The Sound of (Congressional) Silence: The Broader Meaning of "Sex" in Title VII

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment "because of . . . sex."[1] Whether this prohibition covers discrimination against transgender[2] people has been a subject of much debate in the last couple of decades. One of the more recent phases of this debate took place last year when the American Civil Liberties Union ("ACLU") filed a lawsuit in federal court against the Library of Congress (the "Library") on behalf of Diane Schroer, a distinguished U.S. Army veteran, whose job offer was withdrawn after she[3] told one of the interviewers that she was in the

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[1] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

[2] "Transgender" is "[a]n umbrella term for people whose gender identity and/or gender expression differs from the sex they were assigned at birth," including "transsexuals, cross-dressers, and other gender-variant people. . . . Transgender people may or may not choose to alter their bodies hormonally and/or surgically." "Transsexual" is "[a]n older term which originated in the medical and psychological communities." Although it is still used by some transsexual people to describe themselves, it is "not an umbrella term, and many transgender people do not identify as transsexual." *Media Reference Guide, 7th Edition: Transgender Glossary of Terms*, Gay & Lesbian Alliance Against Defamation, *available at* http://www.glaad.org/media/guide/transfocus.php (last visited July 19, 2007). Throughout this Note, I also use the term "trans people" synonymously with "transgender" for variation.

[3] To express my support for the transgender rights movement, here, and throughout this piece, I defer to people's chosen gender, rather than the sex category assigned to them at birth. On the difference between gender and sex, *see* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10-11 (1995).

process of transitioning from the male to female gender.[4] Moving to dismiss the case for failure to state a claim, the Library did not dispute the fact that Schroer was "highly qualified for the position."[5] The district court also accepted as fact that the Library refused to hire Schroer for no reason other than her disclosed intention to start living and presenting herself as a woman and to wear traditionally feminine clothes at work.[6] Even so, the trial judge ruled that these allegations by themselves did not amount to a valid sex discrimination claim under Title VII.[7] Judge Robertson then called on Schroer to submit additional evidence concerning "the scientific basis of sexual identity in general, and gender dysphoria in particular."[8] "If, as some believe, sexual identity is produced in significant part by hormonal influences on the developing brain *in utero*," he reasoned, "this would place transsexuals on a continuum with other intersex conditions such as [androgen insensitivity syndrome], in which the various components that produce sexual identity and anatomical sex do not align."[9] According to Judge Robertson, since discrimination against people because of an intersex condition "cannot be anything other than 'literal[ ]' discrimination 'because of . . . sex,'" transsexual plaintiffs would, by analogy, also fall within the scope of Title VII.[10] Schroer herself had a much simpler take on the matter: "After risking my life for more than 25 years for my country, I've been told I'm not worthy of the freedoms I worked so hard to protect. . . . All I'm asking is to be judged by my abilities rather than my gender."[11]

In this Note, I argue that Schroer's view, naïve as it may seem, represents a more straightforward and, from a legal perspective, more apposite method of remedying discrimination against transgender people. Applying medical terminology such as "Gender Identity Disorder" or "gender dysphoria" to Schroer's transition and grouping it with "other intersex con-

[4] Schroer v. Billington, 424 F. Supp. 2d 203, 206 (D.D.C. 2006). Classified as a male at birth, Diane Schroer, the plaintiff in this case, was about to begin the initial stages of the sex-reassignment protocol under the Harry Benjamin International Gender Dysphoria Association ("HBIGDA") guidelines. She would start using "a traditionally feminine name, dressing full-time in traditionally feminine attire, and begin living and presenting herself as a woman." *Id.*

[5] *Id.* at 205-06.

[6] *Id.* at 206-07.

[7] *Id.* at 210-11.

[8] *Id.* at 213.

[9] *Id.* at 213 n.5.

[10] *Id.* The language Judge Robertson quotes here is from Judge Grady's opinion in *Ulane v. Eastern Airlines, Inc.* ("*Ulane I*"), 581 F. Supp. 821, 825 (D. Ill. 1983), which was overruled by the Seventh Circuit in *Ulane v. Eastern Airlines, Inc.* ("*Ulane II*"), 742 F.2d 1081 (7th Cir. 1984). Note that Judge Robertson cites no other authority for his proposition that people with an intersex condition are covered by Title VII.

[11] *ACLU Files Lawsuit on Behalf of Army Veteran Against Library of Congress for Transgender Discrimination*, ACLU Press Release, June 2, 2005, *available at* http://www.aclu.org/lgbt/transgender/12256prs20050602.html (last visited July 19, 2007) (quotations omitted).

ditions," as Judge Robertson suggests, is problematic for a couple of reasons. To begin with, insofar as these labels characterize transgender people as "disordered," they convey bias and may in fact be offensive.[12] In relying on such language, the court endorses an essentialist notion of sex, i.e., that chromosomes and genitalia at birth are "naturally" either male or female, and that these biological components in a "normal" course of events translate into two distinct kinds of people: men and women.[13] This view has been extensively criticized by feminists and transgender rights advocates in the last few decades[14] and today can be described as, at best, debatable. My position is that it is premature for the *Schroer* court to take a side in this controversy. Moreover, I argue, it is unnecessary. More than fifteen years ago, the United States Supreme Court established in *Price Waterhouse v. Hopkins* that Title VII forbids employers from taking gender into account when making employment decisions.[15] Accordingly, the district court's inquiry should center not on the nature or the causes of Schroer's gender identity,[16] but rather on the Library's attempt to control how its employees experience and express their own gender. It is my position that Title VII prohibits such arbitrary exercises of power. In the words of Justice Brennan, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[17] I argue that

[12] *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, 289-90 (2005). As Vade puts it, "I do not like to see myself as having a body and mind that do not match. . . . Everyone is a whole person—a whole embodied thoughtful person—a complex person. Just because I am gender non-conforming does not mean that something does not match. I have a gender non-conforming body and a gender non-conforming mind all wrapped in [sic] up in one gender non-conforming me." *Id.* at 289 n.115. *See also Media Reference Guide*, *supra* note 2.

[13] Note the district court's attempt to "medicalize" Schroer's gender non-conforming behavior by suggesting that it may be a result of hormonal imbalance. *Schroer*, 424 F. Supp. 2d at 213 n.5. The district court thus expresses an assumption that there must be something wrong with a person who presents herself as woman but has XY chromosomes and does not have female reproductive organs.

[14] *See* discussion *infra* Parts II and V.

[15] 490 U.S. 228, 239 (1989). The Court held that there is only "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." *Id.* at 242 (citing 42 U.S.C. § 2000e-2(e)).

[16] The district court refers to it as "sexual identity." It imports the phrase from *Ulane I*, where Judge Grady defines it as "a question of one's own self-perception," and as "also a social matter: How does society perceive the individual?" *See Ulane I*, 581 F. Supp. 821, 823 (D. Ill. 1983). I submit that courts do not need this additional term to remedy discrimination against transgender people. The word "gender" encompasses all the social and cultural connotations attached to one's biological sex and gender-based discrimination is already prohibited per the Supreme Court's *Price Waterhouse* decision. *See* discussion *infra* Part II.

[17] *Price Waterhouse*, 490 U.S. at 251.

a straightforward application of this principle to the facts already presented to the district court should result in an easy victory for Diane Schroer.

Part I presents the legislative history of Title VII and Part II discusses the early transgender cases. As I explain, Congress' failure to clarify its intent in prohibiting sex-based employment discrimination resulted in lower courts adopting a very narrow definition of "sex" as a category based on biological differences at birth, rather than on gender characteristics or performance. Consequently, courts interpreted Title VII's ban on sex discrimination as covering only discrimination against "biological" men and women, but not discrimination against transgender employees. However, as I argue in Part II, limiting the definition of sex in Title VII to biological differences between men and women is a mistake. In doing so, courts overlook the fact that most sex discrimination cases deal not with people's genitalia or chromosomes, but rather with socially constructed gender norms. Moreover, this narrow reading of Title VII has been undermined by the Supreme Court's discussion of gender stereotyping in *Price Waterhouse v. Hopkins*, a case that represents an important advance in sex equality jurisprudence. As I demonstrate in Part III, although *Price Waterhouse* did not explicitly discuss application of Title VII to transgender cases, the Court's holding – specifically, that it constitutes impermissible sex discrimination when an employer insists that a female employee dress and act more femininely – could be, and indeed has been, construed as extending Title VII protection to transgender employees.

As discussed in Part IV, however, even though *Price Waterhouse* explicitly bars employers from "assuming or insisting" that their employees match gender-specific stereotypes, many courts continue to hold that neither Title VII nor the logic of *Price Waterhouse* offer protection to transgender employees. They justify this result by portraying intolerance towards transgender people as being categorically different from the impermissible perpetuation of gendered norms. This is the approach taken by the district court in *Schroer*. There, the court stated that protecting a female employee's right to act masculine "is different, not in degree, but in kind, from protecting men, whether effeminate or not, who seek to present themselves *as* women."[18]

It is my position that neither Title VII nor *Price Waterhouse* contain any language supporting such a distinction. Modeling my argument on *Smith v. City of Salem*,[19] I submit that discrimination against transgender employees, as illustrated by Schroer's experience, cannot be anything other than an attempt to curtail such employees' freedom to define and express their gender. I conclude in Part V by arguing that the *Schroer* court's attempt to "medicalize" transsexualism, and its refusal to acknowledge Schroer's sex-stereotyping

[18] *Schroer*, 424 F. Supp. 2d at 210 (emphasis in original).
[19] 378 F.3d 566 (6th Cir. 2004).

claim, stir transgender jurisprudence in a regressive direction, a direction that is contrary to the principles of gender equality and harmful to the interests of the transgender civil rights movement.

