in agreement with this interpretation though differing on the merits) expanded the definition of "sex" under Title VII to include discrimination on the basis of stereotypes of the way men and women should act.[35]

Under the strict pre-*Price Waterhouse* regime, it was virtually impossible for a trans plaintiff to successfully bring a case under Title VII. Some notable early opinions involving claims brought by transsexual women flatly rejected the notion that discrimination against a person on the basis of changing legal sex could be protected under Title VII.[36] The common argument behind this approach was that Congress, in including the word "sex" in Title VII while failing to define it, meant to effectuate the term's "plain meaning" and common usage.[37] The federal circuit courts reasoned that transsexual status did not fall within this "plain meaning," and that the legislative history revealed no indication that Congress had considered transsexual people at all in enacting Title VII.[38]

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33 42 U.S.C. § 2000e-2(a)(1) (2012).

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

35 Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (plurality opinion), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071.

36 *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("[W]e are in agreement with the district court that for the purposes of Title VII the plain meaning must be ascribed to the term 'sex' in absence of clear congressional intent to do otherwise."); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975) ("[I]n enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism . . . .").

37 *Sommers*, 667 F.2d at 750.

38 *Id.*; *Voyles*, 403 F. Supp. at 457.

C. Price Waterhouse *and Its Aftermath—From Title VII to the Equal Protection Clause*

The plaintiff in *Price Waterhouse* was a woman at an accounting firm who was denied a partnership position.[39] Among the most relevant facts in the case were that the partners believed she "overcompensated for being a woman" by being "macho," and that one of them took her aside after the partnership meeting and told her to wear more makeup and dress more femininely.[40] Justice Brennan and a majority of the Supreme Court by concurrence found that this was actionable discrimination under Title VII despite being ostensibly based on the plaintiff's behavior rather than simply her state of being a woman.[41] Responding to the defendant's argument that discrimination based on behavior rather than strict definitions of sex was not contemplated under Title VII, Justice Brennan wrote the following for the plurality of the Court:

> 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.[42]

While other Justices disagreed with the plurality's holding regarding the standard of proof required to demonstrate discriminatory intent, a majority agreed that employment discrimination based on sex stereotypes was prohibited under Title VII.[43]

Since *Price Waterhouse*, the "sex stereotyping" formulation has been applied to several other sources of federal anti-discrimination law, including the Equal Protection Clause of the 14th Amendment[44] and the Equal Credit Opportunity Act.[45]

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39 *Price Waterhouse*, 490 U.S. at 234 (plurality opinion).

40 *Id.* at 235.

41 *Id.* at 251.

42 *Id.* (alteration in original) (internal quotation marks omitted).

43 *See* Susan Bisom-Rapp, *Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases*, 1995 UTAH L. REV. 1029 (analyzing and applying feminist and postmodern theory to the mixed-motive analysis articulated by the plurality in *Price Waterhouse*).

44 *See, e.g.*, Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Brown v. Zavaras, 63 F.3d 967 (10th Cir. 1995).

45 *See, e.g.*, Rosa v. Park W. Bank & Trust Co., 213 F.3d 213 (1st Cir. 2000).

D. *Discrimination Based on Sexual Orientation and Other Forms of Gender Nonconformity Post-*Price Waterhouse

Federal courts have consistently held that discrimination on the basis of sexual orientation is not actionable under the "sex stereotyping" regime put forward in *Price Waterhouse v. Hopkins*.[46] However, these courts have recognized *Price Waterhouse*-type claims brought on the grounds of discrimination on the basis of failure to conform to sex stereotypes through behavior that is also associated with homosexuality. Several federal courts have ruled that discrimination against sexual orientation per se would not properly ground a "sex stereotyping" claim under Title VII, but further allegations that one was discriminated against on the basis of gender nonconformity, other than one's non-normative sexual orientation, would bring the claim within *Price Waterhouse*'s ambit.[47] Contrary to what one might expect from this distinction between gender non-conforming sexualities and gender non-conforming behavior, the application of *Price Waterhouse* to employment discrimination based on a male employee's cross-dressing has drawn a division in the circuit courts. One court holds that discrimination on the basis of cross-dressing is per se not discrimination on the basis of sex or sex stereotypes.[48] The First Circuit, on the other hand, has held discrimination on the basis of cross-dressing to be a quintessential example of sex stereotyping discrimination.[49] Transsexual status has seen a similar divide in the circuits on the issue of the type and degree of gender-variance protected by *Price Waterhouse*.

II. ANALYSIS

A. *Federal Courts Split on the Application of* Price Waterhouse *to Discrimination Claims Brought by Transsexual Women*

In applying the holding of *Price Waterhouse v. Hopkins* to claims of employment discrimination brought by transsexual women, the federal

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46 *See, e.g.*, Medina v. Income Support Div., N.M., 413 F.3d 1131 (10th Cir. 2005); Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).

47 *See Rene*, 305 F.3d at 1068; Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874 (9th Cir. 2001) ("[Plaintiff] contends that the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. We agree.").

48 Oiler v. Winn-Dixie La., Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *1 (E.D. La. 2002) (cross-dressing not protected under Title VII and *Price Waterhouse*).

49 *Rosa*, 214 F.3d at 213 (cross-dressing protected under "sex discrimination" in Equal Credit Opportunity Act).

courts have divided three ways. The most stringent interpretation holds that transsexual people claiming sex stereotype discrimination cannot avail themselves of protection from *Price Waterhouse* sex stereotyping. A more moderate interpretation allows transsexual plaintiffs to proceed with claims of discrimination on the basis of sex stereotyping by conceptualizing the issue as discrimination against the plaintiff's failure to conform to their assigned sex. The most progressive view is that discrimination against an individual on the basis of the employer's perception of the employee's gender non-conformity, including transsexual status, is per se discrimination on the basis of sex stereotyping no matter whether the plaintiff is conceptualized as their assigned sex or their self-identified sex for the purposes of the court's analysis. This Note contends that each of these interpretations rests on an overly narrow view of the nature of discrimination on the basis of "sex," and proposes an alternative interpretation—that discrimination on the basis of actual or perceived gendered traits, regardless of whether such traits conform to sex stereotypes or gender roles, is prohibited discrimination "because of . . . sex" under Title VII.[50]

1. Transsexual Women Are Per Se Unprotected

Some courts have found that, regardless of whether a plaintiff who is a transsexual woman argues that the employer's discriminatory action is based on sex stereotypes, the discrimination she alleges is not actionable if it can be reasonably tied to her transsexual status instead. The Seventh Circuit, in particular, has been vehement in excluding transsexual women from any protection at all under Title VII, as exemplified by the case of *Ulane v. Eastern Airlines, Inc.*[51] This extremely narrow interpretation disregards both the complex social meanings and assumptions surrounding past and present ideas of "sex" in the United States, and the purpose behind the enactment of Title VII.[52]

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50 *See infra* Part III.

