Articles

Gender Nonconformity: An Analysis of Perceived Sexual Orientation and Gender Identity Protection Under the Employment Non-Discrimination Act

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Introduction

USING THE WORDS SEX, gender, sexual orientation, and gender identity interchangeably may seem innocuous, but the disaggregation and conflation of these different categories has permitted courts to either extend or give a more preclusive effect to sex discrimination under the Title VII of the Civil Rights Act of 1964.[1] In fact, a closer examination of these decisions suggests that courts were acting purposively by applying different categories for certain types of cases and individuals as a way to prohibit recovery for plaintiffs of a particular sexual orientation or gender identity.

Although sex is often the term used in federal civil rights statutes,[2] such as in Title VII, society's understanding of gender and sexu-

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1. 42 U.S.C. § 2000e (2000).

2. Civil rights statutes do not treat issues of sex discrimination differently than Title VII. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (2006) ("No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex . . . ."); Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §§ 3601, 3604(a) (2000) ("[I]t shall be unlawful . . . [t]o refuse to sell or rent . . . or to refuse to negotiate for the sale or rental of . . . or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."); Title IX, Education Amendments of 1972, 20 U.S.C. § 1681(a) (2006)

ality is much different now than it was when many such laws were passed. Sex is now understood as merely the biological underpinnings of an individual,[3] while gender is the societal expectation of what it means to be male or female.[4] Because gender refers to the physical appearance and mannerisms of an individual, many scholars agree that this should be the focal point of inquiry in cases involving "sex."[5] One scholar astutely captures this idea with her phrase "sex bears an epiphenomenal relationship to gender."[6]

This Article examines the efficacy of the most recently proposed version of the Employment Non-Discrimination Act ("ENDA") in protecting plaintiffs on the basis of gender nonconformity. A comparative

("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

3. The term "sex" refers to the designation of men and women into categories based on "differences in the structure and function of the reproductive organs . . . ." 15 THE OXFORD ENGLISH DICTIONARY 107 (2d ed. 1989). This definition is not inconsistent with the definition courts have applied when defining "sex" under Title VII of the Civil Rights Act of 1964. *See, e.g.*, Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1222 (10th Cir. 2007) (precluding recovery for a transsexual plaintiff "[i]n light of the traditional binary conception of sex"); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984) (adopting a plain meaning of sex which leads to the narrow conclusion that discrimination based on sex makes it "unlawful to discriminate against women because they are women and against men because they are men"). Title VII does not provide a definition as explicit as the Oxford English Dictionary but is rooted in biology: "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to . . . pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k) (2000).

4. In this Article, "gender" refers to the designation of male and female into categories based on "social and cultural, as opposed to the biological, distinctions between the sexes." 6 THE OXFORD ENGLISH DICTIONARY 428 (2d ed. 1989); *see also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 10 (1990) (stating gender is socially constructed and often defined "relative to the constructed relations in which it is determined"). The Supreme Court expanded Title VII to consider "sex" as more expansive, but acknowledging sex stereotypes goes beyond the traditional understanding of "sex." *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (holding that Congress's intent of Title VII was "to forbid employers to take gender into account in making employment decisions").

5. *See, e.g.*, Katherine Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1 (1995). According to Franke, anti-discrimination laws inappropriately focus on an individual's biology and not his or her gender—the physical manifestation and presentation of one's masculinity and femininity. *Id.* at 2. Courts' defererence to biology in such cases makes it a false proxy for gender identity and sexual identification. *Id.* at 40. *But see* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 76 (1995) (expressing reluctance in protecting gender under anti-discrimination laws in part because its inclusion may produce gender essentialism of masculinity and femininity).

6. Franke, *supra* note 5, at 2. R

analysis of discrimination based on perceived sexual orientation[7] and gender identity[8] reveals that plaintiffs are generally victims of discrimination because of physical appearance and gender-nonconforming attributes. Part I briefly reviews the legislative history of Title VII and ENDA and those laws' application of sex, gender, and sexual orientation. Part II analyzes case law involving gender nonconformity discrimination under Title VII. This Part illustrates that gay, lesbian, and transgender plaintiffs are victims of discrimination and tend to be targeted not because of their sexual orientation and gender identity per se, but rather because they are gender nonconformists who exude visible traits and mannerisms that are atypical with their ascribed biological sex. This Part will demonstrate that the most recent version of ENDA would successfully prevent judges from engaging in the inappropriate conflation of sexual orientation and gender stereotyping. Given the previous failed efforts to include gender identity within the purview of ENDA, Part III highlights the legal implications of eliminating the gender identity language from ENDA. Without gender identity protections, employers could actually use sexual stereotypes as a legitimate non-discriminatory reason to discriminate against an employee. Consequently, further policy efforts should be placed to keep

7. For this Article, "sexual orientation" refers to "[t]he direction of one's sexual interest toward members of the same, opposite, or both sexes." THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1596 (4th ed. 2000).

