

Comments

STRANGE BEDFELLOWS? SEX, RELIGION, AND TRANSGENDER IDENTITY UNDER TITLE VII

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INTRODUCTION

David Schroer appeared to be the ideal job applicant for a terrorism research analyst position at the Library of Congress’s Congressional Research Service.¹ A retired Army Special Forces Commander, he had directed a classified terrorist tracking operation for U.S. Special Operations Command (USSOCOM) and had conducted briefings for top officials, including Vice

* Juris Doctor, Northwestern University School of Law, 2010. The author thanks Jennifer Levi for inspiration, Andrew Koppelman and Kimberly Yuracko for their invaluable guidance and feedback during the development of this Comment, the staff of the *Northwestern University Law Review* for their thorough and thoughtful editorial assistance, and her family for their tremendous and inexhaustible love and support.

¹ See *Schroer v. Billington (Schroer I)*, 424 F. Supp. 2d 203, 205 (D.D.C. 2006).

President Dick Cheney and Secretary of Defense Donald Rumsfeld.² After Schroer outscored seventeen other applicants during the job interview process, a selection committee unanimously agreed to offer him the job.³ He accepted their offer the next day.⁴

When Schroer met with the Library's hiring manager a few days later, he explained to her that he identified as transgender, was transitioning from male to female, and intended to begin living and working as a woman.⁵ The next day, the hiring manager called Schroer, told him he was "not a good fit" for the position, and rescinded his job offer.⁶ After the position was filled by another candidate, Schroer filed a Title VII sex discrimination lawsuit.⁷

In *Schroer v. Billington*, after two unsuccessful motions to dismiss by the Library, the D.C. District Court vindicated Schroer's claim in a bench trial.⁸ As the court explained, "the Library's refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination 'because of . . . sex.'"⁹

In so holding, the *Schroer* court broke with long-established precedent interpreting Title VII's prohibition on discrimination "because of sex" to outlaw discrimination because of one's status as a "man" or "woman," but not because of one's status as a "transsexual."¹⁰ Although two Sixth Circuit decisions had protected transsexual women under Title VII, those decisions

² *Id.* at 205–06. Schroer was a graduate of Army Ranger School and National War School, and had been awarded the Defense Superior Service Award, four Meritorious Service Medals, and two Expeditionary Medals for combat operations. *An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the H. Subcomm. on Health, Employment, Labor and Pensions*, 110th Cong. 18 (2008) [hereinafter *Transgender Discrimination Hearing*] (statement of Diane J. Schroer, Colonel, U.S. Army, Ret.).

³ *Schroer v. Billington (Schroer III)*, 577 F. Supp. 2d 293, 296 (D.D.C. 2008). The Library's hiring manager told Schroer that his skills and experience made him "significantly better than the other candidates." *Id.*

⁴ *Id.*

⁵ *Id.* The hiring manager initially reacted by saying, "Why in the world would you ever want to do that?" After further conversation, she told Schroer that he had given her "a lot to think about." *Id.* at 296–97.

⁶ *Id.* at 299. In Schroer's words, he went from "hero to zero in twenty-four hours." *Transgender Discrimination Hearing*, *supra* note 2, at 14.

⁷ *Schroer I*, 424 F. Supp. 2d 203, 206–07 (D.D.C. 2006).

⁸ *Id.* at 205 (denying motion to dismiss); *Schroer v. Billington (Schroer II)*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) (denying a motion to dismiss an amended complaint); *Schroer III*, 577 F. Supp. 2d at 300 (finding for Schroer after a bench trial).

⁹ *Schroer III*, 577 F. Supp. 2d at 308.

¹⁰ See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) ("The phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men. The words of Title VII do not outlaw discrimination against . . . a person born with a male body who believes himself to be female . . .").

had strained to comport with precedent by conceptually casting the plaintiffs as gender nonconforming effeminate men.¹¹ *Schroer*, in contrast, interpreted Title VII's plain language to prohibit discrimination against transsexuals as transsexuals.¹²

Notably, to justify this interpretative move, the court compared *Schroer* to a religious convert:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only “converts.” That would be a clear case of discrimination “because of religion.” No court would take seriously the notion that “converts” are not covered by the statute.¹³

Likewise, the court reasoned, a statute that protects “men” and “women” also logically protects “transsexuals.”¹⁴

The *Schroer* court's religious analogy challenged the argument that only particular, immutable manifestations of a protected status like “religion” or “sex” should receive Title VII protection.¹⁵ This argument, if left unchallenged, works inexorably against transgender protection: even if one's gender identity is a fixed characteristic,¹⁶ a transgender person can only express it externally through a transition between, or differentiation from, particular socially prescribed manifestations of male and female. Because of this inherent external “change,” transgender identity is often perceived as a

¹¹ See *Smith v. City of Salem*, 378 F.3d 566, 572 (6th Cir. 2004) (“Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.”); *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005) (“Following the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.”).

¹² *Schroer III*, 577 F. Supp. 2d at 305 (“I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived *Schroer* to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.”).

¹³ *Id.* at 306.

¹⁴ *Id.* at 306–07.

¹⁵ Elizabeth Glazer and Zachary Kramer maintain that *Schroer*'s religious analogy demonstrates the concept of protection for “transitional identity,” or “identity that has aspects of one or more extant identities, but which is inchoate, in that the identity does not express fully any of those extant identities.” Elizabeth M. Glazer & Zachary A. Kramer, *Transitional Discrimination*, 18 TEMP. POL. & CIV. RTS. L. REV. 651, 664 (2009). Similarly, Camille Hébert challenges the idea that a protected identity must be manifested in a particular narrow way by pointing out that racial and national origin discrimination prohibitions do not require a plaintiff to demonstrate racial or ethnic purity. See L. Camille Hébert, *Transforming Transsexual and Transgender Rights*, 15 WM. & MARY J. WOMEN & L. 535, 586–89 (2009).

¹⁶ Gender identity is defined as a person's internal sense of maleness or femaleness. See discussion *infra* Part I.

superficial and inauthentic, rather than a fundamental and genuine, aspect of one's "sex" status.¹⁷

As *Schroer* is a district court opinion, it is unclear what its doctrinal impact will be, and circuit courts offer divergent interpretations as to whether and how Title VII's sex discrimination protections apply to transgender plaintiffs.¹⁸ This Comment argues that, given this doctrinal flexibility, transgender protection under Title VII is actually determined by courts' implicit "authentication" of a plaintiff's transgender identity based on two criteria: first, whether the plaintiff's transgender identity has been medically diagnosed; and second, whether the plaintiff's gender expression sufficiently conforms to society's binary male-or-female gender norms. These factors implicitly serve to establish that the plaintiff's transgender identity, as something both immutable and assimilationist, warrants Title VII protection. However, these factors fail to adequately encompass the reality of transgender experiences, and therefore result in vastly underinclusive protection for transgender people. Many transgender people, for example, do not receive a medical diagnosis, and many do not conform to strict "male" or "female" norms.¹⁹

If employment discrimination protection for transgender plaintiffs actually depends on the perceived authenticity of their gender identities, *Schroer*'s religious analogy points the way toward a much better authentication rubric. After all, religious identity, like gender identity, may have a deeply personal internal genesis, lack a fixed external referent, and deviate from "dogmatic" social norms. Yet, judges must determine whether a plaintiff's claimed religious belief warrants Title VII protection. Under existing doctrine, they do so by assessing the consistency and sincerity of the plaintiff's religious belief.²⁰ This Comment proposes that courts should import these criteria from Title VII religious discrimination doctrine into the sex discrimination context for the purposes of "authenticating" transgender identity. The result would be a legal landscape that better balances the needs of employers for certainty and predictability with the lived experiences of most transgender people.

Part I provides a brief description of the broad range of transgender identities and the problem of transgender discrimination. Part II explains courts' divergent interpretations of whether and how Title VII's prohibitions on discrimination "because of sex" protect transgender plaintiffs. Part

¹⁷ For example, the conservative Traditional Values Coalition released a statement saying that transgender nondiscrimination protections would "*elevate[] what a person 'thinks' he is over what he actually is,*" and called Simon Aronoff, Deputy Director of the National Center for Transgender Equality, a "woman who thinks she's a man." *The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the H. Subcomm. on Health, Employment, Labor and Pensions, 110th Cong.* 117, 119 (2007) [hereinafter *ENDA Hearing*] (statement of Traditional Values Coalition) (emphasis original).

¹⁸ See discussion *infra* Part II.

¹⁹ See discussion *infra* Part I.

²⁰ See discussion *infra* Part IV.

III argues that these Title VII cases are actually turning on implicit considerations of a transgender plaintiff's medical status and conformance with the gender binary, as criteria that "authenticate" a transgender identity for the purposes of antidiscrimination protection. Part IV proposes a more appropriate rubric for authenticating transgender identity, modeled on tests for religious-based protections under Title VII. Part V concludes.

I. BEING TRANSGENDER

A. *Transgender Identities*

"Transgender" is a grassroots term that emerged in the mid-1990s to self-describe a broad range of people "whose gender identity or expression does not conform to the social expectations for their assigned sex at birth."²¹ While one's "sex" is typically associated with biological characteristics such as chromosomes, reproductive organs, genitalia, and hormones,²² "gender identity" refers to a person's "internal, deeply felt sense of being either male or female, or something other or in between."²³ It is sometimes conceptualized as a psychological aspect of sexual identity.²⁴ Scientific studies indicate that gender identity develops by approximately age three, but its genesis is undetermined.²⁵ Some studies suggest that it may be related to sex differentiation of the brain.²⁶ Other scholars, however, contend that gender identity is entirely socially constructed.²⁷ Transgender advocates typically argue that, whatever its genesis, for both transgender and nontransgender persons, gender identity is experienced as something innate and difficult to change.²⁸

²¹ Paisley Currah, Richard M. Juang & Shannon Price Minter, *Introduction to TRANSGENDER RIGHTS* xiii, xiv (Paisley Currah et al. eds., 2006); see Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENDER RIGHTS*, *supra*, at 3, 4 [hereinafter Currah, *Gender Pluralisms*] (describing early development of "transgender" as a label).