51 742 F.2d 1081 (7th Cir. 1984). In holding that the plaintiff's identity foreclosed her from protection under Title VII, the court stated: "It is clear from the evidence 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." *Id.* at 1087 (footnote omitted).

52 *See infra* Part III.

2. Potential Claims Based on Stereotypes of Plaintiff's Assigned Sex

Several circuits have held that a transsexual woman can be protected under Title VII and *Price Waterhouse* sex stereotyping discrimination, but only as members of their birth-assigned sex. The Sixth Circuit issued a line of decisions following this model, beginning with *Smith v. City of Salem, Ohio*[53] in 2004. The court in *Smith* conceptualized the effect of *Price Waterhouse* on Title VII claims brought by transsexual women as follows:

> After *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.[54]

While the reasoning of the Sixth Circuit has evolved somewhat with its 2006 decision in *Myers v. Cuyahoga County, Ohio*, holding that "Title VII protects transsexual persons from discrimination for failing to act in accordance and/or identify with their *perceived* sex or gender," the court prefaced its analysis of this issue with the statement "Myers transitioned to being a female person around 1973 or 1974, and so she had always been female while she was employed by Cuyahoga County [beginning in 1982]."[55] This reasoning indicates that the Sixth Circuit based its decision on an evaluation of the plaintiff's gender identity on a binary scale, and conditioned its recognition of the validity of her womanhood on her "transitioning to" femaleness, rather than focusing on the more important fact that, as the court itself observes, "[t]he County was aware that Myers was a transsexual" throughout her tenure because she disclosed this fact to them during the hiring process.[56] The adherence of this analysis to the "non-conformity" model of sex discrimination shut out the possibility that the plaintiff trans woman could have a valid sex discrimination claim based on being perceived as too feminine, and therefore "artificial" or "frivolous"; it further

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53 378 F.3d 566, 574 (6th Cir. 2004) ("Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants' actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination."); *see also* Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005) ("Following the holding in *Smith*, [plaintiff] Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.").

54 *Smith*, 378 F.3d at 573.

55 Myers v. Cuyahoga Cnty., Ohio, 182 F. App'x 510, 518–19 (6th Cir. 2006) (emphasis added).

56 *Id.* at 518.

disregards the potential influence of the employer "ungendering" her upon learning of her trans status, conceptually stripping her of her womanhood.[57]

The most recent circuit decision espousing the view that transsexuality is unprotected under Title VII and *Price Waterhouse* unless it is framed in terms of failure to conform to sex stereotypes is *Etsitty v. Utah Transit Authority*.[58] The Tenth Circuit in *Etsitty* held that the plaintiff was not entitled to protection based on her transsexual status under Title VII, and therefore "[her] claim must rest entirely on the *Price Waterhouse* theory of protection as a man who fails to conform to sex stereotypes."[59] While the plaintiff's claim ultimately failed because she

> [had] not presented a genuine issue of material fact as to whether UTA's stated motivation for her termination [that threat of sexual harassment litigation warranted UTA's refusal to allow her to use the women's restroom] is pretextual, [the court assumed], without deciding, that such a claim is available and that Etsitty has satisfied her prima facie burden.[60]

The Tenth Circuit's assumption that a trans person can state a claim under Title VII, coupled with the court's opinion that the plaintiff's assigned sex would be their "sex" for the purposes of such a claim, indicates that *Etsitty* falls under the same category as the Sixth Circuit cases discussed above.

In the same year, the United States District Court for the District of Columbia decided *Schroer v. Billington*.[61] The court stated in dicta that the plaintiff could not maintain a *Price Waterhouse* claim based on discrimination "*solely* from her disclosure of her gender dysphoria and her intention to present herself as a woman. . . . because protection from sex stereotyping is different, not in degree, but in kind, from protecting transsexuals *as transsexuals*."[62] However, unlike *Smith* and *Etsitty*, the court in *Schroer* based its decision that the plaintiff stated a claim under Title VII on her "assert[ion] that she was discriminated against because, when presenting herself as a woman, she did not conform to [her employer's] sex stereotypical notions about women's appearance and behavior."[63] This is a novel approach to the moderate interpretation in that it recognizes discrimination may be carried out against a transsexual woman because she does not live up to what her employer

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57 SERANO, *supra* note 3, at 3, 172.
58 502 F.3d 1215 (10th Cir. 2007).
59 *Id.* at 1224.
60 *Id.*
61 525 F. Supp. 2d 58 (D.D.C. 2007).
62 *Id.* at 63.
63 *Id.*

expects from her *preferred* gender, not her *assigned* gender, and thus acknowledges a dimension of gender discrimination that neither the Sixth Circuit nor Tenth Circuit cases above has reached. However, in relying on a baseline gender to which a plaintiff has failed to conform, this rationale leaves unanswered the threat of discrimination to one whose *conformity* to any gender stereotypes provides the impetus for discrimination against them by their employer.