8. There are many ways to define "gender identity." *See* PAISLEY CURRAH & SHANNON MINTER, THE POLICY INSTITUTE OF THE NATIONAL GAY AND LESBIAN TASK FORCE & NATIONAL CTR. FOR LESBIAN RIGHTS, TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS 45–50 (2000). Currah and Minter cite various state and local laws as examples of statutory definitions of gender identity. One example is a definition adopted by the Council of the City of New Orleans:

> [T]he actual or perceived condition, status or acts of:
>
> Identifying emotionally or psychologically with the sex other than one's biological or legal sex at birth, whether or not there has been a physical change of the organs of sex.
>
> Presenting and/or holding oneself out to the public as a member of the biological sex that was not one's biological or legal sex at birth.
>
> Lawfully displaying physical characteristics and/or behavioral characteristics and/or expressions which are widely perceived as being appropriate to the biological or legal sex other than one's biological sex at birth, as when a male is perceived as feminine or a female is perceived as masculine, and/or being physically and/or behaviorally androgynous.

Id. at 46 (citing NEW ORLEANS, LA., CODE § 54-379 (1998)). This quote highlights the critical feature of this definition, namely an individual's personal identification of being male or female. Gender nonconformists merely refer to those who exhibit mannerisms, physical attributes, and appearances that do not conform to societal norms of their assigned sex.

gender identity within the scope of ENDA.[9] But, more importantly, the debate over a gender-inclusive ENDA should reinvigorate a discussion about the role of sex, gender, and sexual orientation.

I. History of Sex, Gender, and Sexual Orientation in Federal Employment Law

In order to understand the history of ENDA, it is imperative to investigate the legislative history of "sex" under Title VII. The paucity of discussion on the legislative floor about sex did not provide judges and law makers with enough of a record to rely upon for purposes of interpreting the meaning of sex and whether it should be expanded to cover gender bias and transgender[10] discrimination. This Part details the history[11] of Title VII, focusing specifically on the inclusion of sex within the amendment.

9. Scholars have presented a variety of stances regarding a transgender-inclusive ENDA. *See, e.g.*, Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKLEY J. GENDER L. & JUST. 83, 144 (2008) (stating that a transgender-inclusive ENDA would provide legal protections but would not challenge the fundamental problem of relying on rigid categories such as sex and gender); J. Banning Jasiunas, Note, *Is ENDA the Answer? Can a "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1554–56 (2000) (claiming that creating free-standing legislation could lead courts to interpret the law more narrowly than Title VII, and to refuse to create the more "interpretative" frameworks developed through case law, such as sex stereotyping).

Instead of enacting ENDA to obtain gender identity protections, another stance on the issue is to amend Title VII to prohibit discrimination on the basis of *gender*, which would be an umbrella term for sexual orientation and gender identity. *See* Jennifer S. Hendricks, *Instead of ENDA, A Course Correction for Title VII*, 103 NW. U.L. REV. COLLOQUY 209, 210 (2008), http://www.law.northwestern.edu/lawreview/colloquy/2008/43/. However, the proposal to amend Title VII, while procedurally plausible, has historically been unsuccessful. For a detailed history of Title VII amendment efforts, see *infra* Part I.C.

10. In this Article, the term "transgender" is used as an umbrella term to refer to individuals "whose gender identity or expression does not conform to the social expectations for their assigned sex at birth." TRANSGENDER RIGHTS xiv (Paisley Currah et al. eds., 2006). There is a distinction, however, between transgender and transsexual; while transgender refers to a broader gender identity, "transsexual" is a medical or psychiatric diagnosis. *See* AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532–38 (4th ed. 1994).