PART I: LEGISLATIVE HISTORY OF TITLE VII

Enacted as part of the Civil Rights Act of 1964, Title VII specifically targets employment discrimination. A historic piece of federal legislation, the Act was a result of the civil rights movement of the 1950s and early 1960s that focused national attention primarily on racial injustice—not on sex discrimination. This historical backdrop led some courts to view the law of sex equality as "accidental" in origin. Judge John F. Grady, for example, expressed the following opinion:

> [T]his amendment introducing sex into the picture was a gambit of a Southern senator who sought thereby to scuttle the whole Civil Rights Act, and, much to his amazement and no doubt undying disappointment, it did not work. We not only got an act including race discrimination, which he had sought to bar, but we got sex as well.[20]

Although there may be more than one explanation as to why the word "sex" was added to Title VII,[21] generally it is agreed that Congress' primary concern at the time was racial discrimination and that the prohibition of employment discrimination on the basis of sex was not a well-researched or thoroughly debated policy proposal.[22] As a result, courts were left with no

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[20] *Ulane I*, 581 F. Supp. at 822; *see also* Bradford v. Peoples Natural Gas Co., 60 F.R.D. 432, 434-435 (D. Pa. 1973) (stating that "a giant step towards 'women's lib' was perhaps unintentionally taken").

[21] *See generally* Jo Freeman, *How "Sex" Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991). Freeman rejects the generally accepted explanation that "sex" was added to Title VII by southern congressmen to split the civil rights coalition and kill the legislation. Freeman argues that the credit should be given to a women's rights activist group who had "experienced lobbyists on the Hill" and "knew how to take advantage of the momentum generated by a larger social movement to promote their own goals," as well as to "a larger group of Congressmen willing to make an affirmative statement in favor of women's rights." *Id.* at 164, 183.

[22] *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63-64 (1986) (finding that "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," and that as a result "we are left with little legislative history to guide us"); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) ("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."); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 n.4 (9th Cir. 1977) (noting that there was no hearing or debate on the addition of "sex" to Title VII and that "[t]here is a dearth of legislative history" on that section); Diaz v. Pan Am. World Airways, 442 F.2d 385, 386 (5th Cir. 1971) (noting "that there is little legislative history to guide . . . interpretation"); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 816-17 (1991) (explaining that the lack of legislative history regarding the addition of the word "sex" to Title VII is due to the fact that it was added one day before passage of the Act); Note, *Developments in the Law-Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971) (describing how the prohibition against sex discrimination was added as a floor

guidance as to what Congress intended to accomplish when it prohibited employment discrimination "because of" an individual's "sex." As Judge Grady phrased it, "The question we are confronting here today is: What did we get when we got sex?"[23]

In 1972, Congress amended Title VII through the Equal Employment Opportunity Act ("EEOA")—this time with a clear intent "to remedy the economic deprivation of women as a class."[24] A statement of the need that prompted the bill cites "numerous studies" showing that "women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone."[25] This statement also emphasizes that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices," and declares that, "[t]he time has come to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities. . . ."[26]

Yet, well-intentioned and inspiring as they are, these declarations leave many questions unanswered. As Katherine M. Franke notes, Congress' ban on sex-based discrimination could be, and, in fact, has been interpreted by courts and scholars in a variety of ways, including as an "unfair consideration of biological differences between males and females," as a "resort to archaic notions about the skills, abilities, or desires of men and women," as a "perpetuation of stereotypical notions of masculinity and femininity," and as an "unwelcome instigation of sexual behavior."[27] A common way to analyze these different formulations is to place them into two categories: discrimination based on an individual's "sex" and discrimination based on an individual's "gender."[28] As Mary Anne C. Case explains, although these two terms are used interchangeably in everyday conversation and are often conflated in equality jurisprudence, most feminist theorists recognize that "sex" and "gender" stand for two separate concepts:

> "[S]ex" refers to the anatomical and physiological distinctions between men and women; "gender," by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions. While it is a sex distinction that men can grow beards and women typically cannot, it

amendment in the House without any prior hearings or debate and without even a minimum of congressional investigation).

[23] *Ulane I*, 581 F. Supp. at 822.

[24] *Holloway*, 566 F.2d at 662 (citing H.R. Rep. No. 92-238, at 5 (1971), as reprinted in 1972 U.S.C.C.A.N. 2137, 2141 (1971)).

[25] H.R. Rep. No. 92-238, at 5.

[26] *Id.*

[27] Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 4 (1995).

[28] *See generally id.*

> is a gender distinction that women wear dresses in this society and men typically do not.[29]

Accordingly, the question then becomes whether Congress was using the word "sex" to mean biological sex, gender, or both? On the one hand, given Congress' strong, sweeping statements about the need "to bring an end to job discrimination once and for all, and to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities,"[30] it would be reasonable to assume that Congress was referring to "sex" in the broadest sense possible, with physiological, as well as cultural, connotations, i.e., gender, in mind. To exclude gender from the definition of "sex" would drastically reduce Title VII's reach. For, as Katherine M. Franke points out, very few sex discrimination cases arise due to anatomical differences between males and females. Rather, the core of sex discrimination jurisprudence consists of cases where employers base their policies and decisions on stereotypic notions about the skills, abilities, or desires of men versus those of women.[31] On the other hand, to interpret the word "sex" as referring to both sex *and* gender raises the question of how broadly courts may construe Title VII without infringing on Congress' legislative role. Clearly, there must be some limits. But where should courts set those limits if they do not know what Congress intended in the first place?

PART II: EARLY TRANSGENDER CASES

Due to the lack of a clear and cohesive account of Congress' intent in prohibiting sex-based employment discrimination, federal courts initially were reluctant to expand the scope of Title VII—especially when it came to plaintiffs whose behavior fell outside of the traditional gender roles.[32] Consequently, the courts adopted a very restrictive definition of "sex" as a category based on biological differences at birth, rather than on gender characteristics or performance.

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[29] Case, *supra* note 3, at 10-11.

[30] H.R. Rep. No. 92-238.

[31] Franke, *supra* note 27, at 36.

[32] *See, e.g., Ulane II*, 742 F.2d 1081, 1086 (7th Cir. 1984) (stating that to include transgender people within the protective scope of Title VII would be "a broad sweeping of the untraditional and unusual within the term 'sex' as used in Title VII. Only Congress can consider all the ramifications to society of such a broad view."). For other early cases holding that discrimination against transgender people is not covered by Title VII, see Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977); Doe v. U.S. Postal Service, No. 84-3296, 1985 U.S. Dist. LEXIS 18959 at *4-5 (D.D.C. June 12, 1985); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977); Grossman v. Bd. of Educ., 11 Fair Empl. Prac. Cas. (BNA) 1196, 1199 (D.N.J. 1975); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975).

In *Ulane II*, for example, the Seventh Circuit refused to apply Title VII to a discrimination complaint filed by a transsexual plaintiff ("Ulane") who was discharged by Eastern Airlines ("Eastern") after undergoing sex-reassignment surgery.[33] The Seventh Circuit began its analysis by noting that "[a]lthough the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress."[34] Noting "the total lack of legislative history supporting the sex amendment" and recognizing the principle that "unless otherwise defined, words should be given their ordinary, common meaning," the court concluded that the word "sex" in the context of Title VII implied only that it is unlawful "to discriminate against women because they are women and against men because they are men."[35] Using this reading of Title VII, the Seventh Circuit ultimately concluded that Title VII did not apply to Ulane's claim that she was fired because she was a transsexual.[36] "Had Congress intended more," the court reasoned, "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."[37] In the Seventh Circuit's opinion, the fact that there had been several failed attempts by members of Congress to amend Title VII to prohibit discrimination against homosexuals was yet another reason that the word "sex" in Title VII "should be given a narrow, traditional interpretation, which would also exclude transsexuals."[38]

Importantly, because Ulane also alleged that she was discriminated against as a woman, the Seventh Circuit's "traditional interpretation" of sex as "men" and "women," but not transsexuals, did not end the discussion.[39] The lower court found that if "the choices were limited to male or female . . . the evidence clearly predominates in favor of the conclusion that plaintiff is a female, not a male,"[40] and that its "findings and conclusions concerning sexual discrimination against the plaintiff by Eastern Airlines, Inc. apply with equal force whether plaintiff be regarded as a transsexual or a female."[41]

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[33] Ulane alleged two counts of discrimination. Count II, discussed in this paragraph, states her claim as a transsexual. Count I, addressed in the paragraph immediately below, alleges that she was discriminated against as a woman. *See Ulane II*, 742 F.2d at 1082.

[34] *Id.* at 1086.

[35] *Id.* at 1085.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1085-86.

[39] *See id.* at 1082.

[40] *Ulane I*, 581 F. Supp. 821, 839-40 (D. Ill. 1983).

[41] *Id.* at 840.

The Seventh Circuit was unimpressed by the lower court's argument. Rather, the Seventh Circuit thought it was highly significant that Ulane's "male" chromosomes "are unaffected by the hormones and surgery," even if Ulane herself did not consider this fact to be relevant.[42] The court also stressed Ulane did not have a uterus and ovaries and, therefore, would not be able to bear children.[43] For this reason, despite Ulane's testimony that, "from early childhood she felt like a female,"[44] and despite Ulane's determined efforts to make her body appear more "feminine" through hormone therapy and sex reassignment surgery,[45] the court was reluctant to accept that "a woman can be so easily created from what remains of a man."[46]

Yet, at the same time, the Seventh Circuit purported to keep an open mind about the issue and stated that, at any rate, whether society "considers Ulane to be female" did not "decide this case."[47] In the court's opinion, what mattered instead was Eastern's subjective perception of Ulane's sex and its motivation in firing her.[48] The court then held that the facts presented were "insufficient to support a finding that Ulane was discriminated against because she is *female* since the district judge's previous findings all centered around [the judge's] conclusion that Eastern did not want '[a] *transsexual* in the cockpit.'"[49] The Seventh Circuit concluded, "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."[50]

The court's assertion that its opinion of Ulane's sex does not "decide the case" is puzzling, if not disingenuous. As the Seventh Circuit itself observed, "Eastern was not aware of Ulane's transsexuality, her hormone treatments, or her psychiatric counseling until she attempted to return to work after her reassignment surgery. Eastern knew Ulane only as one of its male pilots."[51] Thus, if one accepts that after the surgery Ulane came to work as a

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[42] *Ulane II*, 742 F.2d at 1083 nn. 5 & 6 (making the same point in both footnotes).