3. Transsexuality Subsumed Under Sex Stereotyping Protection

The plurality of the circuits that have ruled on the issue of transsexual women's status under Title VII follow the general theory set forth by the Ninth Circuit in *Schwenk v. Hartford*.[64] In addition to holding that the federal Gender-Motivated Violence Act (GMVA)[65] paralleled Title VII and *Price Waterhouse*, the court added, in response to the defendant's argument that this parallel meant that the GMVA applied only to "sex" in the biological sense, that "under *Price Waterhouse*, 'sex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender. . . . Indeed, for purposes of these two acts, the terms 'sex' and 'gender' have become interchangeable."[66] However, this same circuit recognized "safety" concerns based on the transsexual plaintiff's use of the women's bathroom as a legitimate and nondiscriminatory business reason warranting dismissal of her claim.[67]

A far more sweeping example of this model can be seen in the Eleventh Circuit's 2011 opinion in *Glenn v. Brumby*.[68] The court there held that "discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[69] While this approach satisfactorily covers discrimination against a trans person based on their failure to conform to gender stereotypes without the need to ascribe a baseline gender to the plaintiff, it would seem to leave no remedy for a person who conforms *too well* to gender norms, or is merely presumed to do so on the basis of their particular trans identity.

In the case of *Hunter v. United Parcel Service, Inc.*,[70] the fact that women often wear clothing or hairstyles traditionally thought to be designed for men defeated the Title VII claim of a trans man who bound

64 204 F.3d 1187 (9th Cir. 2000).
65 42 U.S.C. § 13981(c) (2012).
66 *Schwenk*, 204 F.3d at 1202.
67 *See* Kastl v. Maricopa Cnty. Cmty. Coll. Dist., 325 F. App'x 492, 494 (9th Cir. 2009).
68 663 F.3d 1312 (11th Cir. 2011).
69 *Id.* at 1317.
70 697 F.3d 697 (8th Cir. 2012).

his breasts, wore his hair short, and dressed in men's clothing, on the grounds that he could not prove that the employer was aware that his presentation varied from his birth-assigned gender.[71] The degree to which gender-nonconformity in people perceived as women is generally tolerated in American culture essentially foreclosed him from arguing that his clothing and hairstyle, clearly not gender-conforming for someone perceived to be a woman (and applying under a female name), comprised the gender non-conformity on which the employer decided not to hire him.[72]

4. *Mia Macy v. Eric Holder*

In a landmark opinion, the Equal Employment Opportunity Commission (EEOC) held in *Mia Macy v. Eric Holder* that an employer violates Title VII and *Price Waterhouse*,

> regardless of whether . . . [it discriminates] because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.[73]

The point that puts the EEOC decision beyond even those courts that subsume trans status under sex stereotyping is the Commission's statement that "gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms."[74] This brings not only transsexual status under the protection of Title VII, but includes non-binary gender identities and expressions as well.

Nevertheless, there are several problems that even this most progressive of decisions does not solve. The jurisdictional status of the decision is such that it does not bind federal courts, which can decline to enforce its orders based on a more conservative interpretation.[75] The

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71 *Id.* at 703–04 ("Many fashion trends have called for women to wear short haircuts, men's clothes, or men's shoes. To hang a rule of law on fashions that may change with the times would create an unworkable rule.").

72 *Id.* at 703 ("At the time of the interview, Hunter had not undergone any surgical procedures related to gender reassignment. There is no evidence that he had any facial hair, that he told [the interviewer] he identified as male or transgendered, or that [the interviewer] engaged in any dialogue or action that suggested he was aware of Hunter's protected status.").

73 Mia Macy v. Eric Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *6 (Apr. 20, 2012).

74 *Id.*

75 *See, e.g.*, *Hunter*, 697 F.3d at 702–04 (Although this decision was handed down five months after *Mia Macy* was decided, and the plaintiff explicitly claimed the defendant rejected

Supreme Court could also overrule the Commission on this issue, and the Commission could overrule itself if enough future appointees to its adjudicating body no longer agree with the *Mia Macy* reasoning. Further, while the Commission's language would seem to be quite sweeping, it may be inapplicable to cases in which plaintiffs conform to social expectations of gender beyond simply being trans. An illustration of this problem can be found in *Hunter*, decided five months after *Mia Macy*, where the gender nonconformity claim of the plaintiff (a trans man) was dismissed because he "failed to establish that [the employer's interviewer] knew Hunter was transgendered or gender non-conforming; he therefore [could not] prove that [the employer] discriminated against him because of a protected status of which [the employer] was unaware."[76] *Hunter* also serves as an example of the potential anomaly of relying on the employer's perceptions of a plaintiff's gender identity or conformity/non-conformity: ignorance of trans issues or gender variance on the part of the employer as a defense to employment decisions made on the basis of specific gendered traits. If the plaintiff in *Hunter* were allowed to ground his Title VII sex discrimination claim on the allegation that the employer based its decision not to hire him on the fact that the plaintiff "applied to UPS using the name Jessica Axt, yet came to the interview with his breasts bound, a short haircut, and wearing clothing and shoes he purchased from the men's department,"[77] all facts which the employer could not have helped but perceive regardless of whether it drew an explicit connection between these traits and the plaintiff's trans status, the problem of Hunter's perceived gender conformity,[78] almost certainly due to the ironically decades-known societal invisibility of trans-masculine people,[79] would not as likely have defeated his claim.

Gender policing is a broader problem than in a binary sense, and erasure and marginalization of trans women and men in queer and feminist spaces is a real issue as well, though the power dynamic is certainly different in such cases.[80] As gender diversity becomes more visible in the workplace, courts will need a workable basis to uphold the purpose of Title VII, rather than allowing the vagaries of the tyranny of the majority delay defining the parallel rights of newly-visible minorities.

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his job application on the basis of his gender non-conformity, the Eighth Circuit made no express mention of *Mia Macy*.).

76 *Id.* at 704.

77 *Id.* at 703–04.

78 *Id.* at 704.

79 *See* JASON CROMWELL, TRANSMEN & FTMS: IDENTITIES, BODIES, GENDERS & SEXUALITIES 11 (1999).

80 *See generally* SERANO, *supra* note 3, at 47.

B. *Academic Analysis and Proposed Solutions: Legislative Action, Categorical Redefinition, Strict Scrutiny, and Per Se Protection*

Legal scholars have analyzed Title VII's application to trans people extensively in the last few years.[81] Several have suggested that legislative action, such as amendment to Title VII, is the ideal route.[82] The thrust of this Note, however, is that the current state of federal law as set forth by Congress and interpreted by the Supreme Court, could afford adequate protection to all individuals who experience discrimination based on gender conformity and gender non-conformity, if the judicial inquiry were modified to reject the idea of a perceived or actual baseline "sex," and instead recognized gendered traits as the true targets of "sex discrimination."