11. Title VII was not the first time law makers sought employment discrimination protections. The earliest account of employment discrimination legislation was the Unemployment Relief Act of 1933, which provided that, "no discrimination shall be made on account of race, color, or creed." Unemployment Relief Act, ch. 17, § 1, 48 Stat. 22, 23 (1933) (repealed 1966). *See* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 169 (1991). In 1941, President Franklin D. Roosevelt issued Executive Order 8802 (commonly known as the Fair Employment Act), which affirmed the prohibition of discrimination on the basis of race, creed, color, or national origin in the national defense industry. DVORA YANOW, CONSTRUCTING "RACE" AND "ETHNICITY" IN AMERICA 96 (2003). This history inspired law makers to introduce other bills

A. Title VII and the Real Reason for Including Sex

In June 1963, when Title VII was first introduced on the House floor, the bill only included employment protections on the basis of race, color, and national origin.[12] The legislative history of Title VII suggests that sex was used as a political maneuver to defeat the law's passage. Most notably, Representative Howard W. Smith of Virginia, who had a well-known history of opposing civil rights legislation,[13] resorted to more implicit means to oppose the current bill given the political climate. He proposed a one word amendment to Title VII—"sex"—in the hopes that it would be defeated.[14]

Following Representative Smith's proposal, the debate concerning the amendment was light-hearted and humorous.[15] One historian

that provided employment discrimination protections in private employment. *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUSTRY & COM. L. REV. 431, 433 (1966).

12. This was an omnibus civil rights bill introduced by President John F. Kennedy. The bill was intended to affirm the rights provided to African Americans, such as voting and public education, while prohibiting discrimination in federal programs, public accommodation, and employment. Civil Rights Act of 1964, S. 1731, 88th Cong. (1963); *see also* KATHLEEN MORGAN BARRY, FEMININITY IN FLIGHT 128 (2007) (noting the exclusion of "sex" in the bill).

13. *See* BRUCE J. DIERENFIELD, KEEPER OF THE RULES: CONGRESSMAN HOWARD W. SMITH OF VIRGINIA 194–95 (1987). Representative Smith's biography contains numerous interviews with his congressional colleagues who noted his opposition both to race integration and gender equality. Additionally, Representative Smith was from a state in which textile mills wanted to engage in pay inequity to reduce the costs of production. A sex-inclusive Civil Rights Act would enable women to choose where they wanted to work and demand pay equity; choices that would hurt the profitability of southern companies. "As a result, Smith and other southern Democrats may have adopted a chivalrous pose to assist local businesses." *Id.* at 195.

14. 110 CONG. REC. 2577 (1964), *reprinted in* 1964 LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3213 (1964).

15. *See id.* at 3213–28. After offering the amendment, Representative Smith proceeded to read a letter from a woman who pointed out that although the 1960 U.S. Census found that women outnumber men in America, women were considered the minority. The letter read: "Just why the Creator would set up such an imbalance of spinsters, shutting off the 'right' of every female to have a husband of her own, is, of course, known only to nature." *Id.* at 3213. Represenative Emanuel Celler, a New York Democrat and the then Chairman of the House Judiciary Committee, quickly responded by challenging Representative Smith's view that women are minorities, claiming, "I heard with a great deal of interest . . . that women are in the minority. . . . I can say as a result of 49 years of experience . . . that women, [i]ndeed, are not in the minority in my house. . . . I usually have the last two words, and those words are, 'Yes, dear.'" *Id.* at 3214. Representative Celler then suggested that any such inequality was appropriate, stating, "[y]ou know, the French have a phrase for it when they speak of women and men . . . 'vive la difference.' I think the French are right." *Id.* at 3215.

Although the women supported Representative Smith's "sex" amendment, they were just as light-hearted in the debate. For example, Representative Katherine St. George, a Republican from New York, admitted that women are not the minority and are in fact

described this discussion as the "Ladies Day in the House."[16] On February 8, 1964, the same day as the addition of sex to Title VII, the Civil Rights Act passed in the House with a vote of 168 to 133.[17] The bill ultimately passed in the Senate with a vote of 73 to 27.[18]

What began as an insidious plot to defeat the civil rights bill has become a nightmare for judicial interpretation, particularly in more contemporary cases involving gender stereotypes.[19] The lack of a detailed legislative history of Title VII has prompted courts to employ a plain meaning interpretation of sex by deferring to a biological definition.[20] To compound matters, our understanding of gender and sexuality has since evolved,[21] and yet Title VII jurisprudence remains grounded in a more antiquated conception.