[43] *Id.* at 1083 (citing Ulane's physician).

[44] *Id.*

[45] *Id.* Ulane "began taking female hormones as part of her treatment, and eventually developed breasts from the hormones." She also went through a "sex reassignment surgery" involving the "removal of the external male sexual organs and the construction of an artificial vagina by plastic surgery." *Id.*

[46] *Id.* at 1087. As implied by the words, "*even if one believes* that a woman can be so easily created. . . ." (emphasis added); *see also id.* at 1087 n.7 (concluding that "if Ulane is not a transsexual, then she is a transvestite," as opposed to a "woman").

[47] *Id.*

[48] *Id.*

[49] *Id.* (emphasis in original).

[50] *Id.*

[51] *Id.* at 1083.

woman – which is what the district court argued[52] – then logically there is no difference between evidence demonstrating that Eastern fired Ulane because she was a transsexual and evidence that Eastern fired Ulane because she ceased being a male and became a female, or, in other words, because of her newly asserted status as a woman.

The Seventh Circuit's contention that, "if Eastern did discriminate against Ulane, it was not because she is female, but because Ulane is a transsexual,"[53] exposes its entrenched belief that a person who transitions from being a man to being a woman can never become a "real" woman, as defined by XX chromosomes, "female" genitalia and the ability to bear children. Indeed, the court was mistaken when it said, "even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case."[54] Since the Seventh Circuit provided no alternative rationale for rejecting the lower court's findings as "insufficient" to support Ulane's claim as a woman, it leaves one free to conclude that the court's limited view of sex and its belief that only "biological" men and women are protected by Title VII is all that matters in this case.

The essentialist view of sex endorsed by the Seventh Circuit – namely, that chromosomes and genitalia at birth are "naturally" either male or female, and that these biological characteristics predetermine one's gender role[55] – has not gone unchallenged.[56] Both before and after the *Ulane II* decision came out, feminists and scholars of sex equality jurisprudence maintained that biological differences *per se* do not explain men and women's differentiated gender roles, and that the answer is to be found instead in our culture and social practices.[57] In fact, as Katherine M. Franke points out, whatever causal relationship may exist between biology and gender works the other way around: "Our pregiven dimorphic concepts of gender lead to the discovery of facts that differentiate the sexes[.]"[58] Or, in the words of Suzanne Kessler and Wendy McKenna, "Scientific knowledge does not inform the answer to 'What makes a person either a man or a woman?' Rather, it appears to validate the already existing knowledge that a person is

[52] *Ulane I*, 581 F. Supp. 821, 839-40 (D. Ill. 1983).

[53] *Ulane II*, 742 F.2d at 1087.

[54] *Id.*

[55] On the difference between sex and gender, see Case *supra* note 3, at 10-11.

[56] Indeed, the Seventh Circuit itself acknowledged the controversy as it noted that whereas "some in the medical profession . . . conclude that hormone treatments and sex reassignment surgery . . . cannot change the individual's innate sex," there were also experts "arguing that one must look beyond chromosomes when determining an individual's sex and consider factors such as psychological sex or assumed sex role." *Ulane II*, 742 F.2d at 1083 n.6 (citations omitted).

[57] *See, e.g.*, Franke, *supra* note 27, at 39; SUZANNE J. KESSLER & WENDY MCKENNA, GENDER: AN ETHNOMETHOD-OLOGICAL APPROACH 163 (1978); Vade, *supra* note 12.

[58] Franke, *supra* note 27, at 39.

either a woman or a man and that there is no problem in differentiating between the two."[59]

The idea that there is no "natural" link between biological manifestations of sex, such as chromosomes and genitalia, and the social meanings attached to them may seem counterintuitive at first. How could a social practice endure for thousands of years and be so common in so many parts of the globe, and yet be completely arbitrary? Surely these traditional gender roles must have *some* rational basis. Otherwise, why would they be so "traditional" in the first place? Indeed, as Dylan Vade notes, some theorists speculate that gender distinctions are based on genital size and shape because such differences, in turn, correspond to men and women's differentiated roles in reproduction.[60]

In the end, however, the original source of this dimorphic, biologically-based view of sex is not important. As Katherine M. Franke explains, "Every social institution has a material base, but culture and social practices transform that base into something with qualitatively different patterns and constraints."[61] For instance, although the ability to give birth to children is biologically predetermined, the unequal division of responsibility for raising children and the resulting stereotype of women as inferior labor force is not.[62] In other words, biology is what people make of it. Accordingly, for courts addressing sex discrimination, the focus should not be on the plaintiff's physical body parts or her presumed role in reproduction, but on "the social processes that construct the categories we call female and male, women and men, homosexual and heterosexual."[63] In discrimination cases, as in most other aspects of our lives, genitalia and chromosomes explain very little. For, as Dylan Vade aptly comments, "we do not read the gender of our co-workers, our friends, or the people we pass on the street by looking at their actual genitalia. We read gender and then assume genitalia."[64]

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[59] KESSLER & MCKENNA, *supra* note 57, at 163 (quoted in Franke, *supra* note 27, at 39).

[60] Vade, *supra* note 12 (citing Sherry Ortner, *Is Female to Male as Nature Is to Culture?*, *in* WOMEN AND VALUES: READINGS IN RECENT FEMINIST PHILOSOPHY (Marilyn Pearsall ed., 1986)).

[61] Franke, *supra* note 27, at 39.

[62] This holds for other supposedly "biological" differences between male and female workers. As Franke illustrates, "even employers hiring individuals for jobs in which body strength is a reasonable qualification have abandoned sex-based hiring policies because most studies of male and female physical skills and abilities have revealed more significant within-group differences than between-group differences." Franke, *supra* note 27, at 36 (citing CYNTHIA COCKBURN, MACHINERY OF DOMINANCE: WOMEN, MEN AND TECHNICAL KNOW-HOW 229-36 (1985); ANNE FAUSTO-STERLING, MYTHS OF GENDER 218 (1989); IRIS M. YOUNG, THROWING LIKE A GIRL AND OTHER ESSAYS IN FEMINIST PHILOSOPHY AND SOCIAL THEORY 142 (1990); Janet S. Hyde, *Meta-Analysis and the Psychology of Gender Differences*, 16 SIGNS 55 (1990)).

[63] Franke, *supra* note 27, at 40.

[64] Vade, *supra* note 12, at 284 & n.99.

Going back to the facts of *Ulane II*, it is very clear that Ulane's chromosomes and sex organs played no part in Eastern's decision to fire her. Eastern fired Ulane on the day she started to *present* herself as a woman, but for all Eastern knew, Ulane could have been a biological woman all along.[65] For that matter, even if Ulane were a "biological" woman (and thus, according to the Seventh Circuit, a member of the protected class) and if she were in fact fired because of her status as a woman, it would most likely not be "because of" her chromosomes or genitalia. Thus, a literal application of the Seventh Circuit's narrow definition of "sex" as a category based solely on biological differences makes a successful Title VII claim practically impossible. As Franke observes:

> [T]his interpretation simply fails to describe correctly what takes place when a person is discriminated against because of her sex. When women are denied employment, for instance, it is not because the discriminator is thinking a Y chromosome is necessary in order to perform this kind of work. Only in very rare cases can sex discrimination be reduced to a question of body parts.[66]

Indeed, as noted above, upon closer inspection, even childbearing discrimination cases "turn on the social rather than biological meaning of parenthood."[67]

That sex discrimination cannot be conceptualized solely in terms of biology was well understood[68] by the *Ulane I* court. Judge Grady held that even though the legislative history of Title VII provided no straight answer as to what Congress meant by "sex,"[69] and even though there was some controversy in the medical community regarding this issue,[70] he had enough evidence to conclude that "sex" could not be understood as "a cut-and-dried

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[65] There are many examples from history of women passing as men for extended periods of time. *See, e.g.*, *DeAnne Blanton*, WOMEN SOLDIERS OF THE CIVIL WAR, 25 PROLOGUE 1 (1993), *available at* http://www.archives.gov/publications/prologue/1993/spring/women-in-the-civil-war-1.html (noting that during the American Civil War, both the Union and Confederate armies unknowingly enlisted women who assumed masculine names, disguised themselves as men, and hid the fact they were female).

[66] Franke, *supra* note 27, at 36.

[67] *Id.* at 36 n.143 (citing Barbano v. Madison County, 922 F.2d 139, 142-43 (2d Cir. 1990) (holding that an employer may not question a female applicant about whether she would become pregnant and quit); Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 703-04 (8th Cir. 1987) (discharge of a pregnant unmarried staff member was justified as a bona fide occupational qualification by the club's "role model rule"); Vigars v. Valley Christian Ctr., 805 F. Supp. 802, 807-08 (N.D. Cal. 1992) (stating that the termination of a parochial school librarian for an "out-of-wedlock" pregnancy violates Title VII)).

[68] "Solely" is the key word. As I demonstrate below, Judge Grady still believed there to be a natural link between physical and social aspects of sex. *See* critique of *Ulane I infra* Part V.

[69] *Ulane I*, 581 F. Supp. 821, 822 (D. Ill. 1983).