Ann C. McGinley identifies a problem that even legislation specifically protecting against discrimination based on gender identity and expression may fail to rectify: "the courts' binary view of sex and gender, a view that identifies men and women as polar opposites, and that sees gender as naturally flowing from biological sex."[83] The attempts that judges have made to understand the positions of sexual minorities, particularly in the realm of gender, have been well-documented.[84] A handful of solutions rest on leveraging "medical and sociological definitions" to state a claim under *Price Waterhouse*,[85] but establishing such definitions in each plaintiff's claim would be unduly invasive, and relying upon them would inevitably narrow access to Title VII protections.[86]

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81 *See* Shawn D. Twing & Timothy C. Williams, *Title VII's Transgender Trajectory: An Analysis of Whether Transgender People Are a Protected Class Under the Term "Sex" and Practical Implications of Inclusion*, 15 TEX. J. C.L. & C.R. 173 (2010) (overview of the arguments for and against trans inclusion under Title VII and to what degree trans people ought to be protected).

82 S. Elizabeth Malloy, *What Best to Protect Transsexuals From Discrimination: Using Current Legislation or Adopting a New Judicial Framework*, 32 WOMEN'S RTS. L. REP. 283, 284–85 (2011) ("Part IV suggests the need for a separate category prohibiting discrimination against transsexuals."); Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 716 (2012) ("Based on [social science] research and legal analysis, the Article concludes that a federal law like the Employment Non-Discrimination Act (ENDA), a bill pending in Congress that would prohibit sexual orientation and gender identity employment discrimination, is needed.").

83 Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 713 (2010).

84 *See* Dean Spade, *Keynote Address: Trans Law & Politics on a Neoliberal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 353 (2009).

85 Francine Tilewick Bazluke & Jeffrey J. Nolan, *"Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361, 362 (2006).

86 *See generally* Romeo, *supra* note 6.

Chinyere Ezie has argued for according "sex" in equal protection cases "strict, not intermediate, scrutiny," in order to avoid the schemes of binary classification that pervade judicial analyses of trans and intersex people.[87] This is not a perfect solution, as Ezie notes, because a "gender-blind" doctrine of equal protection may impede targeted gender-based initiatives such as the Violence Against Women Act in the same manner as ostensible race-blindness has impeded reparative efforts.[88] Ilona M. Turner[89] argues that,

> discrimination against a transgender employee due to her or his transgender status constitutes a valid sex discrimination claim [per se] . . . . whether the individual is viewed by the employer or the court as a man who is insufficiently masculine, a woman who is insufficiently feminine, or someone who falls in between those seemingly binary categories.[90]

Franklin H. Romeo has written about the problems inherent in the "medical model" of gender identity which virtually all courts use in dealing with non-cis gender identities:[91]

> The medical model explains gender nonconformity through the psychiatric diagnosis of Gender Identity Disorder . . . and relies upon medical evidence—both in the form of psychological diagnoses and physical treatments such as hormone therapy and gender-related surgeries—in order to establish gender transgressions as legitimate and therefore worthy of recognition and protection under the law.[92]

Of the federal courts that have decided on the issues of whether and how transsexual women fit into Title VII protections from sex discrimination, the opinions of all but a few contain a lengthy analysis of personal narratives and medical and psychiatric documentation, even when the import of such information within the relevant facts of the case and the reasoning leading to the court's decision is never explicitly made clear.[93] The medical model employed by courts to evaluate the legitimacy of the person's "sex" for Title VII purposes presents two

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87 A. Chinyere Ezie, *Deconstructing the Body: Transgender and Intersex Identities and Sex Discrimination—The Need for Strict Scrutiny*, 20 COLUM. J. GENDER & L. 141, 144 (2011).

88 *Id.* at 196, 199.

89 Ilona M. Turner is a staff attorney at the National Center for Lesbian Rights.

90 Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 562 (2007).

91 *See* Romeo, *supra* note 6.

92 *Id.* at 724.

93 *See* Smith v. City of Salem, Ohio, 378 F.3d 566, 568 (6th Cir. 2004) (Prior to holding that Smith stated a claim under Title VII for discrimination on the basis of stereotypes of how a man should "look and act," the opinion included the following without ever identifying its connection to the holding: "Smith—biologically and by birth a male—is a transsexual and has been diagnosed with Gender Identity Disorder ("GID"), which the American Psychiatric Association characterizes as a disjunction between an individual's sexual organs and sexual identity.").

overarching problems: It "sets regulatory standards regarding gender that reinforce sexist and heterosexist norms" and "[subjects] gender transgressive people who rely upon public services . . . to a greater degree of scrutiny regarding their gender presentation than those who are able to meet their basic needs through private means" due to the highly gender-normative and sex-segregated nature of public assistance programs and services, along with the common presumption that certain aspects of the lives of those receiving public assistance, including gender expression and identity, ought to be susceptible to evaluation and criticism by "the public."[94]

To respond to these problems, Romeo suggests a model of "self determination," which "recognizes gender as a fundamental aspect of human life, which every person has the capacity and inherent right to control."[95] This Note argues that the plain language, purpose, and legislative history of Title VII, the language of *Price Waterhouse v. Hopkins* and other Supreme Court cases touching on concepts of sex and gender, and public policy reasons, dictate that this model of gender self-determination should be applied in the context of sex discrimination under Title VII in order to advance broader protections for all people, no matter their degree of gender-conformity or non-conformity. In order to avoid the problem of judicial intrusiveness and misunderstanding of trans and gender-nonconforming identities and expressions, this Note contends that the best way to promote a model of gender self-determination is to avoid characterizing actual or perceived employee gender expressions in reference to "gender non-conformity" or "traditional stereotypes," and instead recognize actual or perceived gendered traits as the basis of discrimination "because of sex" under Title VII.