²² See Julie Greenberg, *The Roads Less Traveled: The Problem with Binary Sex Categories*, in *TRANSGENDER RIGHTS*, *supra* note 21, at 51, 51. Biological sex characteristics can be ambiguous or incongruent, as is the case with intersexed individuals. *Id.* For an excellent summary of the range of natural variation within and among these characteristics, see *id.* at 56–63.

²³ Jamison Green, *Introduction to PAISLEY CURRAH & SHANNON MINTER, NAT'L CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 3* (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>.

²⁴ See Hébert, *supra* note 15, at 583–84.

²⁵ See *id.* at 584.

²⁶ See Greenberg, *supra* note 22, at 61.

²⁷ See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 33 (1990) ("There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results.").

²⁸ See Jennifer L. Levi, *Clothes Don't Make the Man (or Woman), But Gender Identity Might*, 15 *COLUM. J. GENDER & L.* 90, 111–12 (2006). Accordingly, some transgender advocates "reverse the traditional idea that gender is an expression of sexed bodies and instead identify gender identity as the

A wide range of gender nonconforming people can be described as transgender, including, but not limited to, transsexuals.²⁹ The narrower term “transsexual” specifically refers to a person who desires to alter bodily sex characteristics through hormone treatment or sex reassignment surgery.³⁰ Many transgender people, however, rely on external gender markers, such as hairstyle and clothing, to achieve their desired appearance.³¹ Some do not wish to change their bodies; others find that the required medical procedures are unnecessarily invasive or prohibitively expensive, especially since sex reassignment surgeries are not covered by most health insurance policies.³² Most transgender people, therefore, do not actually undergo surgery.³³ The most common medical intervention for transgender people is hormonal therapy, which alters masculine or feminine secondary sex characteristics such as voice, body hair, and muscle and fat distribution.³⁴

Because the term “transgender” encompasses so many different ways of being, it is often described as an “umbrella term.”³⁵ Though the use of a single term risks oversimplifying important differences between individuals, it serves to unite those who share an investment in “a right to determine and express their gender without fear, stigmatization, marginalization, or punishment.”³⁶

B. *Discrimination Against Transgender People*

Transgender people continue to be misunderstood and marginalized. They face discrimination that affects nearly every aspect of social life, including public accommodations,³⁷ health care,³⁸ education,³⁹ familial rela-

presocial fixed category” and bodily sex as the characteristic that can be more easily altered. Currah, *Gender Pluralisms*, *supra* note 21, at 18.

²⁹ Green, *supra* note 23, at 3. Other common transgender identifiers include “FTM” (female-to-male), “MTF” (male-to-female), “transman,” “transwoman,” “trans,” “butch,” “femme,” and “gender-queer.” 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, 266 (2005).

³⁰ Phyllis Randolph Frye & Katrina C. Rose, *Responsible Representation of Your First Transgender Client*, 66 TEX. B.J. 558, 558–59 (2003).

³¹ Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 754–55 (2008).

³² *Id.*; Vade, *supra* note 29, at 268–69.

³³ Spade, *supra* note 31, at 754.

³⁴ *Id.* at 755.

³⁵ See Currah, *Gender Pluralisms*, *supra* note 21, at 4. For an illuminating discussion of the range of transgender identities and experiences, see Vade, *supra* note 29, at 264–73.

³⁶ Currah, Juang & Minter, *supra* note 21, at xv. The number of people who share this investment is growing. San Francisco’s annual “Trans March,” billed as the largest existing transgender event, has reportedly grown dramatically since the first march occurred in 2004, and expected an estimated 10,000 participants in 2009. See Trans March, <http://www.transmarch.org> (last visited Oct. 16, 2010); Wikipedia, “Trans March,” http://en.wikipedia.org/wiki/Trans_March (last visited Oct. 16, 2010).

³⁷ See Willy Wilkinson, *Public Health Gains in the Transgender Community in San Francisco: Grassroots Organizing and Community-Based Research*, in TRANSGENDER RIGHTS, *supra* note 21, at

tions,⁴⁰ law enforcement,⁴¹ and, as discussed below, employment.⁴² Often this discrimination takes the form of deliberate exclusion, harassment, and violence,⁴³ but it is also more subtly fostered by social and administrative systems, regulating everything from public restrooms to personal identification documents, that fail to acknowledge that rigid “male” and “female” categories do not always map onto human experience.⁴⁴

Employment discrimination against transgender people is widespread. Many transgender people have difficulty getting hired, especially if the name or gender marker on official identification documents, such as a driv-

192, 193 (“[T]rans people are often mistreated while walking down the street and denied service in public accommodations such as restaurants, retail establishments and bathrooms.”).

³⁸ See Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 96–99 (2002) (describing discrimination by private health insurers and health care providers against transgender patients).

³⁹ See Dean Spade, *Compliance is Gendered: Struggling for Gender Self-Determination in a Hostile Economy*, in TRANSGENDER RIGHTS, *supra* note 21, at 217, 219 (“[H]arassment and violence against trans and gender nonconforming students is rampant in schools, and many drop out before finishing or are kicked out. Many trans people also do not pursue higher education because of fears about having to apply to schools and having their paperwork reveal their old name and birth sex because they have not been able to change these on their documents.”); see also Currah, *Gender Pluralisms*, *supra* note 21, at 7 (describing discriminatory treatment by middle school officials that eventually led “Pat Doe,” a gender nonconforming student, to stop attending school).

⁴⁰ See generally Taylor Flynn, *The Ties That (Don’t) Bind: Transgender Family Law and the Unmaking of Families*, in TRANSGENDER RIGHTS, *supra* note 21, at 32 (discussing how the law can destroy marital and parental relationships when a spouse or married parent transitions). Courts have invalidated marriages in which one partner is transgender by defining the transgender partner’s legal sex as birth sex, which renders the marriage same-sex and therefore illegal in most jurisdictions (notably, however, a prominent federal constitutional challenge against California’s state constitutional prohibition on same-sex marriage, *Perry v. Schwarzenegger*, is currently pending in the Ninth Circuit). The parental rights of the transgender parent may be terminated as a result. See *id.* at 39–41, 42–45.

⁴¹ Police harassment and profiling of transgender people has been described as “widespread.” Spade, *supra* note 31, at 757. “The cultural stereotype that transgender women are prostitutes” may lead to police profiling, which in turn may contribute to an overrepresentation of transgender people in the criminal justice system. In prison, transgender people are typically housed according to their birth sex, and face sexual assault and other violence. *Id.* at 757–58.

⁴² M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998–2008*, 84 CHI.-KENT L. REV. 559, 560 (2009).

⁴³ “Trans people are often the targets of hate violence” and “face daily harassment and assault on the streets, at work, and in their homes.” Wilkinson, *supra* note 37, at 193. According to statistics compiled by the National Coalition of Anti-Violence Programs, sixteen percent of reported anti-LGBT bias-motivated incidents in 2007 were anti-transgender. NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, ANTI-LESBIAN, GAY, BISEXUAL, AND TRANSGENDER VIOLENCE IN 2007, at 4 (2008), available at http://www.ncavp.org/common/document_files/Reports/2007HVRReportFINAL.pdf. Victims of anti-transgender-motivated murders are memorialized at websites such as REMEMBERING OUR DEAD, <http://www.rememberingourdead.org> (last visited Aug. 9, 2010), and INTERNATIONAL TRANSGENDER DAY OF REMEMBRANCE, <http://www.transgenderdor.org/> (last visited Aug. 9, 2010).

⁴⁴ See Dean Spade, *Trans Formation: Three Myths Regarding Transgender Identity Have Led to Conflicting Laws and Policies that Adversely Affect Transgender People*, L.A. LAWYER, Oct. 2008, at 36 (explaining how gender classification policies based on “the myth that all people should be regarded solely through the lens of their birth gender” have pervasive negative impacts on transgender lives).

er's license, birth certificate, or social security card, does not match their gender presentation.⁴⁵ Others are fired when they transition from one sex to another or are otherwise "outed" on the job.⁴⁶

In a 2006 survey of transgender people in San Francisco, for example, 57% of the respondents reported facing employment discrimination on the basis of their transgender status, including 40% who had been denied employment, 18% who had been fired, 22% who had been verbally harassed, 23% who had been referred to with the wrong name or pronoun, and 14% who lacked access to appropriate restroom facilities.⁴⁷

Because it is so difficult for transgender people to secure and maintain employment, there are relatively high levels of poverty, homelessness, substance abuse, and prostitution in the transgender population.⁴⁸ These problems are compounded when transgender people are unable to access sex-segregated social service facilities, such as foster homes, homeless shelters, drug treatment centers, and domestic violence shelters that comport with their gender identity.⁴⁹ In short, pervasive discrimination forces many transgender people into "a deadly cycle of poverty and unemployment."⁵⁰

II. WHAT COURTS TALK ABOUT WHEN THEY TALK ABOUT "SEX"

Although explicit prohibitions on discrimination based on gender identity have been included in some recent versions of the proposed federal Employment Nondiscrimination Act (ENDA), such provisions have been controversial, and ENDA has not yet been passed.⁵¹ Therefore, Title VII's

⁴⁵ Spade, *supra* note 31, at 752. Many transgender people have difficulty changing official documents because evidence of sex reassignment surgery or other medical intervention, which not all transgender people are able or willing to access, is often required. *See id.* at 760–75 (describing the requirements for changing gender markers on Social Security documents, birth certificates, driver's licenses, and passports).