[70] *Id.* at 823.

matter of chromosomes."[71] Rather, he argued, the term "can be and should be reasonably interpreted to include among its denotations the question of sexual identity," which was in part "a question of one's own self-perception," and in part a question of how society perceives the individual.[72] Thus, since transsexuals, according to Judge Grady, "are persons with a problem relating to their very sexual identity as a man or a woman,"[73] there were both practical and logical reasons to include them within the protective scope of Title VII.

The district court acknowledged that there had been numerous failed attempts to broaden Title VII to cover homosexuals and cross-dressers.[74] The court held, however, that this had no bearing on whether Congress intended the term "sex" to include transsexuals, since they were in a separate category. "Homosexuals and transvestites are not persons who have sexual identity problems," Judge Grady observed. "They are content with the sex into which they were born. Transsexuals, on the other hand, are persons with a problem relating to their very sexual identity as a man or a woman."[75] Drawing this distinction enabled the court to conclude that whereas "the statute was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex,"[76] there was nothing in Congressional records indicating that "Congress intended anything one way or the other on the question of whether the term, 'sex,' would include transsexuals." "The matter simply was not thought of. It was not discussed," Judge Grady concluded.[77]

For Judge Grady, Congress' silence as to the meaning of the word "sex" was a license to interpret it in what he deemed to be "the most reasonable way,"[78] namely, by listening to witnesses and medical experts, and exercising his common sense and discretion as a judge. Judge Grady analogized this

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[71] *Id.* at 825.

[72] *Id.* at 823. It is my opinion that courts have no need for the term "sexual identity" since the word "gender" already encompasses all the social and cultural connotations attached to one's biological sex.

[73] *Id.*

[74] *Id.* at 823. Writing in 1983, Judge Grady used the term "transvestite." Today, the preferred term is "cross-dresser." *See Media Reference Guide*, *supra* note 2.

[75] *Id.* Although separating "sexual identity" from "sexual orientation" may have been useful in Judge Grady's analysis of legislative history, this distinction is highly debatable. Thus, it is not clear what evidence ultimately led Judge Grady to conclude that transsexuals have sexual identity problems while cross-dressers do not. Note also the substantial disagreement between the experts in the case on whether Ulane was a transsexual or transvestite. For a critique of this view, see discussion *infra* Part V.

[76] *Ulane I*, 581 F. Supp. at 823.

[77] *Id.*

[78] *Id.* at 825.

case to *Carrillo v. Illinois Bell Telephone Company*,[79] which examined the meaning of the word "race" in Title VII. The *Carillo* court accepted that the literal meaning of the word "race" encompassed only genetically inherited characteristics, such as skin color. However, the court argued, the word must be understood more broadly as encompassing Hispanic ethnic identity to reflect the reality that Hispanics traditionally have been discriminated against as "non-whites" – regardless of their actual skin color.[80] Although this case was not "precisely applicable here," Judge Grady explained, "it is illustrative of the fact that . . . people sometimes react to other people according to stereotypes, misperceptions, and other motivations which are arguably discriminatory and are arguably redressable under statutes which might not be thought ordinarily to apply to those situations."[81] He believed this method of statutory interpretation to be consistent with the fact that Title VII is a remedial statute, and that it was "well accepted" that such remedial statues should be "liberally construed."[82]

Unfortunately for Ulane, the appellate court did not agree with the lower court's application of these principles of statutory construction. On the contrary, it thought the lower court had crossed over from "the realm of interpreting and reviewing and into the realm of legislating."[83] As the Seventh Circuit stated:

> We do not believe that the interpretation of the word "sex" as used in the statute is a mere matter of expert medical testimony or the credibility of witnesses produced in court. Congress may, at some future time, have some interest in testimony of that type, but it does not control our interpretation of Title VII based on the legislative history or lack thereof. If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline on behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation.[84]

Yet, five years later, it was not Congress, but rather the Supreme Court's *Price Waterhouse v. Hopkins* decision,[85] with its strongly worded opprobrium of gender stereotyping, that presented a challenge to the Seventh Circuit's narrow reading of Title VII. As discussed in Parts III and IV below, although *Price Waterhouse* did not explicitly overrule *Ulane II*, the Court's holding – specifically, that it constitutes impermissible sex discrimination for an employer to insist that a female employee dress and act more femininely

[79] 538 F. Supp. 793, 795 (N.D. Ill. 1982).
[80] *Id.*
[81] *Ulane I*, 581 F. Supp. at 824.
[82] *Id.* at 823-24.
[83] *Ulane II*, 742 F.2d 1081, 1086 (7th Cir. 1984).
[84] *Id.*
[85] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

– could be and indeed has been used successfully to remedy discrimination against transgender employees.[86]

PART III: *PRICE WATERHOUSE* AND ITS POTENTIAL

The plaintiff ("Hopkins") in *Price Waterhouse*, a female associate in an accounting firm, was denied partnership because she failed to conform to traditional "female" norms of behavior. In reviewing the facts of the case, the Supreme Court paid particular attention to the sexist comments made by the firm's partners in evaluating her candidacy. Some of them described the plaintiff as "macho" or someone who "overcompensated for being a woman," while others suggested that she could improve her chances of becoming a partner if she would only take "a course at charm school," "walk more femininely, talk more femininely, dress more femininely, have her hair styled, and wear jewelry."[87]

Ruling for the plaintiff, the Court held that employment decisions made on the basis of such gender stereotypes constituted discrimination "because of one's sex" and thereby established a cause of action under Title VII.[88] "We are beyond the day," the Court proclaimed, "when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group."[89] The court further concluded that "in 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."[90]

The Court's holding represents an important advance in sex equality jurisprudence. Unlike *Ulane II*, which takes the biologically predetermined, dimorphic notion of gender as a given, *Price Waterhouse* recognizes biological sex as separate from gender and prohibits employers from exploiting physical differences between men and women to construct "appropriate" gender behavior. Logically, this broader understanding of sex discrimination should result in a radical expansion of the class of people protected by Title VII. For instance, if Ulane were presenting her case after the *Price Waterhouse* decision, she could have analogized her situation to Hopkins' and argued that Eastern fired her because her female gender identity did not match East-

[86] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 573 (6th Cir. 2004); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000).

[87] 490 U.S. at 231-35.

[88] *Id.* at 251.

[89] *Id.*

[90] *Id.* (citations omitted).

ern's stereotypic notion that men[91] ought to be masculine. Moreover, the same argument could be made on behalf of cross-dressers and homosexuals.[92] For, like the partners who thought Hopkins was not feminine enough, employers who discriminate against homosexuals and cross-dressers are ultimately penalizing them for failing to conform to socially constructed gender norms, such as that women do not engage in sexual relations with other women or that men do not wear women's clothes.

A case that well illustrates this progressive reading of *Price Waterhouse* is *Smith v. Salem*.[93] In *Smith*, the plaintiff ("Smith"), a transsexual firefighter, filed a Title VII claim against the city, making a *Price Waterhouse*-based claim that the city officials discriminated against her for expressing her female identity.[94] Ruling for Smith, the court observed that, as a result of *Price Waterhouse*, "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is discrimination based on a failure to conform to stereotypical gender norms."[95] Based on this broader meaning of sex discrimination, the Sixth Circuit concluded that because transsexuals are individuals who do not conform to traditional gender stereotypes – assumptions about how people of a particular biological sex should dress and act – they are protected by Title VII's ban on sex-based discrimination.[96]

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[91] Since Eastern (and the Seventh Circuit) considered Ulane a man. *Ulane II*, 742 F.2d 1081, 1083 (7th Cir. 1984).

[92] *See, e.g.*, Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068 (9th Cir. 2002) (holding that "gender stereotyping of a male gay employee by his male co-workers" constituted actionable harassment under Title VII and concluding that "the repeated testimony that his co-workers treated Rene, in a variety of ways, 'like a woman' constitutes ample evidence of gender stereotyping"); Rosa v. Park West Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000) (applying *Price Waterhouse* to a claim on behalf of a biologically male plaintiff who alleged that he was denied an opportunity to apply for a loan because he was dressed in "traditionally feminine attire"); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 226 (2007); Melinda Chow, Smith v. City of Salem: *Transgender Jurisprudence and an Expanding Meaning of Sex Discrimination under Title VII*, 28 HARV. J.L. & GENDER 207, 214-15 (2005); Thomas Ling, Smith v. City of Salem: *Title VII Protects Contra-Gender Behavior*, 40 HARV. C.R.-C.L. L. REV. 277 (2005).

[93] 378 F.3d 566 (6th Cir. 2004). For other cases treating discrimination against transgender employees as sex discrimination based on gender non-conforming behavior, see Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 17, 2006); Kastl v. Maricopa Cty. Cmty. College Dist., No. 02-1531, 2004 U.S. Dist. LEXIS 29825 (D. Ariz. June 2, 2004); Tronetti v. TLC Healthnet Lakeshore Hosp., No. 03-0375E, 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. Sept. 26, 2003).

[94] *Smith*, 378 F.3d at 567-69.

[95] *Id.* at 573. The Sixth Circuit defines gender as a term "borrowed from grammar to designate the sexes as viewed as *social* rather than *biological* classes." *Id.* at 572 (quoting RICHARD A. POSNER, SEX AND REASON 24-25 (1992)) (quotations omitted).

[96] *Smith*, 378 F.3d at 575.

The court thought this expansion of Title VII's coverage was a logical outcome of *Price Waterhouse*'s prohibition on discrimination against females who act too masculine. It held that there was no principled way to distinguish between "an employer who discriminates against women because, for instance, they do not wear dresses or makeup," and an employer who discriminates against men "because they *do* wear dresses and makeup."[97] The Sixth Circuit rejected the lower court's inference that Smith's sex-stereotyping claim was "disingenuous" and that it was invoked "as an end run around his 'real' claim" based on transsexuality.[98] Further, the Sixth Circuit stated that such reasoning would lead to an anomalous and unfair result:

> [T]he man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination "because of . . . sex," but rather, discrimination against the plaintiff's unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as "transsexual" on a plaintiff, and then legitimize discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.[99]

As the appellate court explained, such an approach could not be reconciled with the Supreme Court's holding in *Price Waterhouse*, for it does not condition Title VII protection for gender non-conforming behavior on the underlying cause of such behavior or how it may be categorized. "[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," the court stated.[100]

It is my position that the *Smith* court correctly applied the principles of Title VII and *Price Waterhouse* to the facts of the case. Furthermore, of all the

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[97] *Id.* at 574 (emphasis in original).