C. *Judicial Interpretations of the Legislative History of Title VII*

Before *Price Waterhouse v. Hopkins* was decided, the predominant position in most circuits was that the word "sex" in Title VII was to be read narrowly.[96] The primary rationale for this determination is found in the Eighth Circuit's 1982 opinion *Sommers v. Budget Marketing, Inc.*:

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94 Romeo, *supra* note 6, at 731, 734.

95 *Id.* at 738–39.

96 *See* Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("Nevertheless, the fact that the proposals [in Congress to add protections on the basis of sexual orientation] were defeated indicates that the word 'sex' in Title VII is to be given its traditional definition, rather than an expansive interpretation."); Holloway v. Arthur Andersen Co., 566 F.2d 659, 662 n.6 (9th Cir. 1977); Wetzel v. Liberty Mut. Ins. Co., 511 F.2d 199, 204 (3d Cir. 1975); Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971).

> The amendment adding the word "sex" to the Civil Rights Act was adopted one day before the House passed the Act without prior legislative hearings and little debate. . . . Because Congress has not shown an intention to protect transsexuals, we hold that discrimination based on one's transsexualism does not fall within the protective purview of the Act.[97]

After the landmark decision by the Supreme Court in *Price Waterhouse*, the general thrust of this view of the congressional history of Title VII regarding transsexual women persisted.[98] However, some courts, like the Eastern District of Louisiana in 2002 in *Oiler v. Winn-Dixie Louisiana, Inc.*,[99] traded such forceful intentionalist arguments for at least a passing acknowledgement that "the number of persons publicly acknowledging sexual orientation or gender or sexual identity issues has increased exponentially since the passage of Title VII."[100] Rather than inferring from the legislative history a pure lack of intent to protect transsexual women, the *Oiler* court framed the situation more delicately: "[N]either plaintiff nor defendant can point to any attempts by Congress to amend Title VII in order to clarify that discrimination on the basis of gender or sexual identity disorders is prohibited."[101]

III. PROPOSAL

The language, purpose, and legislative history of Title VII, the language of the Supreme Court in *Price Waterhouse v. Hopkins*, in reference to the Court's use of the same or similar terms in prior decisions, and the public policy impact of the differing interpretations that could be given Title VII's prohibition of sex discrimination, together counsel a broad reading of "sex" and "sex stereotypes" wherein a baseline "sex" or "gender," be it that which genuinely belongs to the plaintiff or is merely perceived by the employer, is unnecessary. All that matters for purposes of this Note is that a trait actually possessed or perceived to be possessed by the plaintiff is gendered by the employer or society at large, and that this trait was the reason for the discriminatory action of the employer, rather than a bona fide occupational qualification. The purpose of proposing this solution is to expand the approach of the EEOC in *Mia Macy* to protect people from discrimination based on their gender non-conformity or gender conformity, and to shift courts away from denying protection based on

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97 *See Sommers*, 667 F.2d at 750.

98 *See* Oiler v. Winn-Dixie La. Inc., No. Civ.A. 00-3114, 2002 WL 31098541, at *4 (E.D. La. 2002).

99 *Id.*

100 *Id.*

101 *Id.*

the biological model or from conducting an unnecessary and invasive inquiry into the plaintiff's gender, be it as genuinely held or perceived by the employer, based on the medical model of gender.[102]

A. *There Is No Plain Meaning of "Sex" in Title VII*

Title VII of the Civil Rights Act prohibits an employer from discriminating against an employee "because of . . . sex."[103] Several of the federal courts with the least permissive view hold that the "ordinary common meaning" of "sex" under Title VII does not "outlaw discrimination against 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."[104] The social reality is quite contrary to this assertion: The meaning of the term "sex" and its ordinary usage are by no means unequivocal.[105] The etymological, social, and biological uses of the concept of "sex" indicate that the notion of an absolute and measurable biological divide between "male" and "female" biological sexes is more myth than fact.

1. Definitions of Sex: Etymology, Sociology, and Biology

The etymology of the word "sex" indicates that it was first used to divide creatures into groups, be it of species, characteristics, or behaviors, which steadily evolved into a more general division based more on sharing traits generally attributed to members of either "sex," including many traits that had nothing to do with reproductive organs.[106] This multifaceted ad hoc division between the "sexes" was not so ancient that its influence could be cast aside like a mythology; "[t]his sense of sex as a constellation of physical, psychological, behavioral, and social attributes continued late into the nineteenth century."[107] The socially-accepted connection between anatomical reproductive function and social and psychological traits further persisted into the twentieth century, itself the source of much of the resistance to women's rights

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102 *See* Romeo, *supra* note 6, at 734.

103 *See supra* note 12.

104 Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); *see also* Dobre v. Nat'l R.R. Passenger Corp. ("Amtrak"), 850 F. Supp. 284, 286 (E.D. Pa. 1993) ("The term 'sex' in Title VII refers to an individual's distinguishing biological or anatomical characteristics, whereas the term 'gender' refers to an individual's sexual identity.").

105 *See* SERANO, *supra* note 3, at 24.

106 *See* Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What Is the "Plain Meaning" of "Sex" in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573 (2009).

107 *Id.* at 598–99.

movements and gender equality.[108] It was only in the years following World War II, after women took on tasks normally socially apportioned to men, that the idea of a "sex" separate from one's "gender" took shape—a distinction drawn more sharply by the rise of postmodernism in academia.[109]

In the face of the history of the word "sex," the idea that the "traditional"[110] meaning of sex is biological rather than social or psychological loses considerable force.

The Supreme Court's own opinions show the less-than-rigid definitions of "sex" in interpreting Title VII—it has sometimes used the word "gender" to describe the status against which an employer is not allowed to discriminate.[111] Federal Courts of Appeals have observed these seeming linguistic incongruities, as well.[112] In the case of *Mia Macy*, the EEOC stated, "[t]he Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination. . . . [T]he term 'gender' encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity."[113]

Legal scholars have attempted to address the problems courts create for trans people by erroneously relying on artificially binary or linear conceptions of gender to decide whether trans people are entitled to protection under laws relating to gender.[114] This Note argues that courts could avoid making extensive and clumsy academic exercises and reproducing structures of cissexist and classist repression if they relied on no rigid definition of "gender" at all. Courts should instead focus on whether the traits against which employers discriminated against were gendered by (1) the employer itself or an agent thereof, or (2) American society at large. This solution would avoid the myriad pitfalls courts

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108 *Id.* at 600.