⁴⁶ *See* Kylar W. Broadus, *The Evolution of Employment Discrimination Protections for Transgender People*, in *TRANSGENDER RIGHTS*, *supra* note 21, at 93, 93. Broadus lost a longtime job as a claims adjuster for State Farm Insurance after transitioning from female to male. His sex discrimination claim was denied. *Id.* at 94.

⁴⁷ Badgett et. al, *supra* note 42, at 574. Note that San Francisco is presumed to be "one of the most tolerant cities for transgender people in the United States." *Id.* at 575.

⁴⁸ *See* Spade, *supra* note 31, at 752–53, 757.

⁴⁹ *See* Spade, *supra* note 39, at 227.

⁵⁰ Green, *supra* note 23, at 12.

⁵¹ Various versions of ENDA, which originally sought to outlaw discrimination based on sexual orientation, have been introduced in nearly every Congress since 1979. *See* H.R. REP. NO. 110-406, pt. 1, at 2–7 (2007). In 2007, gender identity nondiscrimination provisions were also included in ENDA for the first time. *Id.* at 46. However, bill sponsor Barney Frank later made a controversial decision to drop the gender identity provisions because the bill had a better chance of passage without them. *See* Shawn Zeller, *Frank Fights Old Allies After Axing Transgender Provision*, CQ WEEKLY, Oct. 17, 2007, at 2978. The sexual-orientation-only bill passed the House, but was never voted on by the Senate. *H.R. 3685: Employment Non-Discrimination Act of 2007*, GOVTRACK.US, <http://www.govtrack.us/congress/>

prohibition on sex discrimination currently provides the best legal recourse for transgender plaintiffs under federal law.⁵² Under Title VII, it is illegal for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual’s race, color, religion, sex, or national origin.”⁵³

The extent to which Title VII’s “because of sex” language protects transgender plaintiffs is unsettled. As described below, federal courts have recently offered three divergent interpretations. First, some courts have held that Title VII protects “men” and “women,” but not transgender persons.⁵⁴ Second, the Sixth Circuit has held that Title VII protects transgender women as gender nonconforming “men,” and transgender men as gender nonconforming “women.”⁵⁵ Finally, the D.C. District Court in *Schroer* has held that Title VII’s “because of sex” language plainly protects transsexual persons as persons who *change* from “men” to “women” (or vice versa).⁵⁶ Because of the doctrinal uncertainty resulting from these three interpretations, protection for transgender plaintiffs under Title VII remains tenuous.

The discussion below begins by briefly introducing two landmark precedents that have informed courts’ treatment of transgender Title VII cases: the Seventh Circuit’s *Ulane v. Eastern Airlines*⁵⁷ and the Supreme Court’s *Price Waterhouse v. Hopkins*.⁵⁸ Next, it describes the more recent cases that illustrate the current doctrinal divergence regarding Title VII’s applicability to transgender plaintiffs.

bill.xpd?bill=h110-3685 (last visited Aug. 9, 2010). So far in the 111th Congress, ENDA bills that include both sexual orientation and gender identity nondiscrimination provisions have been introduced in both the House and the Senate. *H.R. 3017: Employment Non-Discrimination Act of 2009*, GOVTRACK.us, <http://www.govtrack.us/congress/bill.xpd?bill=h111-3017> (last visited Aug. 9, 2010); *S. 1584: Employment Non-Discrimination Act of 2009*, GOVTRACK.us, <http://www.govtrack.us/congress/bill.xpd?bill=s111-1584> (last visited Aug. 9, 2010).

⁵² State and local laws may also provide recourse: at least thirteen states, the District of Columbia, and 108 counties and municipalities have employment nondiscrimination laws that include explicit protections for transgender people. NAT’L GAY & LESBIAN TASK FORCE, JURISDICTIONS WITH EXPLICITLY TRANSGENDER-INCLUSIVE NON-DISCRIMINATION LAWS (2008), available at http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf. The thirteen states are: Minnesota, Rhode Island, New Mexico, California, Maine, Illinois, Washington, New Jersey, Vermont, Iowa, Hawaii, Oregon, and Colorado. As of 2008, sixty-one percent of the national population was not covered by such a law. *Id.*

⁵³ 42 U.S.C. § 2000e-2(a)(1) (2006).

⁵⁴ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221 (10th Cir. 2007).

⁵⁵ See *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004).

⁵⁶ See *Schroer III*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

⁵⁷ *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984).

⁵⁸ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

A. Ulane: *Sex as Anatomy*

The Seventh Circuit's *Ulane v. Eastern Airlines*⁵⁹ is the landmark case interpreting Title VII's "because of . . . sex" language⁶⁰ to exclude transgender persons. Plaintiff Karen Ulane was an Army veteran and commercial airline pilot who was fired after she underwent hormonal therapy and sex reassignment surgery to transition from male to female.⁶¹ The court rejected Ulane's Title VII sex discrimination claim, reversing a district court decision holding that the word "sex" reasonably encompassed "sexual identity," including transsexuality.⁶² In its reversal, the Seventh Circuit relied on the lack of legislative history regarding the meaning of "sex" in the statute to find that "Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."⁶³ The "traditional concept of sex," according to the court, encompassed two mutually exclusive, biologically determined, and permanently fixed types of persons: anatomically male men and anatomically female women.⁶⁴

Therefore, the court reasoned, "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."⁶⁵ What Title VII did not do, according to the court, was to "outlaw discrimination against a person born . . . with a male body who believes himself to be female . . ."⁶⁶ Because the court regarded Karen Ulane in exactly this way—as "a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female"—she was not protected.⁶⁷

⁵⁹ *Ulane*, 742 F.2d. 1081.

⁶⁰ 42 U.S.C. § 2000e-2(a)(1) (2006).

⁶¹ *Ulane*, 742 F.2d. at 1082–83.

⁶² *Id.* at 1084. The district court held that "the term, 'sex,' as used in any scientific sense and as used in [Title VII] can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII." *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983).

⁶³ *Ulane*, 742 F.2d. at 1085. The court noted that the inclusion of sex discrimination provisions in Title VII was introduced as a last-minute floor amendment by a congressman "seeking to scuttle adoption of the Civil Rights Act. The ploy failed and sex discrimination was abruptly added to the statute's prohibition against race discrimination." *Id.*

⁶⁴ *See id.* at 1087 ("We agree . . . that if the term 'sex' as it is used in Title VI is to mean more than biological male or biological female, the new definition must come from Congress."); *id.* at 1083 n.6 ("Biologically, sex is defined by chromosomes, internal and external genitalia, hormones, and gonads. Chromosomal sex cannot be changed, and a uterus and ovaries cannot be constructed. This leads some in the medical profession to conclude that hormone treatments and sex reassignment surgery . . . cannot change the individual's innate sex." (citations omitted)).

⁶⁵ *Id.* at 1085.

⁶⁶ *Id.*

⁶⁷ *Id.* at 1087. According to the court, Ulane could not actually be a female because sex reassignment surgery and hormonal therapy would not change her chromosomes or create functioning reproductive organs. *See id.* at 1083 & n.6.

In some ways, the court seemed to regard Ulane as without a sex at all. Most telling was the court's contemptuous expression of doubt that "a woman can be so easily created from what remains of a man."⁶⁸ No longer a complete man, and without a chance of becoming a true woman, Ulane was effectively rendered sexless and therefore outside the bounds of Title VII. Interpreted in this way, *Ulane* essentially stands for the proposition that transgender people are neither "men" nor "women" for the purposes of Title VII protection.

B. Price Waterhouse: *Sex Beyond Stereotypes*

Several years after *Ulane*, a Supreme Court case held that, rather than simply forbidding discrimination against "women because they are women" and "men because they are men,"⁶⁹ Title VII also outlaws discrimination against women because they are not like *stereotypical* women, and men because they are not like *stereotypical* men.⁷⁰ In *Price Waterhouse v. Hopkins*, plaintiff Anne Hopkins claimed that her employer, Price Waterhouse, engaged in sex discrimination by denying her a promotion because of her gender nonconformity.⁷¹ Hopkins, who was described by one Price Waterhouse partner as "macho,"⁷² was told that she could improve her chances for partnership if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."⁷³ In sustaining Hopkins's claim, the Supreme Court established that discrimination based on a person's failure to conform to sex stereotypes constituted discrimination "because of sex" in violation of Title VII.⁷⁴ In a frequently cited portion of its opinion, the Court declared:

[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, for 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.⁷⁵

Price Waterhouse thus interprets Title VII to prohibit not only discrimination based on one's status as a biological male or female, but also discrimination based on one's nonconformance with stereotypes associated with one's biological maleness or femaleness.⁷⁶ This interpretation, often

⁶⁸ *Id.* at 1087.

⁶⁹ *Id.*

⁷⁰ See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

⁷¹ *Id.* at 231–32.

⁷² *Id.* at 235. Another partner advised her to take "a course at charm school." *Id.*

⁷³ *Id.* (internal quotation marks and citation omitted).

⁷⁴ *Id.* at 237–52.

⁷⁵ *Id.* at 251 (internal quotation marks and citation omitted).