B. Sexual Stereotypes and the Recognition of Gender Under Title VII

Nearly thirty-five years after the enactment of Title VII, the United States Supreme Court expanded the definition of sex discrimination to include gender bias within the theory of sex stereotyping.[22] The Court expanded the interpretation of Title VII protections to include discrimination against someone on the basis of a sexual stereotype. Sex stereotype[23] departs from the strict, biological definition of

privileged. "We outlast you—we outlive you—we nag you to death . . . [but] we are entitled to this little crumb of equality." *Id.* at 3221. For a more detailed discussion of the congressional debates concerning the addition of sex to Title VII, see CHARLES W. WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–21 (1985).

16. *See* Freeman, *supra* note 11, at 163. R

17. 110 CONG. REC. 2577 (1964), *reprinted in* 1964 LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 3228 (1964).

18. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

19. *See infra* Part II.A.

20. *See infra* Part II.B.

21. The earliest accounts in which scholars understood "sex" and "gender" to be distinct categories was in the mid- to late-1970s. *See* Rhoda K. Unger, *Toward a Redefinition of Sex and Gender*, 34 AM. PSYCHOLOGIST 1085, 1086 (1979); GAYLE RUBIN, *The Traffic of Women: Notes on the "Political Economy" of Sex in* TOWARD AN ANTHROPOLOGY OF WOMEN 157, 159 (Rayna R. Reiter ed., 1975). These distinctions were accepted by feminist scholars in the community by the 1990s. *See, e.g.*, SUSAN A. SPEER, GENDER TALK: FEMINISM, DISCOURSE AND CONVERSATION ANALYSIS 60–62 (2005) (arguing that, by the 1990s, notable scholars such as Judith Butler embraced and wrote extensively on the sex/gender distinction).

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

23. Sex stereotype is defined as societal expectations of physical appearance, demeanor, and skills that are associated with one sex or the other. In the context of the workplace, these stereotypes influence individuals' perceptions on how male and female employees should behave: men should be assertive, while women should be compassionate. IRENE PADAVIC & BARBARA RESKIN, WOMEN AND MEN AT WORK 42 (2d ed. 2002).

sex under the law. In cases recognizing discrimination based on sex stereotyping, a plaintiff could demonstrate discrimination by establishing that the employer's challenged action was triggered by the plaintiff's failure to conform to her employer's sex-stereotyped expectations.

The seminal case and the most notable legal illustration of gender stereotyping is *Price Waterhouse v. Hopkins*.[24] In that case, Ann Hopkins worked as a senior manager at Price Waterhouse when she became a candidate for partnership. As part of the partnership selection process, the firm solicited written comments from all the current partners on the candidates. Many endorsed Hopkins, noting her professional accomplishments. However, several other partners did not support her promotion. The critical comments were largely based on her personality and physical appearance. Some of the comments called Hopkins "macho," while others noted that she "overcompensated for being a woman" and that she needed to take "a course at a charm school."[25] Hopkins was ultimately denied partnership, and when Hopkins' supervisor told her that she would be reconsidered for candidacy the following year, he suggested that she "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[26]

When the partners subsequently refused to consider her candidacy the following year, Hopkins filed suit and alleged that Price Waterhouse's handling of her partnership candidacy amounted to sex discrimination. The district court judge ruled in her favor because the partnership selection process was tainted by the firm's reliance on sex stereotyping.[27] The District of Columbia Circuit Court of Appeals upheld the district court's ruling that reliance on sex stereotyping could and, in this case, did constitute sex-based discrimination.[28] The matter was appealed to the United States Supreme Court by Price Waterhouse.

The Supreme Court ultimately upheld the district court's ruling. The Court held that, "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gen-

24. 490 U.S. 228 (1989).

25. *Id.* at 235.

26. *Id.*

27. *See* Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1120 (D.D.C. 1985).

28. Hopkins v. Price Waterhouse, 825 F.2d 458, 468 (D.C. Cir. 1987).

der."[29] The Court noted, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[30] It is important to note that the Court did not hold that recognizing the existence of sex stereotyping does not create a presumption of discrimination. Rather, the Court stated:

> Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.[31]

Price Waterhouse served as a significant departure in sex discrimination jurisprudence because the Court acknowledged that sex discrimination can manifest if an employee is gender nonconforming and does not satisfy the expectations of masculinity and femininity. A sex stereotype theory provides a better point of reference in cases involving a broader range of individuals who are not victims of sex discrimination per se.