109 *Id.* at 603–05.

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

111 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) ("Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, *gender*, religion, or national origin offends Title VII's broad rule of workplace equality." (emphasis added)); *see also* Oncale v. Sundowner Offshore Servs., Inc, 523 U.S. 75, 79 (1998).

112 *See* Glenn v. Brumby, 663 F.3d 1312, 1316–17 (11th Cir. 2011).

113 Mia Macy v. Eric Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *5–6 (Apr. 20, 2012) (quoting Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004)) (internal quotation marks omitted) (citing Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000)). Quoting *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011), the Commission elaborated that "six members of the Supreme Court in *Price Waterhouse* agreed that Title VII barred 'not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.'" *Mia Macy*, 2012 WL 1435995, at *5.

114 *See* Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization of Gender that Is More Inclusive of Transgender People*, 11 MICH. J. GENDER & L. 253 (2005).

have created for trans and gender nonconforming people through the obsession with "proving" the gender of a party.[115]

B. *The Legislative Intent Behind the Inclusion of "Sex" in Title VII, If Any, Is Unclear*

In deciding that Title VII and *Price Waterhouse v. Hopkins* did not apply to transsexuals, the Seventh Circuit stated the following:

> The total lack of legislative history supporting the sex amendment coupled with the circumstances of the amendment's adoption clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex. Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate.[116]

The court based this proposition on the fact that the word "sex" was included in the statute at the "last minute" in an attempt to sabotage the passage of Title VII—an attempt that ultimately failed. In recent years, the failure of bills proposed in Congress to protect individuals on the basis of gender identity and expression[117] and sexual orientation have grounded the decisions of some circuits to protect transsexual plaintiffs only on the basis of failure to conform to stereotypes of their assigned sex.[118] Given that "sex" has historically been, and continues to be, an imprecise and shifting term that is often conflated with, and overlapping with, gender,[119] the notion that sex discrimination does not include discrimination on the basis of gender identity and expression deprives the former of any real meaning.

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115 *See* Spade, *supra* note 5, at 746.

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

117 For a discussion of the actual impact of such rejections of a gender-inclusive ENDA, see Jill D. Weinberg, *Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. REV. 1 (2009).

118 *See* Schroer v. Billington, 525 F. Supp. 2d 58, 63–64 (D.D.C. 2007) ("[A] bill [protecting] both sexual orientation and gender identity was introduced in the House . . . . [and it] ultimately passed the version that . . . [protected only] sexual orientation. Companion legislation in the Senate has not yet been introduced.").

119 *See* Weiss, *supra* note 106.

C. *Purpose of Title VII*

The purpose of Title VII has been inferred narrowly by circuit courts following the "per se unprotected" approach.[120] However, the Supreme Court, holding that Title VII protects men as well as women, observed in *Oncale v. Sundowner Offshore Services, Inc.*,[121] that

> statutory prohibitions often go beyond the principal evil [they were passed to combat] 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. Title VII prohibits "discriminat[ion] . . . because of . . . sex" in . . . employment. [This] . . . must extend to sexual harassment of any kind that meets the statutory requirements.[122]

In the face of the Court's recognition of the expansion of Title VII from a law meant to protect women in the workplace to protect men as well, the notion that Congress meant the "traditional" meaning of "sex"[123] to be adhered to in judicial interpretations of Title VII loses considerable force. If the protections of Title VII can extend further than the "principal evil" into "reasonably comparable evils," the intense discrimination faced by trans people in employment on the basis of their gender identities or expressions seems not just a permissible expansion, but a required one. The circuits adopting the "per se" unprotected approach advance no argument why the strictures of traditionalism should be lifted no further than it takes to cover all cisgender men and women.

D. *"Sex" Under Title VII Should Be Interpreted to Bar Discrimination on the Basis of Gendered Traits*

In interpreting acts of Congress prohibiting discrimination on the basis of disability, the Supreme Court has seized upon a phenomenon described by legal scholars as "proxy discrimination"—that the source of the employer's unfair treatment of the employee is based upon the identification of certain traits as correlating with disability, and therefore undesirable.[124] In the face of this formulation, the employer's

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120 *See Ulane*, 742 F.2d at 1084–85; Oiler v. Winn-Dixie La., Inc., No. Civ.A 00-3114, 2002 WL 31098541, at *4–7 (E.D. La. 2002).

121 Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

122 *Id.* at 79–80 (first, second, and third alterations in original).

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

124 *See* Angela Onwuachi-Willig & Mario L. Barnes, *By Any Other Name?: On Being "Regarded As" Black, and Why Title VII Should Apply even if Lakisha and Jamal Are White*, 2005 WIS. L. REV. 1283. The authors utilize the "regarded as" provision of the ADA as follows:

assertion of the "legitimate business reasons" defense for disfavoring the trait must be complete—these business reasons must have nothing whatsoever to do with disability.[125] The Court has interpreted the "regarded as" provision of the Americans with Disabilities Act (ADA)[126] to apply "if a covered entity mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities."[127] The "proxy" of the person's visible impairment, believed by the employer to indicate the existence of a recognized disability, be that a specific disability suspected by the employer or a more general assumption, cannot be used by the employer as a basis for employment consequences to that person any more permissibly than the actual presence of recognized disability.

In 2008, in response to the restrictive 1999 Supreme Court interpretation of the "regarded as" provision of the ADA in *Sutton v. United Air Lines, Inc.*[128] and its progeny, Congress amended the ADA to remove the requirement that the actual or perceived condition "limits or is perceived to limit a major life activity."[129] Among the features of this bill, notable were the finding that *Sutton* "and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA"[130] and the intention of Congress that the amendment "reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.* . . . and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures."[131] This

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> Using the 'regarded as' provision [of the ADA] as a model, this Article proposes a new method for recognizing discrimination claims based on the use of proxies for race—even when those proxies have been used in a way that mistakenly identifies someone as belonging to a certain race. In other words, we recognize that it is not physical race but the presumptions of 'disability,' or rather the constructed social meanings of race, that trigger both conscious and unconscious forms of discrimination.