⁷⁶ See WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, *SEXUALITY, GENDER, AND THE LAW* 606 (2d ed. 2004) ("After [*Price Waterhouse*], it appears that two slightly different kinds of discrimination might

referred to as the Title VII “sex stereotyping” theory, created the possibility that transgender people could find protection under Title VII as men or women who do not conform to sex stereotypes.⁷⁷

C. Divergent Doctrines

As described below, *Ulane* and *Price Waterhouse* continue to reverberate through more recent transgender Title VII cases, but not in a consistent or predictable way. In 2004, a groundbreaking Sixth Circuit case, *Smith v. City of Salem*, used *Price Waterhouse*’s sex-stereotyping theory to protect a transgender plaintiff under Title VII.⁷⁸ The Tenth Circuit later declined to follow the Sixth Circuit and invoked *Ulane* to deny a transgender plaintiff’s sex discrimination claim in *Etsitty v. Utah Transit Authority*.⁷⁹ Finally, the D.C. District Court’s *Schroer v. Billington* decision held that Title VII’s sex discrimination prohibition protects transsexual plaintiffs per se, expressly rejecting the reasoning in *Ulane*.⁸⁰

1. *The Sixth Circuit: Smith v. City of Salem*.—In *Smith v. City of Salem*, Plaintiff Jimmie Smith, a lieutenant with the city fire department, alleged that he suffered adverse employment actions after he disclosed his plans to transition from male to female and began to express “less masculine, and more feminine mannerisms and appearance.”⁸¹ The Sixth Circuit upheld his Title VII sex discrimination claim, declaring that *Price Waterhouse* had “eviscerated” the strictly anatomical definition of “sex” adopted in *Ulane*.⁸² Specifically, the court recognized a distinction between “sex” (“an individual’s anatomical and biological characteristics”), and “gender” (“socially-constructed norms associated with a person’s sex”), and found that *Price Waterhouse* “established that Title VII’s reference to ‘sex’ encompasses . . . gender discrimination . . . based on a failure to conform to stereotypical gender norms.”⁸³

be remedied by Title VII: *Price Waterhouse* passed over Hopkins *either* because some partners didn’t think women were capable of doing the job, *or* because some partners were offended that this woman, however qualified, wasn’t feminine enough for their tastes.”)

⁷⁷ Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 240 (2009) (“After *Price Waterhouse*, transgender employees began basing their claims not on their transgender status, but on their gender-nonconformity.” (citation omitted)).

⁷⁸ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Shortly after *Smith*, in *Barnes v. City of Cincinnati*, the Sixth Circuit protected another male-to-female transsexual, Philecia Barnes, under the same theory. See *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2004) (“Following the holding in *Smith*, Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes.”). However, this Comment focuses on *Smith* as the precedent-setting case in the Circuit.

⁷⁹ 502 F.3d 1215, 1221, 1224 (10th Cir. 2007).

⁸⁰ 577 F. Supp. 2d 293, 306–08 (D.D.C. 2008).

⁸¹ *Smith*, 378 F.3d at 572.

⁸² *Id.* at 573.

⁸³ *Id.* (citation omitted).

The court held that Smith had stated a Title VII claim because he had “alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendants’ actions.”⁸⁴ Smith’s situation was viewed as the mirror image of Anne Hopkins’s:

After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses and makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.⁸⁵

By casting the female-identified Smith as a dress-and-makeup-wearing man, the court was able to bring the case within the ambit of *Price Waterhouse*. Title VII, therefore, shielded Smith because of his status as a gender nonconforming male, not because of his transsexual status.⁸⁶ In fact, the court implied that Title VII protected the plaintiffs *despite* their transsexual status: “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim”⁸⁷ So, while *Smith* resulted in a favorable outcome for a transgender plaintiff, the court technically prohibited discrimination because of failure to conform to sex stereotypes, not discrimination because of transgender status *per se*.

Given that transgender persons are, by definition, persons who do not conform to stereotypes associated with their birth sex, the distinction between sex-stereotyping and status-based protection may seem trivial. It presents two potential problems, however. First, it disregards a transgender person’s gender identification by forcing a transgender woman, for example, to cast herself as male.⁸⁸ Second, as long as such a distinction persists, courts can conceivably “legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification” such as “transsexual” or “transgender.”⁸⁹

2. *The Tenth Circuit: Etsitty v. Utah Transit Authority*.—The distinction between sex-stereotyping and status-based protection was fatal to a

⁸⁴ *Id.* at 572.

⁸⁵ *Id.* at 574 (citation omitted).

⁸⁶ See Kramer, *supra* note 77, at 216 (“Smith articulated a cognizable sex discrimination claim . . . not because he was transgender, but because he was a man whose feminine gender expression did not correspond with stereotypical expectations of his sex.” (citation omitted)).

⁸⁷ *Smith*, 378 F.3d at 575.

⁸⁸ See Glazer & Kramer, *supra* note 15, at 666 (“One difficulty with the *Smith* case is that it reduces Smith’s transgender identity to little more than a fashion choice to wear women’s clothing.”).

⁸⁹ *Smith*, 378 F.3d at 574 (citation omitted).

transgender plaintiff's Title VII sex discrimination claim in the Tenth Circuit's *Etsitty v. Utah Transit Authority* decision.⁹⁰ Krystal Etsitty, a male-to-female transsexual, was a bus driver who was fired because her employer did not want her using female restrooms along her bus route.⁹¹ Etsitty alleged that she was discriminated against both because she was transsexual and because she did not conform to male sex stereotypes.⁹²

As to Etsitty's transsexual status-based claim, the court explicitly agreed with *Ulane* that the plain meaning of "sex" was limited to "the two starkly defined categories of male and female," and did not encompass transsexuals.⁹³ The court held that:

In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.⁹⁴

Etsitty's sex-stereotyping claim *was* a claim that she was discriminated against because she was a male—a gender nonconforming male. However, the court denied that claim as well, because it found that Etsitty was something other than merely gender nonconforming.⁹⁵ Etsitty's "use of a restroom designated for the opposite sex," the court held, went beyond "a mere failure to conform to sex stereotypes."⁹⁶

This distinction between transgender people and gender nonconforming males and females thus rendered *Price Waterhouse* inapplicable to Krystal Etsitty. The court recognized that "it may be that use of the women's restroom is an inherent part of one's identity as a male-to-female transsexual and that a prohibition on such use discriminates on the basis of one's status as a transsexual."⁹⁷ But by holding that Title VII required her to be a "male" or a "female," while at the same time implying that she was something else entirely, the court left Etsitty in a kind of legal purgatory, invisible to the law and beyond the reach of its protections.

3. *The D.C. District Court: Schroer v. Billington.*—As mentioned in this Comment's Introduction, the D.C. District Court ruled in favor of transsexual plaintiff Diane Schroer in her sex discrimination claim against

⁹⁰ See *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

⁹¹ *Id.* at 1218–19.

⁹² *Id.* at 1218.

⁹³ *Id.* at 1222 (citation omitted).

⁹⁴ *Id.*

⁹⁵ *Id.* at 1224.

⁹⁶ *Id.* (citation omitted). The only rationale offered was bare and clearly result-oriented: "However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms." *Id.*

⁹⁷ *Id.*

the Library of Congress in *Schroer v. Billington*.⁹⁸ In the first of two alternative holdings, the court held that Schroer was entitled to judgment under a *Price Waterhouse* sex-stereotyping theory.⁹⁹ More notably, however, the court also held that Title VII protected Schroer per se based on her transsexual status. As Judge James Robertson wrote: “I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender nonconforming transsexual.”¹⁰⁰ Even the latter was prohibited, according to Robertson, “based on the language of the statute itself.”¹⁰¹

In so holding, Judge Robertson acknowledged that the court contradicted decisions like *Ulane* and *Etsitty*.¹⁰² But in his view, courts excluding transsexuals from Title VII protection had wrongly “allowed their focus on the label ‘transsexual’ to blind them to the statutory language itself.”¹⁰³ Even if “sex” was defined as one’s anatomical sex, he explained, “the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of sex.’”¹⁰⁴ As described previously, Judge Robertson invoked an analogy to a religious convert to make his point: if discrimination against a person because he changed his religion was discrimination because of religion, then discrimination against a person who changed his sex was clearly discrimination because of sex.¹⁰⁵

Taken together, *Smith*, *Etsitty*, and *Schroer* suggest that a transgender plaintiff’s employment discrimination claim could be treated by a court in one of three possible ways: (1) the court could allow the plaintiff to state a Title VII claim as a transgender person; (2) the court could allow the plaintiff to state a Title VII claim as a gender nonconforming male or female; or (3) the court could find that the plaintiff has no Title VII claim. The next Part argues that, given this doctrinal flexibility, transgender employment discrimination case outcomes are highly dependent on *sub rosa* criteria that “authenticate” the plaintiff’s transgender identity as warranting antidiscrimination protection.

⁹⁸ 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

⁹⁹ *Id.* at 305.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 306.

¹⁰² *Id.* at 307.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 308.

¹⁰⁵ *Id.* at 306.

III. WHAT COURTS TALK ABOUT WHEN THEY TALK ABOUT TRANSGENDER IDENTITY

Beneath the doctrine, the discourse in these key transgender Title VII cases suggests that courts are implicitly considering two criteria in order to determine whether a transgender plaintiff should be protected: first, whether the plaintiff has been diagnosed with and treated for Gender Identity Disorder (GID),¹⁰⁶ and second, whether the plaintiff's gender expression is sufficiently "male" or "female" in conformance with society's binary gender norms.¹⁰⁷ These two criteria, taken together, "authenticate" the plaintiff's transgender identity as the kind of identity that typically qualifies for protection under Title VII.

The first criterion, GID diagnosis and treatment, serves as a kind of proxy for the "immutability" considerations that are often at work in anti-discrimination law.¹⁰⁸ Under the immutability rubric, status and characteristics that a person cannot easily change should be protected; conduct or

¹⁰⁶ "Gender Identity Disorder" is the formal diagnosis for a person who experiences significant "gender dysphoria," defined as "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–33 (4th ed. 1994). Treatment for GID is typically undertaken in accordance with the Harry Benjamin "Standards of Care," guidelines originally conceived by, and now named after, an endocrinologist known for his pioneering studies of transsexuality begun in the 1940s. See Dallas Denny, *Transgender Communities of the United States in the Late Twentieth Century*, in TRANSGENDER RIGHTS, *supra* note 21, at 171, 175–76. The Standards of Care describe hormone therapy and sex-reassignment surgery options, and require psychotherapy and "Real Life Experience," living full-time in the gender of choice, before physical medical intervention. See generally HARRY BENJAMIN, INT'L GENDER DYSPHORIA ASS'N, STANDARDS OF CARE FOR GENDER DYSPHORIA (6th ed. 2001) (providing background on GID and standards of care). However, the GID diagnosis has been criticized for pathologizing transgender people. See, e.g., Judith Butler, *Undiagnosing Gender*, in TRANSGENDER RIGHTS, *supra* note 21, at 274, 274–75 ("To be diagnosed with gender identity disorder is to be found, in some way, to be ill, sick, wrong, out of order, abnormal, and to suffer a certain stigmatization as a consequence of the diagnosis being given at all.").