[98] *Id.* at 571. The district court had held that transsexuals were outside the scope of Title VII, relying on pre-*Price Waterhouse* cases such as *Ulane II*, 742 F.2d 1081 (7th Cir. 1984), *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982), and *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977). *See Smith*, 378 F.3d at 571.

[99] *Smith*, 378 F.3d at 574. This approach is exemplified by *Oiler v. Winn-Dixie Lousiana, Inc.*, No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002). As the distict court put it, "Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male employee. . . . The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna.'" *Id.* at *28. *See also* Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); Underwood v. Archer Mgmt. Services, Inc., 857 F. Supp. 96, 98 (D.D.C. 1994).

[100] *Smith*, 378 F.3d at 574-75.

decisions discussed in this Note, *Smith* presents the most equitable and straightforward way of dealing with transgender discrimination claims. *Smith* demonstrates that it is unnecessary for judges to get caught up in the protracted (and often inconclusive) debate on the relationship between biological sex and gender,[101] or to make dubious distinctions among various forms of gender stereotype-defying behavior.[102] The approach in *Smith* acknowledges individuals' right to create their own gender roles without fear of discrimination, unconstrained by their biological sex or medical experts' labels. Along these lines, it may be, as Thomas Ling asserts, that the *Smith* decision is a timely reflection of timely reflection of our society's increased "acceptance of alternative sex and gender expressions,"[103] and that it represents "an increasing appreciation, in both law and society, for the liberty to 'define one's own concept of existence, of meaning of the universe, and of the mystery of human life.'"[104] In any event, I believe that, insofar as one's gender has nothing to do with one's professional aptitude, the Sixth Circuit's extended definition of sex discrimination is entirely consistent with *Price Waterhouse*. Moreover, it is consistent with the spirit of Title VII and Congress' expressed intent "to insure every citizen the opportunity for the decent self-respect that accompanies a job commensurate with one's abilities. . . ."[105]

PART IV: *SCHROER* AT THE CROSSROADS

Naturally, courts differ in their perceptions of societal trends[106] just as they differ in their interpretations of the law.[107] To be sure, there are some

[101] Such debates occasionally turn into so-called "battles of experts." For instance, the different outcomes in *Ulane I* and *Ulane II* can partly be explained by how much weight each attaches to the testimony of Dr. Wise, the defense witness. Thus, Judge Grady expressed his opinion that Dr. Wise was "contemptuous" and prejudiced against transsexuals. *Ulane I*, 581 F. Supp. 821, 832 (D. Ill. 1983). Judge Grady also stated, "I can tell you quite candidly that I attach no weight whatever to his testimony and, other things being equal, would be inclined to believe that the opposite of anything he testified to would be more probably true than not true." *Id.* at 824. The Seventh Circuit, however, cites Dr. Wise's work without any apparent reservations. *Ulane II*, 742 F.2d at 1083 nn.4-6.

[102] See my critique of *Ulane I infra* Part V.

[103] Ling, *supra* note 92, at 287 (citing Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1901 & n.28 (2004)).

[104] Ling, *supra* note 92, at 287 (citing Lawrence v. Texas, 539 U.S. 558, 588 (2003)).

[105] H.R. Rep. No. 92-238, at 5 (1971), as reprinted in 1972 U.S.C.C.A.N. 2137, 2141 (1971).

[106] Thus, while the *Smith* court may take its cue from our society's increased "acceptance of alternative sex and gender expressions," for other courts "the claim that Title VII protects men in dresses" may seem "culturally quite radical." *See*, respectively, Ling, *supra* note 92, at 287; Case, *supra* note 3, at 79.

[107] *See, e.g.*, Etsitty v. Utah Transit Auth., No. 2:04C616, 2005 U.S. Dist. LEXIS 12634 at *12, *15 (D. Utah June 24, 2005) (holding that the *Smith* court's "complete rejection of sex-related conventions was never contemplated by the drafters of Title VII and is not required by the lan-

ambiguities in *Price Waterhouse* that have hindered the major expansion of sex discrimination law. For one thing, the Supreme Court did not explicitly state whether Title VII would still apply if the sexist standards were forced upon both female and male employees, or, in other words, if the employer not only required its female employees to dress and act "womanly," but also expected its male employees to appear "manly." Consequently, many courts felt free to disregard the Court's broad "entire spectrum of disparate treatment"[108] language and interpreted *Price Waterhouse* to apply only in cases where women are treated unfairly vis-à-vis men. Thus, discrimination based on sexual orientation was held not to be covered by Title VII, since it affected homosexual men and women equally.[109] Similar reasoning has been used to uphold gender-specific dress and grooming codes in the workplace.[110]

With respect to the transgender plaintiffs, *Price Waterhouse* produced mixed results. Some courts followed the *Smith* court's lead.[111] Others, both before and after *Smith*, continued to rely on *Ulane II* and similar pre-*Price Waterhouse* cases.[112] *Schroer v. Billington*,[113] the district court case which prompted this Note and which I discuss in more detail below, is somewhat unique. Although the *Schroer* court did not disagree with the actual result in

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guage of the statute or the Supreme Court opinion in *Price Waterhouse*"). *See also* cases listed *infra* notes 109 & 110.

[108] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1981).

[109] *See, e. g.*, Dawson v. Bumble & Bumble, 398 F.3d 211 (2d Cir. 2005); Schroeder v. Hamilton School Dist., 282 F.3d 946 (7th Cir. 2002); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257 (3rd Cir. 2001); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999); Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 751-52 & n.3 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, 876 F.2d 69, 70 (8th Cir. 1989). As explained in *Schroer*, "the rationale . . . is that such discrimination . . . impacts homosexual men and women alike. But an employer who discriminates against lesbian women but not gay men would indeed violate Title VII, no less than any other employer who employs a practice that disadvantages women on some other basis." 424 F. Supp. 2d 203, 208 (D.D.C. 2006).

[110] *See, e.g.*, Jespersen v. Harrah's Operating Co., Inc., 392 F.3d 1076, 1077-78 (9th Cir. 2004) (holding that a grooming policy requiring female, but not male, employees to wear stockings and colored nail polish, wear their hair "teased, curled, or styled," and wear make-up did not violate Title VII, since it required each sex to conform to equally burdensome gender-specific standards); *see also* Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000); Harper v. Blockbuster Entertainment Corp., 139 F.3d 1385 (11th Cir. 1998); Tavora v. New York Mercantile Exchange, 101 F.3d 907 (2nd Cir. 1996).

[111] *See, e.g.*, Barnes v. City of Cincinnati, 401 F.3d 729, 737 (6th Cir. 2005); Mitchell v. Axcan Scandipharm, Inc., No. 05-243, 2006 U.S. Dist. LEXIS 6521 (W.D. Pa. Feb. 17, 2006).

[112] *See, e.g.*, *Etsitty*, 2005 U.S. Dist. LEXIS 12634; Oiler v. Winn-Dixie Lousiana, Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417 (E.D. La. Sept. 16, 2002); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); Cox v. Denny's, Inc., No. 98-1085, 1999 U.S. Dist. LEXIS 23333 (M.D. Fla. Dec. 12, 1999); Underwood v. Archer Mgmt. Services, Inc., 857 F. Supp. 96, 98 (D.D.C. 1994).

[113] 424 F. Supp. 2d 203 (D.D.C. 2006).

Smith, it did take issue with its reasoning.[114] Specifically, the judge in *Schroer* was not willing to accept the Sixth Circuit's holding that there is no categorical difference between women like Hopkins, who refuse to conform to traditional "female" norms of behavior, and "men" like Smith, who insist on doing so.[115] To Judge Robertson, the "difference is not simply one of degree."[116]

A. *The Facts*

Classified as a male at birth and diagnosed with GID later in life, the plaintiff in *Schroer* ("Schroer") was about to begin the initial stages of the sex-reassignment protocol under the Harry Benjamin International Gender Dysphoria Association ("HBIGDA") guidelines.[117] From that point, she would wear women's clothes, use a traditionally feminine name – Diane – and otherwise live and present herself to others as a woman. At about the same time, but before she changed her name or began presenting as a woman, Schroer applied for a position as a terrorism research analyst with the Congressional Research Service, an arm of the Library of Congress – a position for which she was more than qualified.[118] Schroer thought it would be appropriate to explain her situation to her potential employer, and so she showed the Library's representative photographs of herself wearing traditionally feminine business clothes.[119] Soon after the interview, Schroer learned that she was no longer being considered for the position.[120]

Schroer then filed a Title VII claim against the Library, invoking a *Price Waterhouse*-based claim. She argued that "the defendant decided not to hire her either because it perceived Plaintiff to be a man who did not conform with gender stereotypes associated with men in our society or be-

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[114] *Id.* at 211 ("To say, as I do, that . . . the allegations of Schroer's complaint do not assert a *Price Waterhouse* type of claim in any event, is not to say that Ms. Schroer has no protection under Title VII from discrimination based on her transsexuality.").

[115] Smith v. City of Salem, 378 F.3d 566, 574 (6th Cir. 2004). The word "men" is in quotation marks because Smith did not think of herself as a man. However, the city and the court did.

[116] *Schroer*, 424 F. Supp. 2d at 210 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 564 (4th ed.1994); *Etsitty*, 2005 U.S. Dist. LEXIS 12634 at *12, *15 ("[T]here is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman.")).