Id. at 1289.

125 Hazen Paper Co. v. Biggins, 507 U.S. 604, 611 (1993) ("When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.").

126 42 U.S.C. § 12102(3) (2012).

127 Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521–22 (1999) (hypertension asserted as "nonlimiting impairment"; claim dismissed due to DOT regulations disqualifying plaintiff from driving).

128 Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) ("[I]f a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is 'substantially limited' in a major life activity and thus 'disabled' under the Act.").

129 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADAAA] (amending 42 U.S.C. § 12102(a)(3)(A)).

130 *Id.* § 12101(a)(4).

131 *Id.* § 12101(b)(3).

latter point, in particular, pulls the judicial inquiry away from probing into the particulars of the plaintiff's condition, and the employer's perception of such particulars, to the nature of the condition in the abstract.[132] While the Supreme Court has not spoken on the scope of the "regarded as" provision of the ADA subsequent to the 2008 amendment, several courts have held that the amendment supersedes the *Murphy* inquiry into the ameliorative effect of mitigation efforts,[133] and others have stated that supersession is a possible result of the amendment.[134] Prior to the ADAAA, in the words of the Second Circuit, it was "not enough . . . that the employer regarded [the plaintiff] as somehow disabled; rather, the plaintiff must show that the employer regarded [her] as . . . having an impairment that substantially limited a major life activity."[135] Congress, acting in furtherance of the original broad remedial purpose of the ADA, replaced this inquiry with one far less invasive: "[Having] been subjected to an action prohibited under [the ADA] because of an actual or perceived physical or mental impairment *whether or not* the impairment limits or is perceived to limit a major life activity."[136] In so doing, Congress expressed its disapproval of scathing judicial analyses of the entirety of the plaintiff's condition and the depth of the defendant's knowledge of this condition with the result of limiting the scope of protection under the ADA.

Given the imprecise and non-exhaustive definition of "sex," along with its frequent conflation and overlap with gender identity and expression,[137] this Note contends that gendered traits expressed by the employee or perceived by the employer are the only characteristics against which discrimination on the basis of "sex stereotypes" realistically occurs. The inquiry in Title VII sex discrimination cases should therefore focus on proxy discrimination, such as that targeted by the "regarded as" provision of the ADA. In keeping with the principle articulated in *Mia Macy* that employees' gender identities and expressions are only relevant to the employer in the case of a bona fide

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132 Lloyd v. Hous. Auth. of Montgomery, Ala., 857 F. Supp. 2d 1252, 1263 (M.D. Ala. 2012) ("In effect, [the ADAAA] provisions require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated.").

133 *Id.* ("[T]he ADA Amendments Act of 2008 (ADAAA) rejected [the *Sutton* and *Murphy*] approach. Now courts must inquire into whether an impairment substantially limits a major life activity 'without regard to the ameliorative effects of mitigating measures.'" (citing 42 U.S.C. § 12102(4)(E)(i))).

134 Kemp v. Holder, 610 F.3d 231, 236 (5th Cir. 2010) ("[As the ADAAA does not apply retroactively to claims filed before 2009], even though Kemp's claim might fare differently if the ADAAA applied, we are bound to follow *Sutton* and evaluate whether his impairment constitutes a disability when taking into account the benefit imparted by his hearing aids.").

135 Ragusa v. Malverne Union Free Sch. Dist., 381 F. App'x 85, 88 (2d Cir. 2010) (alterations in original) (quoting Colwell v. Suffolk Cnty. Police Dep't, 158 F.3d 635, 646 (2d Cir. 1998)) (internal quotation marks omitted).

136 42 U.S.C. § 12102(3)(A) (emphasis added).

137 *See supra* Part III.A.

occupational requirement,[138] Title VII sex discrimination cases should follow the example of the ADAAA and eschew invasive and unnecessary judicial inquiry into the details of the gender identity or expression of the employee beyond the characteristics asserted by both the employee and the employer to have been the basis of the adverse employment decision.[139]

The Court's refusal to apply a similar approach to age discrimination cases has been seen by legal scholars as a misinterpretation of the ADEA's purpose

> in line with [the Court's failure to acknowledge in race discrimination cases] . . . . differential treatment based upon a mere perception of a person's race—in other words, disparate treatment based upon racial stereotyping due to a trait, factor, or quality that is considered to belong to persons of a particular race.[140]

Judicial opinions in sex stereotyping cases would similarly be properly interpreted by recognizing that it is not blunt distaste for certain gender identities and expressions that comprises discrimination "because of sex," but a perception of certain gendered traits possessed by an individual that an employer views as "weak," "frivolous," "artificial," or disabling, or as evidence that a person is "disturbed" or deceptive.[141]

The fact that discrimination on the basis of gender is implicit in the language, history, and Supreme Court interpretation of Title VII is significant. The sweeping breadth of the concept of gender could be read even more expansively than the EEOC read it in *Mia Macy*. This reading is necessary because it is not only failure to conform to gender norms that elicits a negative response from individuals and American society. Femininity itself is valued less than masculinity in the United States—even when the individual in question identifies as a woman.[142] In queer spaces and communities, transmasculinity and butchness as expressed by individuals assigned female at birth are widely lauded, while femininity, and especially femininity in those assigned male at birth, is written off as frivolous, weak, or artificial.[143] In the workplace, a

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138 *See* Mia Macy v. Eric Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *6 (Apr. 20, 2012) ("Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" (quoting another source) (internal quotations marks omitted)). The EEOC further observed that, "[e]ven then, the [bona fide occupational qualification] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *Id.* (quoting another source) (internal quotation marks omitted).

139 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–05 (1973).

140 Onwuachi-Willig & Barnes, *supra* note 124, at 1324–25.

141 SERANO, *supra* note 3, at 5, 92.

142 *Id.* at 5–6, 47.