¹⁰⁷ It is important to realize that these two factors are not independent: they often act to reinforce each other. For example, a diagnosis of GID, which is usually a precondition for sex reassignment surgery, typically requires a longstanding identification with and aspiration toward a set of traits stereotypically associated with the opposite sex. Once GID has been diagnosed, medical intervention tends to focus on physical and behavioral actualization of many of these stereotypically gendered traits. See Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 731–32 (2005); Dean Spade, *Resisting Medicine, Re/Modeling Gender*, 18 BERKELEY WOMEN'S L.J. 15, 24–26 (2003).

¹⁰⁸ See, e.g., *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) ("Equal employment opportunity may be secured only when employers are barred from discriminating against employees on the basis of immutable characteristics, such as race and national origin."); *Rogers v. Am. Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981) (holding that a policy that prohibited a black employee from wearing her hair in corn rows did not constitute racial discrimination because the policy "does not regulate on the basis of any immutable characteristic"). Some scholars argue that immutability "has been given an unnecessary and unintended prominence" in antidiscrimination law. See, e.g., Camille Gear Rich, *Performing Racial and Ethnic Identity: Discrimination by Proxy and the Future of Title VII*, 79 N.Y.U. L. REV. 1134, 1220 (2004) (citation omitted).

characteristics that a person can easily change should not.¹⁰⁹ Immutability considerations played out fairly explicitly in the 2007 debate about whether ENDA should include transgender protections. Opponents of these protections claimed, for example, that gender identity was something “non-inherent” and “ephemeral,”¹¹⁰ constituted only by person’s “actions or representations” rather than by any “discernible characteristic or status.”¹¹¹ Proponents of transgender protections, on the other hand, described transgender people as having “an internal sense of [one’s] gender” that conflicts with birth sex,¹¹² and as having been “born with that set of feelings.”¹¹³ In transgender Title VII case law, as further discussed below, a GID diagnosis and treatment functions as an implicit certification that a person’s transgender identity represents a medically discernible status, not just a chosen conduct.

The second criterion underlying transgender Title VII decisions—conformance to male or female gender norms—tests whether a transgender person’s identity is sufficiently assimilationist to be protected. Scholar Kenji Yoshino has described how antidiscrimination law, while generally protecting immutable traits, may require that other related traits be downplayed, or “covered,” in order to foster assimilation with the dominant culture.¹¹⁴ For example, Yoshino notes that, while an African-American woman could not be fired for having dark skin, she could be prohibited from wearing her hair in a “cornrow” style associated with African-American culture.¹¹⁵ The requirement that a transgender plaintiff conform to binary gender norms can be conceived of as a kind of “covering” requirement: even if a male-to-female transsexual woman “can’t help” being transgender, she might be required to look like what society expects a cisgender (that is, non-transgender) woman to look like in order to minimize the social disruption associated with her transgender status.

¹⁰⁹ See Rich, *supra* note 108, at 1202–03 (noting that some courts “have concluded that Title VII protects only against ‘status’-based discrimination and is not concerned with discrimination triggered by ‘conduct’” and that “courts are conducting an inquiry into the status/conduct divide when they attempt to distinguish between the ‘involuntary’ attributes of a group and those which are ‘voluntary,’ or, alternatively, when they distinguish between the ‘immutable’ and ‘mutable’ characteristics of a protected class identity” (citations omitted)).

¹¹⁰ See H.R. REP. NO. 110-406, at 33 (2007).

¹¹¹ ENDA Hearing, *supra* note 17, at 36 (statement of Lawrence Z. Lorber, Partner, Proskauer Rose, LLP).

¹¹² *Id.* at 8 (statement of Rep. Tammy Baldwin).

¹¹³ *Id.* at 12 (statement of Rep. Barney Frank).

¹¹⁴ Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 850 (2002). Assimilation in the workplace may be valued so highly because a homogenous workforce reduces transaction costs for employers. See Devon W. Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 Yale L.J. 1757, 1789–91 (2003) (reviewing CROSSROADS, DIRECTIONS, AND A NEW CRITICAL RACE THEORY (Francisco Valdes, Jerome McCrystal Culp & Angela P. Harris eds., 2002)).

¹¹⁵ Yoshino, *supra* note 114, at 890–92. Such was the outcome in *Rogers v. American Airlines*, 527 F. Supp. 229, 231 (S.D.N.Y. 1981).

What transgender people look like certainly was a concern for some of the opponents to the proposed transgender protections in ENDA. For example, the conservative Traditional Values Coalition warned that:

If Americans see what these poor gender confused individuals look like . . . , they'd be outraged. Imagine being forced to hire or retain a person who goes through half of a so-called sex change operation? Should a business really have to deal with she-male demands? Or, to hire or retain a person who just "thinks" he's the opposite sex, but doesn't "transition" into another sex.¹¹⁶

Another opponent objected that the transgender-inclusive ENDA bill "does not even limit gender identity to male and female."¹¹⁷

Courts seem to account for concerns like these by requiring a transgender person to be clearly identifiable as either a man or a woman in conformance with male or female gender norms as a condition for Title VII protection. In short, given the appropriate medical "certification," the law will protect a gender identity that is unmoored from biological sex—but only when that gender identity fits clearly into either the "man" or "woman" category. Switching categories is allowed, but lingering between them is not.

The discussion below examines the discourse in *Smith*, *Schroer*, and *Etsitty* to demonstrate how GID diagnosis and treatment as well as conformance with binary gender norms are at work in determining which transgender plaintiffs receive Title VII protection. Because these two criteria do not fairly capture the lived experiences of most transgender people, however, they result in vastly underinclusive Title VII protection.

A. *Smith v. City of Salem*

In *Smith v. City of Salem*, which extended Title VII protection to transsexual firefighter Jimmie Smith under a sex-stereotyping theory,¹¹⁸ GID diagnosis and medical history figured prominently in the Sixth Circuit's discussion.¹¹⁹ The court initially described Smith as someone who "considers himself a transsexual *and* has been diagnosed with Gender Identity Disorder," which, it further explained, "the American Psychiatric Association [APA] characterizes as a disjunction between an individual's sexual organs and sexual identity."¹²⁰ Implicitly, then, what Smith subjectively "considered himself" to be was not sufficient to authenticate his transgender status: a stamp of legitimacy from an objective scientific medical organization was also necessary.

¹¹⁶ *ENDA Hearing*, *supra* note 17, at 76–77 (statement of the Traditional Values Coalition).

¹¹⁷ *Id.* at 102 (statement of Richard Land, President, Ethics and Religious Liberty Comm'n of the S. Baptist Convention).

¹¹⁸ 378 F.3d 566, 571–72 (6th Cir. 2004).

¹¹⁹ *Id.* at 572.

¹²⁰ *Id.* at 567–68 (emphasis added) (citation omitted).

Similarly, the court characterized Smith's claim as one of discrimination "on account of his non-masculine behavior *and* GID."¹²¹ Reference to the GID diagnosis here demonstrated that Smith's claim was based on his medically certified status, not merely on his conduct, and was therefore a tenable discrimination claim under Title VII. The court's discussion of GID "treatment," in turn, legitimized Smith's nonmasculine conduct as merely an incident of this medically certified status. For example, the court explained that "after being diagnosed with GID, Smith began 'expressing a more feminine appearance on a full-time basis'—including at work—in accordance with international medical protocols for treating GID."¹²² It also noted that Smith "informed [a supervisor] of the likelihood that his treatment would eventually include complete physical transformation from male to female."¹²³ Framed as a nondiscretionary, medically required aspect of treatment for his transgender status, Smith's gender nonconformity became acceptable and worthy of legal protection. In this way, discussion of medical diagnosis and treatment served as the court's implicit answer to the status-or-conduct question.

The court also subtly confirmed that Smith's gender identity was sufficiently "female" to accord with society's binary gender norms. Although the court stated that, under *Price Waterhouse*, "employers who discriminate against men because they . . . wear dresses and makeup" violate Title VII,¹²⁴ and cast Smith as a gender nonconforming male in order to comport with this precedent, it did not ultimately see Smith simply as a man in a dress. Rather, it saw him as a man who was intent on making a "complete physical transformation from male to female."¹²⁵ There was no indication that Smith wished to retain significant "maleness" while also adopting significant feminine characteristics, nor otherwise reside in the ambiguous terrain between male and female norms. As such, Smith's gender identity was sufficiently assimilationist to binary gender norms to warrant Title VII protection.

B. *Schroer v. Billington*

As described in Part II, the D.C. District Court's *Schroer v. Billington* decision went beyond *Smith* by holding that Title VII's "because of sex" language protected transsexuals per se.¹²⁶ Despite this apparent doctrinal extension, however, *Schroer* leaned heavily on the same implicit criteria that were at work in *Smith*.

¹²¹ *Id.* at 570 (emphasis added).

¹²² *Id.* at 568.

¹²³ *Id.*

¹²⁴ *Id.* at 574.

¹²⁵ *Id.* at 568.

¹²⁶ *Schroer III*, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008).