[117] *Schroer*, 424 F. Supp. 2d at 205. For the text of the guidelines, see The Harry Benjamin International Gender Dysphoria Association's Standards of Care for Gender Identity Disorders, Sixth Version (2001), *available at* http://www.hbigda.org/Documents2/socv6.pdf.

[118] *Schroer*, 424 F. Supp. 2d at 205.

[119] *Id.* at 206.

[120] *Id.* at 206-07.

cause it perceived Plaintiff to be a woman who did not conform with gender stereotypes associated with women in our society."[121]

B. *Schroer's Sex-Stereotyping Claim*

In addressing Schroer's sex-stereotyping claim, the district court conceded that *Price Waterhouse* indeed contains language barring employers from "assuming or insisting" that their employees match gender-specific stereotypes.[122] Yet at the same time, Judge Robertson asserted, "Neither the logic nor the language of *Price Waterhouse* establishes a cause of action for sex discrimination in every case of sex stereotyping."[123] In support of this argument, he listed several cases where appellate courts refused to recognize Title VII claims of discrimination based on sexual orientation or gender-specific dress and grooming codes, even though, according to Judge Robertson, all of them "present claims of adverse action that partake in some measure of sex stereotyping."[124] In the court's opinion, these cases indicated that the Supreme Court's actual holding is "considerably more narrow than its sweeping language suggests."[125] The main issue in *Price Waterhouse*, Judge Robertson reminded, was that the employer "had created an intolerable 'Catch-22,'" whereby women were prevented from displaying certain gendered traits necessary to reach the higher rungs of the corporate ladder.[126] The actionable part of *Price Waterhouse*, therefore, covered only "masculine" women or "effeminate" men.[127]

Accordingly, the district court held that Schroer would have had a valid *Price Waterhouse*-based claim if she were a feminine man penalized for going against "the gender grain."[128] Yet, it concluded that Schroer did not present such a case:

> Schroer is not seeking acceptance as a man with feminine traits. She seeks to express her female identity, not as an effeminate male, but as a woman. She does not wish to go against the gender grain, but with it. She has embraced the cultural mores dictating that "Diane" is a female name and that women wear feminine attire. The problem she faces is not because she does not conform to the Library's stereotypes about how men and women should look and behave – she adopts those norms. Rather,

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[121] *Id.* at 210 (citations omitted).

[122] *Id.* at 208 (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989)).

[123] *Schroer*, 424 F. Supp. 2d at 208 (emphasis in original).

[124] *Id.* Many of the cases listed by Judge Robertson have already been discussed in this Note. See *supra* notes 109-10 and accompanying text.

[125] *Schroer*, 424 F. Supp. 2d at 209.

[126] *Id.*

[127] *Id.* at 210.

[128] *Id.* at 211.

> her problems stem from the Library's intolerance toward a person like her, whose gender identity does not match her anatomical sex.[129]

For this reason, the court found that Schroer did not have a valid sex-stereotyping claim.

One very disconcerting aspect of this decision is that even though the district court is adamant in its belief that there is a difference, "not in degree, but in kind," between "macho" women like the *Price Waterhouse* plaintiff Hopkins, and biological men like Schroer who "seek to present themselves *as* women,"[130] it never explains what this difference is or how it may be relevant to the court's legal analysis. Judge Robertson simply quotes a medical manual, which states, "Gender Identity Disorder . . . is not meant to describe a child's nonconformity to stereotypic sex-role behavior as, for example, in 'tomboyishness' in girls or 'sissyish' behavior in boys. Rather, it represents a profound disturbance of the individual's sense of identity with regard to maleness or femaleness."[131] However, this approach confuses "explaining" something with merely labeling it. And even assuming that the manual contains a most thorough analysis of the underlying physiological or biochemical causes of transsexualism,[132] it is still not clear how these underlying causes lead to the court's conclusion that Schroer does not have a valid sex-stereotyping claim. After all, the record in *Price Waterhouse* provides no information as to what caused Hopkins to behave in a "masculine" manner.[133] The *Schroer* court assumes that Hopkins' behavior was just "tomboyishness," as the psychiatric manual phrases it. Yet, based on the facts actually considered by the Supreme Court in *Price Waterhouse*, one could just as easily conclude that Hopkins was a pre-operative[134] transsexual. The Court did not make Title VII protection contingent on the plaintiff's gender

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[129] *Id.* at 210-11.

[130] *Id.* (emphasis in original).

[131] *Id.* (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532, 564 (4th ed. 1994)).

[132] Which it does not. *See* Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24 (2003). As Spade observes, the manual's attempt to distinguish "tomboyishness" and "sissyish" behavior from GID "seems like an afterthought in the writing—a quick way to try and make it not appear that all gender nonconformity is being pathologized by the generalized diagnosis which relies on an impossible norm—a child with no cross gender play habits or transgressive gender explorations." Moreover, "[s]ince almost no child will state 'I'm profoundly disturbed about my gender,' this determination will always be left for parents, doctors, and teachers—the surveillance system kicks in." *Id.* at 24 n.28.

[133] *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); 825 F.2d 458 (D.C. Cir. 1987); 618 F. Supp. 1109 (D.D.C. 1985).

[134] Then again, neither does the record mention Hopkin's actual genitalia. *See Price Waterhouse*, 490 U.S. 228.

matching his or her biological sex. On the contrary, it interpreted Title VII to prohibit employers from "assuming or insisting" that this be the case.[135]

Thus, notwithstanding Judge Robertson's assertions that there is a profound difference between "tomboys" and transsexuals, the difference ultimately *is* one of degree. The court recognizes that *Price Waterhouse* has created "space for people of both sexes to express their sexual identity in nonconforming ways,"[136] but it does not think this space stretches indefinitely. In essence, it penalizes Schroer for straying too far from the archetype of "proper" gender behavior. But how far is *too* far? Without a set of clear legal guidelines on point, it appears largely to be a matter of the judge's personal preference.

Alternatively, perhaps the real problem with Schroer's case was that she chose to be upfront with the court about her intention to "express her female identity, not as an effeminate male, but as a woman."[137] Did Schroer make a mistake by pleading her case as Diane instead of David, her name at birth?[138] Should future transgender plaintiffs be less honest with courts about how they perceive their own genders? That is indeed what the district court seems to suggest, as it notes, "'In some cases, it is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible.'"[139]

However one chooses to look at it, the *Schroer* court did not contribute anything new or insightful to the superficial mode of thinking adopted in earlier cases like *Oiler*, *Dobre* and *Underwood*,[140] and which the *Smith* court summarized as, "superimpos[ing] classifications such as 'transsexual' on a plaintiff, and then legitimiz[ing] discrimination based on the plaintiff's gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification."[141]

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[135] This is similar to Case's argument that disparate grooming standards for the two sexes cannot survive the *Price Waterhouse* holding: "Let me stress again that the record before the Court gives no clue of what Ann Hopkins actually looked like; for all it tells us, her habitual attire might have been a button-down shirt, a rep tie, a man-tailored pinstripe pantsuit, and a buzz cut." Case, *supra* note 3, at 61.

[136] *Schroer*, 424 F. Supp. 2d at 210.

[137] *Id.* at 211.

[138] *Id.* at 205.

[139] *Id.* at 211 n.3 (quoting Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1116 (D.C. Cir. 2000)).

[140] *See supra* note 99.

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

C. *Schroer's "Sexual Identity" Claim*

Schroer should not, however, be read as simply a throwback to the *Ulane II* line of cases.[142] Judge Robertson explicitly rejected the Seventh Circuit's narrow view of sex discrimination as discrimination based on biological differences between men and women.[143] The arguments for such a restricted reading of Title VII were "perhaps persuasive when written," he observed, but they "have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history."[144] The *Schroer* court further noted that "the failure of numerous attempts to broaden Title VII to cover sexual orientation says nothing about Title VII's relationship to sexual identity, a distinct concept that is applicable to homosexuals and heterosexuals alike," since "*no* bill has ever been introduced in Congress to include or exclude discrimination based on sexual identity."[145]

As noted earlier, the notion of "sexual identity" was articulated by Judge Grady in *Ulane I*.[146] Having reviewed expert testimony from a variety of witnesses on the nature of sex and gender, Judge Grady found that, "sex is not a cut-and-dried matter of chromosomes."[147] Rather, he concluded, the term had many meanings. One of them was "sexual identity," which Judge Grady defined as in part "a question of one's own self-perception," and in part a question of how society perceives the individual.[148] He then used this concept to differentiate between transsexuals, as "persons with a problem relating to their very sexual identity as a man or a woman," and homosexuals and cross-dressers, who do not have such a problem.[149] This enabled Judge Grady to conclude that, although Title VII "was not intended and cannot reasonably be argued to have been intended to cover the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex,"[150] it nevertheless did cover transsexuals.[151]

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[142] *See* cases listed *supra* note 112.

[143] *Schroer*, 424 F. Supp. 2d at 211-12.

[144] *Id.* at 212. The court cited Justice Scalia's position in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998), 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." *Schroer*, 424 F. Supp. 2d at 212

[145] *Id.* (citing *Ulane I*, 581 F. Supp. 821, 825 (D. Ill. 1983); Oiler v. Winn-Dixie Lousiana, Inc., No. 00-3114, 2002 U.S. Dist. LEXIS 17417, at *4 (E.D. La. Sept. 16, 2002)).

[146] 581 F. Supp. at 825.

[147] *Id.*

[148] *Id.* at 823.

[149] *Id.*

[150] *Id.*

[151] *Id.* at 825.