143 *Id.* at 5–6.

female-identified individual who expresses feminine traits could easily be thought of as superficial, passive, or not a "go-getter" and targeted as easily for employment discrimination as Hopkins was for being "macho."[144] In the analyses of many circuits that have afforded protection to transsexual women on the basis of failure to conform to their assigned sex, there may be a failure of proof in showing that a "gender-conforming" individual received the employment benefit denied discriminatorily to the plaintiff, that the employer's asserted bona fide occupational requirement was a pretext for unlawful discrimination, or other high-threshold defenses difficult to overcome.[145] The hypothetical feminine-identified individual discriminated against on the basis of femininity would almost certainly fall into this trap. The correct inquiry would be whether the benefit was afforded to an individual not expressing the gendered trait discriminated against by the employer. While the EEOC's language in *Mia Macy* could be read broadly enough to cover this situation, its application to cases of discrimination on the basis of gender conformity is not explicitly stated. Particularly as the social power of LGBTQ people grows, it is important that internal prejudices such as these can be dealt with in the law of employment discrimination.

At a cursory glance, the scope of protection under this proposal may seem overbroad. However, given the fact that, even under the pre-*Price Waterhouse* interpretation of Title VII, the statute was read to cover the entire range of "sexes" (men and women by birth-assigned gender), as this range was perceived at the time, every person was, in theory, protected from sex-based discrimination.[146] This Note merely proposes an interpretation of Title VII that takes stock of the current reality of gender-based discrimination in the workplace. While the "gendered traits" interpretation would significantly increase the range of characteristics that employers are prohibited from basing employment decisions upon, this proposal retains the three-stage inquiry of *McDonnell Douglas*.[147] If the plaintiff makes out a prima facie case that the employer impermissibly discriminated on the basis of a gendered trait, the employer still has the opportunity to assert that the adverse employment decision was based on a legitimate nondiscriminatory

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

145 *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1225 (10th Cir. 2007) (plaintiff failed to offer sufficient evidence to support an inference of pretext in light of employer's proffered legitimate reasons for terminating plaintiff); Schwenk v. Hartford, 204 F.3d 1187, 1196 (9th Cir. 2000) (defendant officer was entitled to qualified immunity because the unconstitutionality of his treatment of the plaintiff trans woman inmate was not clearly established).

146 *See* Oncale v. Sundowner Offshore Servs., Inc, 523 U.S. 75, 79 (1998).

147 *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–04 (1973).

reason.[148] The burden then falls on the plaintiff to show that the employer's asserted legitimate business reason is a pretext for unlawful discrimination, which is often a difficult burden to meet.[149] While the "gendered traits" interpretation protects a broader range of employees from gender-based discrimination, it does not deprive innocent employers with genuine reasons for requiring certain gendered traits of the ability to defend themselves from suit.

The "gendered traits" interpretation of "sex" under Title VII differs from the biological model, the medical model,[150] and even many other trans-positive interpretations proposed by legal scholars, in that it does not focus on categorizing the traits alleged to be the basis of discrimination as anything other than "gendered."[151] Many of the problems other binary-free interpretations present can be averted by simply limiting the court's inquiry to the trait the employer based the employment decision upon. Confining the application of this inquiry to the discrimination context does not carry the same danger of interfering with gender-based legislative initiatives as would a similarly "gender blind" approach to equal protection doctrine.[152] Going further than approaches that include non-binary genders under the "sex stereotypes" ambit of *Price Waterhouse*, the "gendered traits" approach additionally proscribes discrimination against a person for being "too binary-gendered" or the "wrong kind" of non-binary.

CONCLUSION

The "gendered traits" analysis recognizes the ambiguous, broad, and often ad hoc meaning of the word "sex" both in common usage and in jurisprudence. There is ultimately no way for an employer to identify an employee's "sex" on anything other than a karyotype basis without looking to that employee's gendered traits for guidance. Further, certain gendered traits are particularly devalued both in the abstract, and in conjunction with the actual or apparent gender identity of the person who displays them. Both conformity and non-conformity with characteristics considered appropriate for one's gender are unfairly maligned in important arenas in American society. In some cases, the gender non-conformity of certain traits is itself invisible.[153] Employers must look to gendered traits to determine whether or not an employee

148 *See, e.g.*, Mia Macy v. Eric Holder, EEOC Appeal No. 0120120821, 2012 WL 1435995, at *6 (Apr. 20, 2012).

149 *See, e.g.*, *Etsitty*, 502 F.3d at 1225.

150 *See* Romeo, *supra* note 6, at 718.

151 *See* Ezie, *supra* note 87; Turner, *supra* note 90.

152 Ezie, *supra* note 87.

153 *See* Hunter v. United Parcel Serv., Inc., 697 F.3d 697, 704 (8th Cir. 2012).

conforms to them. Whittled down to its core, sex discrimination is discrimination on the basis of gendered traits. Searching for a baseline sex or gender identity that is either perceived by the employer or actually possessed by the employee merely confuses the issue and leads to employees' exclusion from protection from discrimination identical in spirit to traditionally-conceived sex discrimination. Reading the scope of Title VII so narrowly contravenes the remedial purpose of anti-discrimination law, and the remedial purpose of Title VII itself.

Some potential pitfalls of the "gendered traits" interpretation arise in the context of proof. The inquiry would first require identification of the trait on which the employer based its employment decision. This is no more difficult or unusual than identifying whether the employer perceived the employee as "fail[ing] to conform to gender stereotypes"[154] or appearing "too masculine,"[155] and may even be simpler as the investigation of the employer's subjective decision is limited to an identifiable trait rather than such general concepts as conformity or varying degrees of masculinity or femininity. The second step may be more problematic, as it involves discerning whether the employer or society at large "genders" the trait identified. However, this question seems no different than the issue in "regarded as disabled" cases under the ADA: asking whether the employer "mistakenly believes that the person's actual, nonlimiting impairment substantially limits one or more major life activities."[156] While the evidence relevant to the existence of "gendered traits" discrimination will ultimately only be revealed by future cases, this absence of clairvoyance is no reason to reject the "gendered traits" interpretation of "sex" in Title VII.

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154 *Etsitty*, 502 F.3d at 1225.

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

156 Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 522 (1999).