At first, the *Schroer* court seemed to accept Diane Schroer's transgender identity at face value, noting that "although born male, Schroer has a female gender identity—an internal, psychological sense of herself as a woman."¹²⁷ But, as in *Smith*, the fact that Schroer had been "diagnosed with gender identity disorder" emerged to validate as a certified medical status Schroer's otherwise merely self-professed transgender identity.¹²⁸

Also, like the court in *Smith*, the *Schroer* court referred to Schroer's medical treatment in order to legitimize her gender nonconformity. For example, the court noted that after being diagnosed with GID, Schroer had "work[ed] with a licensed clinical social worker . . . to develop a medically appropriate plan for transitioning from male to female" that was "guided by a set of treatment protocols formulated by the leading organization for the study and treatment of gender identity disorders, the Harry Benjamin International Gender Dysphoria Association."¹²⁹ The court also explained that, immediately before Schroer was hired, "she was about to begin the phase of her gender transition during which she would be dressing in traditionally feminine clothing and presenting as a woman on a full-time basis."¹³⁰ Finally, the court reported that, "in the context of explaining the Harry Benjamin Standards of Care [to her employer], Schroer explained that she would be living full-time as a woman for at least a year before having sex reassignment surgery."¹³¹ Thus explained in the context of medical diagnosis and treatment, Schroer's transgender identity was authenticated as something both undeniably real and beyond Schroer's control. Such a demonstration that "being transgender" is more like a status than a conduct served as an implicit justification for Title VII protection.

The court also demonstrated that Schroer's gender identity was sufficiently conformist to binary gender norms to warrant protection. Schroer was described as someone who had become "legally, culturally, and physically, a woman named Diane."¹³² Her female gender identity was not ambiguous in any of these dimensions. She had "lived full-time as woman"¹³³ for over three years, had "changed her legal name,"¹³⁴ and had "obtained a Virginia Driver's license and a United States Uniformed Services card reflecting her name change and gender transition."¹³⁵ The court also noted that Schroer had planned to undergo facial feminization surgery before she began work at the Library, and then sex reassignment surgery a year later.¹³⁶

¹²⁷ *Id.* at 295.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.* at 296.

¹³¹ *Id.*

¹³² *Id.* at 306.

¹³³ *Id.* at 299.

¹³⁴ *Id.*

¹³⁵ *Id.* at 299–300.

¹³⁶ *Id.* at 296.

To the court, Schroer was decidedly not residing somewhere in the socially confusing territory between male and female. In fact, the court seemed to chide the Library's hiring manager for being unable "to visualize Diane Schroer as anyone other than a man in a dress."¹³⁷ Since Schroer fit safely within society's "Woman" category, she was protected under Title VII.

C. *Etsitty v. Utah Transit Authority*

The Tenth Circuit's *Etsitty v. Utah Transit Authority* decision, described in Part II, denied Title VII protection to Krystal Etsitty, a transgender bus driver who was fired because of her employer's concerns about her restroom usage along her bus route.¹³⁸ Etsitty seemed to have the necessary medical status for protection: the court identified her as "a transsexual who ha[d] been diagnosed with Adult Gender Identity Disorder."¹³⁹ The court also noted that Etsitty had seen an endocrinologist who had prescribed her hormones "to prepare for a sex reassignment surgery in the future."¹⁴⁰ However, the court also took pains to recognize that "while [Etsitty] has begun the transition from male to female by taking female hormones, she has not yet completed the sex reassignment surgery."¹⁴¹ Unlike Jimmie Smith or Diane Schroer, Etsitty could not convince the court that she "completely" was, or would "completely" become, a woman. Specifically, as Krystal Etsitty had explained to her employer, she "still had male genitalia because she did not have the money to complete the sex change operation."¹⁴²

As the court explained, Etsitty's male genitals were of significant concern to her employer, the Utah Transit Authority (UTA). UTA feared "liability . . . if a UTA employee with male genitalia was observed using the female restroom" and also worried "that Etsitty would switch back and forth between using male and female restrooms."¹⁴³ Etsitty countered that "because [she] looked and acted like a woman, no one would know she was not biologically female and therefore could not take offense to her use of women's restrooms."¹⁴⁴ Indeed, the bus company had not received any complaints about her restroom usage.¹⁴⁵ However, the bottom line, as reflected by a UTA representative's statement, was that "even though his appearance may look female, he's still a male because he still ha[s] a penis."¹⁴⁶

¹³⁷ *Id.* at 305.

¹³⁸ 502 F.3d 1215, 1219 (10th Cir. 2007).

¹³⁹ *Id.* at 1218.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1219.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1226.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1225 (internal quotation marks omitted).

The importance of Etsitty's penis was made clear by her termination papers, which "indicated [she] would be eligible for rehire after completing sex reassignment surgery."¹⁴⁷

The court agreed with UTA that fear of liability and negative public reaction resulting from "the use of women's public restrooms by a biological male" justified Etsitty's firing.¹⁴⁸ Even though Etsitty had been diagnosed with GID, was taking female hormones, and maintained a feminine appearance, because of her genitalia, she (quite literally) could not gain entrance into society's box marked "Women." The court effectively saw her as a confusing and socially problematic "man in a dress"—and even worse, a man in the wrong restroom.¹⁴⁹ As such, she simply threatened too much social disruption to be protected under Title VII.

D. *The Underinclusivity Problem*

The above cases show that considerations of two criteria—GID diagnosis and treatment, and conformance with society's binary male or female gender norms—play an implicit role in determining whether a transgender identity is protected under Title VII. These two factors function to "authenticate" a transgender identity as being both grounded in an immutable status and assimilationist, and therefore appropriately embraced by nondiscrimination law. The fact that the *Smith* and *Schroer* cases deployed these criteria to justify transgender protection resulted in a significant legal victory for transgender people. However, these factors are ultimately an insecure foundation on which to rest transgender-protective doctrine, because reliance on them excludes the majority of transgender people from protection.

Krystal Etsitty's case provides a paradigmatic example of this underinclusivity. Etsitty certainly had a strong sense of her own female gender identity: as the court reported, she "identifie[d] herself as a woman and ha[d] always believed she was born with the wrong anatomical sex organs."¹⁵⁰ Even before being diagnosed with GID, Etsitty had "lived and dressed as a woman outside of work and used the female name of 'Krystal.'"¹⁵¹ After beginning hormone treatment, she began to "live full time as a woman."¹⁵² Nonetheless, her transgender identity was not authenticated

¹⁴⁷ *Id.* at 1219.

¹⁴⁸ *Id.* at 1224, 1226–27. Etsitty argued that "UTA could not be subject to liability, as a matter of law, for allowing a male-to-female transsexual employee to use women's restrooms," but the court nevertheless found the UTA's fear of such liability legitimate. *Id.* at 1226–27.

¹⁴⁹ Notably, the court did not consider the social implications of requiring Etsitty to use men's bathrooms. *See id.* at 1226–27.

¹⁵⁰ *Id.* at 1218.

¹⁵¹ *Id.*

¹⁵² *Id.*

by the court because it was unclear whether she would complete her GID treatment by having sex reassignment surgery.¹⁵³

Many transgender people could find themselves in Krystal Etsitty's position, because, as explained in Part I, most transgender people do not have sex reassignment surgery.¹⁵⁴ Many cannot afford it, especially since it is not covered by most health insurance policies.¹⁵⁵ Others choose not to have surgery because they find it unnecessarily invasive or risky.¹⁵⁶ Some simply do not wish to change their bodies.¹⁵⁷ Furthermore, some transgender people resist the GID diagnosis that is typically required for surgery because it tends to pathologize transgender identity.¹⁵⁸ GID diagnosis and "complete" sex reassignment from one binary gender category to the other, therefore, are factors that have less to do with the authenticity of one's transgender identity than with access to and attitudes about medical treatment.

Furthermore, some transgender people may not seek a GID diagnosis or a "complete" sex reassignment because they do not identify as a member of the opposite sex. Recall that a transgender person is generally defined as one whose gender identity or expression is not in accord with the social expectations associated with his or her birth sex.¹⁵⁹ This does not mean, however, that a transgender person necessarily has an identity in accord with social expectations associated with the opposite sex. Among the multiplicity of persons who might find a place under the transgender umbrella are butch females, effeminate males, androgynous and intersex persons, and others who in some way occupy the terrain between "man" and "woman."¹⁶⁰ These identities are likely to be left out if transgender protection under Title VII depends on GID diagnosis and conformance with male or female binary gender norms.

The plight of Darlene Jespersen in *Jespersen v. Harrah's Operating Co.*¹⁶¹ is instructive. Although Jespersen did not identify as transgender, her case demonstrates the vulnerability of those who, while not identifying with the opposite sex, nonetheless do not conform to the gendered social norms associated with their own birth sex. Jespersen had "worked successfully as a bartender at Harrah's for twenty years and compiled what by all accounts was an exemplary record" before she was abruptly fired for refusing to

¹⁵³ *See id.*

¹⁵⁴ *See Spade, supra note 31, at 754–55.*

¹⁵⁵ *Id.* at 755; *Vade, supra note 29, at 268–69.*

¹⁵⁶ *See Spade, supra note 31, at 754–55; Vade, supra note 29, at 269.*

¹⁵⁷ *See Vade, supra note 29, at 269.*

¹⁵⁸ *See, e.g., Butler, supra note 106, at 274.*

¹⁵⁹ *See supra* Part I.A.

¹⁶⁰ *See, e.g., Green, supra note 23, at 3.*

¹⁶¹ 444 F.3d 1104 (9th Cir. 2005) (en banc).

comply with a dress code that required all women to wear makeup.¹⁶² Jespersen testified “that wearing [makeup] would conflict with her self-image,”¹⁶³ and that she “found the makeup requirement offensive, and felt so uncomfortable wearing makeup that she found it interfered with her ability to perform as a bartender.”¹⁶⁴ Wearing makeup “affected her self dignity . . . and took away her credibility as an individual and as a person.”¹⁶⁵ She clearly had a deeply ingrained sense of her own identity that did not conform to the stereotypically gendered social expectations reflected by the makeup requirement.