More than two decades later, having rejected Schroer's sex-stereotyping claim,[152] and searching for "a straightforward way" to address "discrimination against transsexuals *because they are transsexuals*," the *Schroer* court proposed that "it may be time" to retrieve from the dustbin of legal history Judge Grady's decision in *Ulane I*.[153] But because the *Schroer* court was merely reviewing the defendant's motion to dismiss for failure to state a claim, it could not apply Judge Grady's approach based on the facts presented. It therefore called for a factual record, "one that reflects the scientific basis of sexual identity in general, and gender dysphoria in particular," and which would support Schroer's claim that that the defendant employer discriminated against her "because of . . . sex."[154]

As I argue in the subsequent section, although Judge Grady may deserve some recognition for his creative attempt to place transsexuals within the protective scope of Title VII, the reasoning behind his decision to extend Title VII protection to transsexuals but not to homosexuals and cross-dressers is highly problematic. It presupposes that there are settled, clearly defined lines among various forms of gender nonconforming behavior, despite ample evidence in the record suggesting the contrary. As such, this decision is detrimental to the transgender rights movement and also contrary to the principle of gender equality announced by the Supreme Court in *Price Waterhouse*. For these reasons, I argue, the dustbin of history is where *Ulane I* belongs.

PART V: *ULANE I* AND THE PROBLEM WITH MEDICALIZING GENDER NONCONFORMITY

In *Ulane I*, Judge Grady refers to "transsexuals" and "transvestites" as if there were some definite, clearly observable difference between the two groups.[155] The supposed difference is that cross-dressers are "content with the sex into which they were born" whereas transsexuals are not. According to Judge Grady, there is sufficient evidence in the record to support this dichotomy.[156]

Yet, when he turns to the facts before him and asks whether Ulane is, in fact, "a true transsexual," and not "an aging and dissembling transvestite,"

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[152] By this I mean Schroer's claim that "the defendant decided not to hire her either because it perceived Plaintiff to be a man who did not conform with gender stereotypes associated with men in our society or because it perceived Plaintiff to be a woman who did not conform with gender stereotypes associated with women in our society." Schroer v. Billington, 424 F. Supp. 2d 203, 210 (D.D.C. 2006) (citations omitted).

[153] *Id.* at 212-13.

[154] *Id.*

[155] *Ulane I*, 581 F. Supp. at 825.

[156] *Id.*

Judge Grady admits that the line is not all that clear and that it is "largely a matter of her own attitude, her own belief about herself."[157] Moreover, it seems that even Ulane herself had not been consistent in her identity as a transsexual. This is indicated by "[t]he fact that she took a long time to make up her mind and that there were many changes of mind and reversals and uncertainties in the process."[158] In the end, whether Ulane is "a true transsexual" in the court's opinion seems to turn on such factors as Ulane's ability to "relat[e] well to other people of both sexes," being "active in her church, in fact, vice president of her church," the fact that she appears feminine enough to the various psychiatrists and, lastly, Judge Grady's own observation of Ulane's conduct in the courtroom, from which he was able to conclude that, "[t]here is nothing flamboyant, nothing freakish, about the plaintiff."[159] One does not have to be an expert in the field to see that these factors are extremely subjective and depend as much on the evaluator's frame of mind as they do on Ulane's talent and determination in playing her part as a well-adjusted, "normal" transsexual, whatever that may entail. To make legal rights and remedies conditional on such imprecise factors is to invite more vagueness and unpredictability into sex equality jurisprudence.

More problematically, Judge Grady's approach is based on some very rigid and undeniably outdated notions about how men and women ought to appear to others and how they ought to live their lives. Judge Grady's comments make it clear that whether or not Ulane has a valid Title VII claim as a "true transsexual" hinges, to a large extent, on her ability to conduct herself "as a woman" with "no reversion to any masculine behavior."[160] Requiring transgender people to exhibit gender-stereotypical behavior to take advantage of their legal rights is problematic because, as Dean Spade observes, while some transgender people may have no problems with adhering to such standards, many "do not imagine themselves entering a realm of 'real manness' or 'real womanness.'"[161]

Describing his personal experience of "passing" as a transsexual while seeking a sex-reassignment surgery, Spade writes that, in order to convince medical experts that he was a "real" transsexual, he "needed to perform a

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[157] *Id.* at 826.

[158] *Id.*

[159] *Id.* at 827.

[160] *Id.*

[161] Spade, *supra* note 132, at *28 (2003)*. *See also* Vade, *supra* note 12, at 255. As Vade observes, "In case law, 'real man' and 'real woman' are the only two gender options. There exists no case in the United States that even considers any other alternatives. Yet, in a recent San Francisco Human Rights Commission survey, about half of the transgender identified people did not identify as strictly female or male." *Id.* at 255 n.5 (citing S.F. Human Rights Comm'n, Gender Neutral Bathroom Survey (2001), *available at* http://www.transgenderlawcenter.org/documents/safe_WC_survey_ results.html).

desire for gender normativity, to convince the doctors that [he] suffered from GID and wanted to 'be' a 'man' in a narrow sense of both words."[162] He was being forced to abandon his convictions about the harms of rigid gender lines, and to adopt a "pretended belief in a binary gender system that [he] had been working to dismantle since adolescence."[163] To people like himself, Spade observes, the requirement to act in accordance with these stereotypes, and "to produce narratives of struggle around those identities that mirror the diagnostic criteria of GID" can often be "dehumanizing, traumatic, or impossible"[164] to satisfy.

Such reinforcement of the traditional gender binary may have gone unnoticed in 1983, when Judge Grady wrote his opinion. In the post-*Price Waterhouse* era, however, it is but a hopeless anachronism, and it should have been immediately recognized as such by the district court in *Schroer*. Given the Supreme Court's holding that employers must not force their employees to conform to archaic notions of masculinity and femininity,[165] it would be hypocritical and absurd of courts to deny Title VII protection to transgender plaintiffs for not adhering to those very same stereotypes.

Judge Grady's contention that Ulane had experienced nothing short of a complete and irreversible male-to-female gender transition (only three years after the surgery – presto!) and his deliberate blindness to any opposing evidence,[166] brings out one very important element in his thinking. Namely, although Judge Grady claims to have an open-minded view of sex, finding it to be "a question of one's own self-perception," as well as "a social matter,"[167] he nevertheless regards anatomical sex as something real and unquestionable,[168] as "the natural biological true backdrop for a cultural gender."[169] In this respect, Judge Grady's view of sex is not all that different

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[162] Spade, *supra* note 132, at 24.

[163] *Id.* at 28.

[164] *Id.* at 28-29.

[165] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

[166] See *Ulane I*, 581 F. Supp. 821, 827 (D. Ill. 1983). Eastern's medical witnesses argued that it was too early to evaluate Ulane's success in adjusting to her female identity. Judge Grady dismissed their skepticism as mere partisanship: "What more can she do? . . . Eastern's medical witnesses would never be satisfied with the post-operative course. If we were in here 30 years from now and there had not been a single problem that could be demonstrated, they would still take the position that you cannot tell about tomorrow." *Id.*

[167] *Id.*

[168] *See id.* at 823. A reported version of Judge Grady's opinion misquoted him as saying, "[W]hatever the physiology may be, it has *nothing* to do with sex as that term is constantly understood." *Id.* (emphasis added). Judge Grady found it necessary to correct the publisher because, as he put it, "[T]he word, 'nothing,' there totally turns on its head what I was trying to say. I am sure that I used the word, 'something,' and if I did not, that is what I meant to say, and I want to clarify that for future reference. . . . I will send that correction into the book publisher so that I do not go down in posterity as someone who cannot articulate a reason for a decision." *Id.*

[169] Vade, *supra* note 12, at 282.

from that of the Seventh Circuit in *Ulane II*. Whereas the Seventh Circuit thinks a person could never change their "real" sex, Judge Grady believes it is possible, yet still assumes that once the physical sex is changed, the social aspect of it, which he refers to as "sexual identity," follows naturally.

Indeed, Judge Grady's very definition of transsexuals as having a "mismatch" between their sex and gender, or of cross-dressers and homosexuals as being "content" with their biological sex,[170] and thus distinguishable from transsexuals, very much depends on the assumption that sex assigned by a doctor at birth is objective and unambiguous, that it is real – *more real* even than people's thoughts and feelings regarding their own gender identities.[171] For, without medically-assigned anatomical sex as a constant, there would be nothing to "mismatch" or be "content" with. There would be no *trans*-sexuals because there would be no "sex" to transcend. Similarly, if people were no longer expected to dress according to their biological sex, there would be no *cross*-dressers. And, insofar as homosexuality refers to sexual and romantic attraction between individuals of the same sex, there would be no *homo*-sexuals either.[172]

The reasoning behind such distinctions is flawed because doctor-assigned sex is, in fact, also a subjective gender assignment. To reiterate Franke's argument, in addition to genitalia and chromosomes, human bodies differ in many real ways, such as in height, weight, skin and hair color. What we make of these differences, and whether we treat them as significant or trivial, depends on our preexisting attitudes towards a particular socially constructed category.[173] These attitudes change from person to person and from one historical period to another. For instance, some people think there is a world of difference between "blondes" and "brunettes," yet others could care less. To use another example, racism, a belief that certain differences in people's physical appearances determine their worth individually and/or as a group, was once almost universally accepted. Today, however, racial dis-

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[170] *Ulane I*, 581 F. Supp. at 823.

[171] Vade, *supra* note 12, at 285.

[172] Although such a state of affairs may be hard to imagine (a "gender galaxy," as Vade describes it), without the concept of anatomical sex and, consequently, no predetermined gender roles, there would simply be people with genitalia of various sizes and shapes, sexually and romantically attracted to other people, also with genitalia of various sizes and shapes. Whether people's reproductive organs happened to be "natural" or surgically altered, and whether they happened to be similar or different from those of their sex partners would be of no consequence as far as society at large is concerned. Either way, no "trans," "homo" or "straight" classifications would result. In such a "gender galaxy," courts would simply defer to whatever gender an individual happens to adopt at that moment, or, for that matter, to that individual's choice not to adopt a gender. *See* Vade, *supra* note 12, at 290-91.