The Ninth Circuit, sitting en banc, however, rejected her *Price Waterhouse* sex-stereotyping claim.¹⁶⁶ The court found that Jespersen’s “subjective reaction” to the makeup requirement was insufficient to demonstrate that the dress code was so burdensome as to be discriminatory.¹⁶⁷ The dress code, according to the court, “appropriately differentiate[d] between the genders,”¹⁶⁸ and the court seemed unwilling to seriously entertain the notion that a female could be significantly burdened by such an “appropriate” female grooming requirement.¹⁶⁹

Chief Judge Alex Kozinski disagreed. In a colorful dissent, he wrote:

Imagine . . . a rule that all judges wear face powder, blush, mascara and lipstick while on the bench. Like Jespersen, I would find such a regime burdensome and demeaning; it would interfere with my job performance. I suspect many of my colleagues would feel the same way. Everyone accepts this as a reasonable reaction from a man, but why should it be different for a woman?¹⁷⁰

Kozinski therefore seemed to understand that a female might react to a “feminine” dress code requirement as negatively as a male might. She might have a gender identity that was neither stereotypically female, nor male, but rather somewhere in between. The en banc majority, however, recognized no such option.

One might ask whether *Jespersen* would have been decided differently if, rather than being Darlene Jespersen, the plaintiff had been a biologically

¹⁶² *Id.* at 1106–07.

¹⁶³ *Id.* at 1107–08.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* Jespersen also testified that “when she wore the makeup, she felt very demeaned.” *Id.*

¹⁶⁶ *Id.* at 1106.

¹⁶⁷ *Id.* at 1112. The court distinguished *Price Waterhouse* based on the impact that the discrimination at issue there had on prospects for job success: Anne Hopkins was assailed by the Price Waterhouse partners for “the forceful and aggressive techniques that made her successful in the first place.” *Id.* at 1111. In Jespersen’s case, however, there was “nothing to suggest the grooming standards would objectively inhibit a woman’s ability to do the job.” *Id.* at 1112. Under this interpretation, sex-stereotyping protection for gender extends only to a subset of gender nonconforming traits which objectively foster job performance in a particular setting.

¹⁶⁸ *Id.* at 1009.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 1118 (Kozinski, J., dissenting).

female transgendered person who had been diagnosed with GID. Perhaps with such objective certification of what the plaintiff subjectively experienced, the court might have accepted the plaintiff's gender identity and understood why complying with the makeup requirement would be so burdensome. But since Jespersen did not and could not credibly identify as male, the court pushed her into society's stereotypical "female" category, the only other cognizable option in a binary-gendered world.

The *Jespersen* case thus illustrates why transgender people who neither subscribe to the gendered norms of their birth sex nor identify as the opposite sex are excluded when courts rely on GID diagnosis and conformance with binary gender norms to authenticate transgender identity. Cases like *Smith* and *Schroer* that implicitly lean on these criteria in order to justify Title VII protection, therefore, could be interpreted as protecting only a relatively narrow class of transsexuals, and not transgender people more generally. Transgender people like Krystal Etsitty, who cannot access sex reassignment surgery, or like Darlene Jespersen, who are gender nonconforming yet do not identify as the opposite sex, are left unprotected.

The next Part argues that, to the extent courts are implicitly testing transgender identities in order to determine who gets protection, a more inclusive test should be used.

IV. TALKING ABOUT "SEX" LIKE RELIGION

Cases like *Smith* and *Schroer* demonstrate that courts are beginning to read Title VII in a more transgender-protective way. In doing so, they are implicitly acknowledging that one's "sex" is in part determined by gender identity and is fluid and complex. They are acknowledging that "sex" is, at least in some ways, not a paradigmatic protected class that is defined solely on the basis of an easily identifiable characteristic.

The *Schroer* court grasped at this when it compared Diane Schroer to a religious convert. Recall the court's analogy:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute.¹⁷¹

Doctrinally, this analogy functioned to show why "transsexuals" should be protected based on the plain language of Title VII's prohibition against discrimination "because of sex," just as "converts" undoubtedly were protected under Title VII's prohibition "because of religion."¹⁷² But the religion analogy also implied that, at least in some ways, sex is like religion—which is

¹⁷¹ *Schroer III*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

¹⁷² *Id.*

not a paradigmatic protected class. For one thing, as the conversion example demonstrates, religious identity is not “immutable.”

In fact, the possibility of change is not the only thing that religious identity and sexual identity, with gender identity as a component, have in common. There are at least two other important similarities. First, religious identity has a deeply personal, internal genesis that lacks a fixed external referent. Likewise, gender identity, as a determinant of sexual identity, is described as an “internal, deeply felt sense” that is independent of one’s physical features.¹⁷³ Second, one’s religious identity may not adhere to tenets of an organized religion or orthodox doctrine, just as one’s gender identity might not conform to dogmatic “male” and “female” norms.

These characteristics of religious identity can make it difficult to discern and define. Nonetheless, and despite the First Amendment, courts can and do engage in the “delicate business”¹⁷⁴ of testing religious identities for the purposes determining whether Title VII protection is warranted.¹⁷⁵ Not every claimed religious identification receives protection: the court must draw lines.¹⁷⁶ Title VII religious discrimination jurisprudence, therefore, provides a model for authenticating—for the purposes of conferring protection—a deeply personal, internal, and sometimes variable identity. Given that gender identity shares some of these difficult characteristics, and to the extent that courts are engaged implicitly in the authentication of transgender identity, the religious model can be instructive. The application of tests for religious identity to the problem of gender identity produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary.¹⁷⁷ The discussion below begins by describing how courts test religious identity in Title VII cases, then proceeds to explain how and why similar tests should be applied in transgender employment discrimination cases.

¹⁷³ Green, *supra* note 23, at 3.

¹⁷⁴ E.E.O.C. v. Union Independiente De La Autoridad De Aqueductos U Alcantarillados De P.R., 279 F.3d 49, 57 (1st Cir. 2002).

¹⁷⁵ See Susannah P. Mroz, Note, *True Believers: Problems of Definition in Title VII Religious Discrimination Jurisprudence*, 39 IND. L. REV 145, 159–73 (2005) (describing several Title VII cases in which courts have “tested” religious identity, despite First Amendment limitations that prevent courts from defining “religion”).

¹⁷⁶ See *id.* at 160–62 (describing Title VII cases in which courts held that neither belief in the healing power of “Kozy Kitten People/Kat Food” nor Ku Klux Klan ideology was a religious belief).

¹⁷⁷ Elizabeth Reilly has similarly proposed that tests for religious identity can be used as models for the legal validation of an intersex person’s self-determined sex identity. See Elizabeth Reilly, *Radical Tweak: Relocating the Power to Assign Sex*, 12 CARDOZO J.L. & GENDER 297, 334–35 (2005).

A. Consistency as a Test for Religious Identity

Under the First Amendment, courts, of course, cannot assess whether a claimed religious belief is true or false.¹⁷⁸ Instead, courts determine whether the belief should be considered “religious” based on whether it “occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”¹⁷⁹ A belief need not correspond to the tenets or dogma of any particular religious organization to be considered “religious,”¹⁸⁰ nor need it even relate to a deity.¹⁸¹ Notably, a belief “need not be acceptable, logical, consistent, or comprehensible” in order to be recognized by the First Amendment.¹⁸²

A separate question that does allow for judicial factfinding, however, is whether a religious belief is “sincerely held.”¹⁸³ So while courts do not assess the validity of a religious belief, they do assess the sincerity of the religious believer in order to determine whether antidiscrimination protection is ultimately warranted.¹⁸⁴

Courts generally evaluate a religious believer’s sincerity by examining whether the believer’s expressions and behavior are consistently in accord with the claimed belief.¹⁸⁵ In *E.E.O.C. v. Union Independiente*, for example, the court denied summary judgment to an employee who claimed he was discriminated against on the basis of his Seventh-Day Adventist objection to union membership.¹⁸⁶ According to the court, evidence that the employee had behaved in a manner inconsistent with the tenets of Seventh-

¹⁷⁸ See *United States v. Ballard*, 322 U.S. 78, 86 (1944) (noting that under the First Amendment, persons “may not be put to the proof of their religious doctrines or beliefs”).

¹⁷⁹ *United States v. Seeger*, 380 U.S. 163, 166 (1965).

¹⁸⁰ *Frazee v. Ill. Dept. of Emp’t Sec.*, 489 U.S. 829, 834 (1989).

¹⁸¹ See, e.g., *Young v. Sw. Sav. & Loan Ass’n*, 509 F.2d 140, 141–42 (5th Cir. 1975) (upholding an atheist’s religious discrimination claim under Title VII); *Peterson v. Wilmur Comm. Inc.*, 205 F. Supp. 2d 1014, 1015–16 (E.D. Wis. 2002) (holding that adherence to the white supremacist doctrine of “Creativity” constituted a religious belief under Title VII even though it “does not espouse a belief in God, afterlife or any sort of supreme being”).

¹⁸² *Thomas v. Review Bd. of the Ind. Emp’t Sec. Div.*, 450 U.S. 707, 714 (1981).

¹⁸³ *Seeger*, 380 U.S. at 185 (“But we hasten to emphasize that while the ‘truth’ of a belief is not open to question, there remains the significant question whether it is ‘truly held.’”).

¹⁸⁴ See *E.E.O.C. v. Union Independiente De La Autoridad De Aqueductos U Alcantarillados De P. R.*, 279 F.3d 49, 56 (1st Cir. 2002) (noting that a Title VII plaintiff “must demonstrate both that the belief . . . is religious and that it is sincerely held” and that “the element of sincerity is fundamental” in order to show conflict with an employment requirement); see also *Mroz*, *supra* note 175, at 167–68 (noting that the analysis of the religious character of a belief is distinct from the analysis of “whether the person ‘really’ believes it,” and that “[e]ven seemingly ‘religious’ beliefs do not qualify as ‘religious’ [for the purposes of Title VII protection] if they are not ‘sincere’”).

¹⁸⁵ See *Union Independiente*, 279 F.3d at 57 (“Evidence tending to show that an employee acted in a manner inconsistent with his professed religious belief is . . . relevant to the factfinder’s evaluation of sincerity.” (citation omitted)); see also *Mroz*, *supra* note 175, 172 (concluding that, under religion-related Title VII jurisprudence, courts compare a person’s beliefs to his actions and, “if the two conflict too greatly, courts will find that a supposedly ‘religious’ belief is . . . not ‘sincere’”).

¹⁸⁶ *Union Independiente*, 279 F.3d at 51.

Day Adventism—by lying on an employment application, being divorced, taking a public oath, and working five days a week—could allow a factfinder to conclude that his professed beliefs were not sincere.¹⁸⁷ The same was true with regard to the employee’s inconsistent statements about what his Seventh-Day Adventist faith required.¹⁸⁸

Two cases in which plaintiffs claimed that religious beliefs required them to wear beards in violation of their employer’s grooming policies are also instructive. In *Hussein v. Waldorf Astoria*, the court denied a plaintiff’s claim that he was discriminated against when his employer refused to let him work with a beard.¹⁸⁹ The court found that the plaintiff’s belief was not sincere because he had never behaved in any way consistent with such a belief.¹⁹⁰ In particular, prior to the incident in question, he had “never worn a beard to work . . . in some 14 years” and had never mentioned his religion or explained his religion to anyone.¹⁹¹ Furthermore, “within three months, he shaved his beard, an undisputed fact that also undercuts his claim of religious necessity.”¹⁹² In contrast, in *Carter v. Bruce Oakley*, a similar claim was upheld when the plaintiff had only shaved his beard when threatened with termination, and had repeatedly informed his employer of that a no facial hair policy conflicted with his religious beliefs.¹⁹³ The cases illustrate how courts use consistency to assess sincerity.

B. Consistency as a Test for Transgender Identity

This Comment has shown that the test courts implicitly use to authenticate gender identity is flawed. To the extent that courts must test transgender identities, the “consistency” test from religious jurisprudence provides a much better rubric. This test developed in a context where identity can be fluid, unorthodox, and lacking a fixed external referent, but nonetheless authentic. Therefore, it reflects a more realistic conceptualization of how gender identity functions as a part of one’s sexual identity.

As such, the consistency test would remedy some of the underinclusivity that plagues the current medical-and-conformity model. For example, it most certainly would protect someone like Krystal Etsitty, who had “always believed”¹⁹⁴ that her gender did not match her birth sex and had consistently “lived and dressed”¹⁹⁵ as a woman. The fact she had not completed sex reassignment surgery would not be dispositive. In addition,

¹⁸⁷ *Id.* at 56–57.

¹⁸⁸ *Id.* at 57.

¹⁸⁹ 134 F. Supp. 2d 591, 592 (S.D.N.Y. 2001).

¹⁹⁰ *Id.* at 597 (finding that the plaintiff’s religious assertion was “not bona fide”).

¹⁹¹ *Id.* at 596.

¹⁹² *Id.* at 596–97.

¹⁹³ 849 F. Supp. 673, 674 (E.D. Ark. 1993).

¹⁹⁴ *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1218 (10th Cir. 2007).

¹⁹⁵ *Id.*

someone like Darlene Jespersen, who had exhibited a consistent gender identity at work for twenty years (in her case, by not wearing makeup) would also be protected. As Judge Kozinski noted, there could be “no doubt”¹⁹⁶ about the “intensity of her feelings”¹⁹⁷ and the sincerity of her gender identity: she was willing to lose her job rather than compromise it. A showing that a transgender identity was consistent, and that it persisted despite significant burdens, would be enough.

The consistency model also fairly accounts for the interests of employers in the stability and predictability of, for example, name and dress. A consistency requirement ensures that employers will be able to regularize professional relations among coworkers and with customers.

One particularly contentious issue between transgender persons and their employers is bathroom use. Under the consistency model, a transgender person could not lose her job for using a bathroom that corresponded with her gender identity like Krystal Etsitty did, regardless of whether she had sex reassignment surgery. This is fair: despite the outcome in *Etsitty*, employers do not have an insurmountably strong interest in preventing transgender women from using women’s restrooms, or in requiring bathroom access to be based on genital status. A common justification for basing bathroom access policies on genital status is that such a practice is customary and reflects a widespread cultural preference.¹⁹⁸ However, requiring a transgender woman to use men’s restrooms instead of women’s restrooms because of her genitals would certainly cause no less disruption than allowing her to use the women’s room.¹⁹⁹ Her use of the men’s restroom would likely be more socially disruptive, in fact, because “fellow employees’ discomfort does not stem from the outward appearance of genitals because most fellow employees never see others’ genitals while using

¹⁹⁶ *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1118 (9th Cir. 2006) (Kozinski, J., dissenting).

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *Etsitty*, 502 F.3d at 1224, 1226 (holding that a transgender woman could be fired for using women’s public restrooms based on the employer’s fear of liability); *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (upholding an employer’s genital-based restroom access policy because it “only required Plaintiff to conform to the accepted principles established for gender-distinct public restrooms”); *Goins v. West Grp.*, 635 N.W.2d 717, 723 (Minn. 2001) (upholding an employer’s genital-based restroom access policy because “the traditional and accepted practice in the employment setting is to provide restroom facilities that reflect the cultural preference for restroom designation based on biological gender”).

¹⁹⁹ See, e.g., *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 n.1 (7th Cir. 1977) (denying a Title VII sex discrimination complaint by a transgender woman who was fired, in part, because of “problems” created by her “use of the men’s room”); *Doe v. Boeing Co.*, 823 P.2d 1159, 1162 (Wash. Ct. App. 1992) (upholding a discrimination complaint against an employer who prohibited a transsexual employee from using a women’s bathroom, and then fired the employee when she wore a pink pearl necklace because it “would cause a complaint if she wore it into the men’s rest room”).

the restroom.”²⁰⁰ This is equally true for transgender men who do not have male genitalia and use men’s rooms, where they can choose to use stalls. Gender presentation, not genitalia, is the most salient factor determining the social “appropriateness” of a person’s presence in a restroom.²⁰¹

Admittedly, a consistency model would not afford protection to all transgender persons. Under a consistency model, gender identity must be relatively stable in order to be considered authentic, so those who experience a fluctuating gender identity or frequently change their gender expression could be denied protection. However, most people—both transgender and cisgender—seem to experience their gender identity, whether or not it corresponds with their birth-assigned sex, as something fairly fixed.²⁰² The consistency model therefore achieves a reasonable balance between the needs of employers and needs of transgender employees.

One can hope that someday gender will not be such a salient part of our social environment, such that more radical or frequent changes in gender identification and presentation will not be regarded as socially problematic. Indeed, perhaps someday our society will cease to obsessively demand that gender be assessed and categorized in the first place. Requiring that one’s professed gender identity be “authenticated” at all, whether according to consistency or another test, is in itself problematic. The consistency model is certainly not perfect, but it is a significant step forward. By providing courts with a workable rubric that divorces gender identity from medical certification and binary gender norms, it would afford transgender persons significantly greater protection than they currently receive.

CONCLUSION

Diane Schroer has displayed remarkable courage as a soldier, as a civil rights plaintiff, and by being true to herself. In some ways, though, she was very lucky. As a distinguished military veteran who had excelled at the highest levels of her profession, she enjoyed a measure of credibility that discrimination prevents many transgender people from establishing. Her financial resources enabled her to access medical care so that she could

²⁰⁰ Jenifer M. Ross-Amato, *Transgender Employees & Restroom Designation—Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569, 594 (2002) (citation omitted).

²⁰¹ *See id.* (“Practically, admittance into multi-use restrooms is determined on the basis of outward appearance . . .”).

²⁰² *See supra* note 28 and accompanying text. To make this point, Jennifer Levi invokes a “thought experiment” proposed by transgender author Daphne Scholinski, who “asks readers to imagine being forced to express their gender identity in a way inconsistent with their sense of self, and to imagine doing so not as a lark, but rather as against one’s will—first, for a day, then for a week, and then for an extended period of time. ‘Try changing things. . . . See how far you can contradict your nature. Feel how your soul rebels.’ For most people who seriously engage the thought experiment, the result is the same—serious discomfort that could translate into humiliation and degradation of one’s sense of self.” Levi, *supra* note 28, at 111–12 (quoting DAPHNE SCHOLINSKI, *THE LAST TIME I WORE A DRESS* xi (1997)).

transform her physical body to match her vision of her true self. Undoubtedly, Schroer had a better chance at success in the courts than most other transgender people.

Because there is no clear doctrine governing the application of Title VII's sex discrimination prohibitions to transgender plaintiffs, courts implicitly "test" transgender identities according to two criteria—GID diagnosis and conformity to the gender binary, in order to determine whether protection is warranted in a particular case. This test, however, results in underinclusive protection, because these two criteria do not map well onto many transgender people's lived experiences. In particular, many transgender people may not obtain a GID diagnosis, most likely do not undergo the types of medical intervention necessary to make a "complete" physical transformation from one of society's sex categories to the other, and some desire no such complete transformation but nonetheless have gender identities that do not correspond to stereotypical norms associated with their birth sex.

The analogy between religious conversion and transsexuality deployed by the *Schroer* court can be expanded in order to provide more inclusive protection for transgender people under Title VII. Religious identity and gender identity are similar in important ways not explicitly referenced in *Schroer*: for example, both can be experienced as a compelling internal sense that is independent of any fixed external physiological characteristic, and both can be idiosyncratic and nonconformist yet entirely sincere. Therefore, the way in which courts currently test the authenticity of a person's religious identity for the purposes of nondiscrimination protection provides a workable model for testing the authenticity of transgender identity as well. Courts should assess consistency, rather than medical diagnosis and treatment or conformance with binary gender norms, in order to authenticate transgender identity under employment nondiscrimination law.