[173] Franke, *supra* note 27, at 38-39.

crimination is widely seen as immoral, and some forms of it are now illegal in many countries.

Anatomical sex is simply another socially constructed category, just as subjective and elusive as gender. It does not center on any independently existing set of facts. Instead, it focuses on people's presumed role in reproductive heterosexual intercourse.[174] This role is "presumed" because, obviously, not everyone is heterosexual. Furthermore, not every heterosexual is able and willing to reproduce. As Vade explains:

> It is difficult to know whether or not and how a five-minute old baby will be a heterosexually reproductive adult. We need a test for heteronormativity that works for five-minute old babies. This is our test: heteronormativity is measured with a ruler. The baby's genitalia are measured by a ruler, and different doctors use different rulers. If the clitoris/penis is below a certain length, it is a clitoris and the child a girl; if the clitoris/penis is above a certain length, it is a penis and the child a boy. If the clitoris/penis falls between the two marks, the child is called intersex, a medical and social emergency. This emergency must be "corrected" immediately, "corrected" with a knife, for the child's own good.[175]

That this approach reflects men's and women's different reproductive roles and thus may have some social utility, Vade insists, should not preclude us from recognizing that this emphasis on differences in genital size and shape is subjective and arbitrary. It is subjective because, as Vade points out, if doctors used different rulers, the differences between men and women would disappear and "all of us would be intersex."[176] Alternatively, if they used more precise rulers, "all intersex people would be 'cured' on the spot."[177] This approach is also arbitrary because it leads doctors to treat some aspects and parts of our bodies as more physical and more determinative of our sex than others, even though, logically, "[g]enitalia are no more physical than one's shoulders or one's hormones," or, for that matter, "[h]ow one moves, feels, talks, interacts."[178]

The absurdity and harm of a biological definition of sex is readily apparent in the *Schroer* court's discussion of androgen insensitivity syndrome ("AIS"). The court proceeds to label various anatomical components of a person's body as independently possessing male or female gender, such as "male" XY chromosomes, "male" testes, "female" external genitalia, and so on, even though the court recognizes that people diagnosed with AIS could

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[174] *See, e.g., Ulane II*, 742 F.2d 1081, 1083 (7th Cir. 1984) (suggesting that Ulane's sex reassignment surgery operation did not create a biological female in "the sense that Ulane would have a uterus and ovaries and be able to bear babies") (citations omitted).

[175] Vade, supra note 12, at 281 (citations omitted).

[176] *Id.* at 282.

[177] *Id.*

[178] *Id.*

choose to identify as either men or women.[179] The court then proposes that transsexualism could also be understood as a misalignment of various biological components[180] – blithely unaware of the fact that such senseless and unsolicited gendering of separate body parts is what makes the so-called "misalignments" possible in the first place.[181] Vade, a transgender attorney and activist, describes how he feels about such practices:

> In the sex-gender conceptual framework, I have a female sex and a male gender; in other words, I am a female bodied, male-identified person. Female body, male head. This makes my head spin, literally makes me nauseated. This conceptualization is self-alienating. I am transgender, all of me is transgender. I am a tranny with a tranny body. I am whole. I match myself just fine. And I will gender my genitalia by myself, thank you very much.[182]

By viewing Schroer's gender nonconformity strictly as a "biological condition" and suggesting that it may be "produced in significant part by hormonal influences on the developing brain *in utero*,"[183] the district court in *Schroer* misses the larger point. This "medical model of transsexualism," as Spade refers to it, "requires one to imagine a child wanting to be a gender transgressive . . . without having that desire stem from a cultural understanding of gender difference defined by the 'advantaging' of certain gender behaviors and identities over others."[184] But we know that "children are not born with some innate sense that girls should wear dresses and boys shouldn't like anything pink," Spade argues. "So how can a desire to transgress an assigned gender category be read outside of cultural meaning?"[185] Such a model is not only unrealistic, but also regressive, for it "naturalizes and depoliticizes gender and gender role distress."[186]

The final point I want to make along these lines is that discrimination faced by transgender people is by no means a marginal issue. Vade beautifully summarizes the nexus between fighting gender stereotypes and deconstructing the notion of sex as a medical "fact":

> Why can we not question sex, the natural objective and eternal truth? We can question the teacher who told me I could not do math. We can

[179] Schroer v. Billington, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006).

[180] *Id.*

[181] *See* discussion of the "gender galaxy" *supra* note 172.

[182] Vade, *supra* note 12, at 289-90.

[183] *Schroer*, 424 F. Supp. 2d at 213 n.5. The court is being extremely vague here. As if there were any aspects of human behavior completely *unaffected* by biological factors! Yet, proving that transsexualism, or for that matter, non-transsexualism, is "in significant part" biologically predetermined seems like a daunting task. Could the court really be expecting Schroer to come up with a satisfactory resolution to the nature/nurture debate?

[184] Spade, *supra* note 132, at 25.

[185] *Id.*

[186] *Id.*

> question the career counselor who told me to wear a skirt. We can question the coach who told me I could not do martial arts. We can question doctors who do breast cancer research exclusively on men. But, questioning the doctor who told me I am a girl is off limits. Why do doctors get to define what it means to be a man or a woman? Why do non-transgender people get to define transgender people?[187]

Vade's logic also works in reverse. If we see biological sex as real and objective, we then assume that it is natural and that there are only two categories of people in this world, men and women, with two distinct sets of gender roles. Thus, if the meaning of being a man or a woman *is* determined by doctors, it may in turn limit our ability to question sexist career counselors, coaches, medical researchers and teachers. There will then be a new generation of doctors, with the same narrow-minded, dualistic approach to sex. In other words, it is a closed loop. As Case warned, "[T]he world will not be safe for women in frilly pink dresses . . . unless and until it is made safe for men in dresses as well."[188]

CONCLUSION

In the closing lines of *Schroer*, the district court briefly mentions "the factual complexities that underlie human sexual identity."[189] The court understands that what is commonly referred to as "sex" is a complex and elusive phenomenon, a permutation of "chromosomal, gonadal, hormonal, and neurological" components.[190] Not only do each of these components *per se* present numerous possibilities,[191] but, as the court points out, these components also "interact with each other, and in turn, with social, psychological,

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[187] Vade, *supra* note 12, at 286.

[188] Case, *supra* note 3, at 68. *See also* Vade, *supra* note 12, at 315. "We have to get protection for all gender diverse people," Vade argues. "Even those who have had the most surgeries and those who are the most heterosexual and those who fit most of the prescribed norms can still be found lacking. We can all be found not female enough or not male enough." *Id.* (citing Jody Marksamer, Wrong Bathroom: The Forces Behind the Legal and Social Exclusion of Transgender People from the Bathroom (2003) (unpublished manuscript on file with Vade)).

[189] Schroer v. Billington, 424 F. Supp. 2d 203, 212 (D.D.C. 2006).

[190] *Id.* at 212-13.

[191] *See* Vade, *supra* note 12, at 280. Vade provides several examples:

> [I]n chromosomes, one can have not only xy or xx, but also xxx, xxy, xxxy, xyy, xyyy, xyyyy, or xo. One can have two ovaries, two testes, one ovary and one testis, two ovotestes, or streak testes which function as neither. One's external morphology can consist of a small clit, a large clit, a small penis, a large penis, both a penis and a vagina. One can have different combinations of internal morphology. Everyone has both testosterone and estrogen and there are endless combinations of relative amounts. Similarly there are endless combinations of phenotypical features (e.g. hair, breasts, etc.).

Id. at 280 n.82 (citing Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 AM. J. HUM. BIOLOGY 151 (2000), *available at* http://www3.interscience.wiley.com/cgi-bin/fulltext/69504033/PDFSTART); *see also* Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278-91 (1999).

and legal conceptions of gender,"[192] in potentially endless combinations. Yet, even though it recognizes that sex is fluid and continuous, the *Schroer* court uncritically imports Judge Grady's conclusion from over twenty years ago that effeminate men, homosexuals and cross-dressers are categorically different from transsexuals, with its antecedent belief in the dualistic biological sex acting as a "natural" backdrop to gender. As argued above, this position is illogical and regressive.

There is no doubt that the *Schroer* court's copious use of medical terms such as "disorder," "dysphoria," or "condition," and its reliance on biological sex as a constant in differentiating among various forms of gender nonconformity reflects its wish to "preserve[ ] the outcomes of the post-*Price Waterhouse* case law without colliding with the sexual orientation and grooming code lines of cases."[193] The court understands that if it allows Schroer to go forward with her sex-discrimination claim based on *Price Waterhouse* – not as a transsexual, but as a man or a woman discriminated against for refusing to conform to gender stereotypes – it then will have to recognize analogous claims by cross-dressers and homosexuals, who may well argue that hostility towards their choice in dress or sexual partners cannot be anything other than perpetuation of traditional gender norms.[194]

Yet, as the Sixth Circuit spells out in *Smith*, there is nothing in the *Price Waterhouse* holding that would make its application contingent on the underlying cause of gender nonconforming behavior, or how such behavior may be categorized.[195] By playing down the value of medical labels in its legal analysis, *Smith* gives proper deference to the Supreme Court's affirmation of gender expression as a matter of personal choice. As the Supreme Court stated, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[196] The district court in *Schroer* and the defendants would be well-advised to take this pronouncement seriously.

[192] *Schroer*, 424 F. Supp. 2d at 212.

[193] *Id.* at 213.

[194] *See id.* at 208. Judge Robertson has, in fact, admitted that gender-specific dress codes and discrimination based on sexual orientation "present claims of adverse action that partake in some measure of sex stereotyping." *Id.*

[195] Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004).

[196] Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989).