C. Legislative History of ENDA

The fight for sexual orientation employment protection has been a contested one for many decades. The earliest effort occurred in 1974 when New York Representatives Bella Abzug and Edward Koch introduced the Equality Act of 1974.[32] The bill proposed to add sexual orientation and marital status protections to the Civil Rights Act of 1964. The bill was referred and failed to make it out of the House Committee on Civil Rights, a division within the Committee on the Judiciary.

In 1975, several Congressmen[33] joined Representative Abzug in her efforts to include sexual orientation as a protected class under the Civil Rights Act of 1964. Representative Abzug once again introduced

29. *Price Waterhouse*, 490 U.S. at 250.

30. *Id.* at 251.

31. *Id.*

32. H.R. 14752, 93d Cong. (1974).

33. Representative Donald M. Fraser of Minnesota introduced a bill to prohibit discrimination on the basis of sexual preference in public accommodations, public facilities, public education, federally assisted programs, employment, and housing. The bill failed to make it out of the Judiciary Committee. H.R. 2667, 94th Cong. (1975).

Representative Richard L. Ottinger of New York introduced a bill to prohibit discrimination on the basis of affectional or sexual preference in public accommodations, public education, equal employment opportunities, housing (the sale, rental, and financing), and education programs which receive Federal aid. The bill failed to make it out of the Judiciary Committee. H.R. 10389, 94th Cong. (1975).

three pieces of legislation to ban discrimination on the basis of sexual preference.[34] Once again, all legislation failed to make it out of the Judiciary Committee for a House vote.

After additional legislative efforts to amend Title VII failed,[35] advocates switched tactics by introducing the stand-alone Employment Non-Discrimination Act in 1994.[36] The bill's sponsor, Representative Gerry Studds of Massachusetts, drafted the bill to only protect individuals on the basis of sexual orientation and not on the basis of transgender or gender identity. The bill was referred to the House Subcommittee on Select Education and Civil Rights. Like prior legislation, the bill failed to make it out of the Subcommittee for a vote. Representative Studds reintroduced the bill in 1995 but again was unsuccessful.[37]

In September 1996, the Senate rejected a gender identity exclusive ENDA by one vote: 49 to 50.[38] Although this defeat marked a

Representative Phillip Burton of California introduced a bill to prohibit discrimination on the basis of sexual preference in public accommodations, public facilities, public education, federally assisted opportunities, equal employment opportunities, housing, and educational programs receiving Federal assistance. The bill failed to make it out of the Judiciary Committee. H.R. 13019, H.R. 94th Cong. (1976).

34. H.R. 13928, 94th Cong. (1976); H.R. 5452, 94th Cong. (1975); H.R. 166, 94th Cong. (1975).

35. The House led the attack in attempting to amend the Civil Rights Act of 1964. H.R. 431, 103d Cong. (1993); H.R. 423, 103d Cong. (1993); H.R. 1429, 102d Cong. (1991); H.R. 655, 101st Cong. (1989); H.R. 709, 100th Cong. (1987); H.R. 230, 99th Cong. (1985); H.R. 2624, 98th Cong. (1983); H.R. 427, 98th Cong. (1983); H.R. 3371, 97th Cong. (1981); H.R. 1454, 97th Cong. (1981); H.R. 2074, 96th Cong. (1979); H.R. 12149, 95th Cong. (1978); H.R. 10575, 95th Cong. (1978); H.R. 8269, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 5239, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 2998, 95th Cong. (1977); H.R. 451, 95th Cong. (1977).

The Senate's efforts were not as numerous and began several years after the House's first bill in 1974. In 1979, the first Senate bill prohibiting employment discrimination on the basis sexual orientation was introduced by Senator Paul E. Tsongas of Massachusetts. S. 2081, 96th Cong. (1979). This effort resulted in additional efforts by the Senate, all of which failed. S. 573, 102d Cong. (1991); S. 47, 101st Cong. (1989); S. 2109, 100th Cong. (1988); S. 464, 100th Cong. (1987); S. 1432, 99th Cong. (1985).

36. S. 2238, 103d Cong. (1994). It was this ENDA bill that also marked an acknowledgement of perceived sexual orientation. The bill defined sexual orientation to include "lesbian, gay, bisexual, or heterosexual orientation, real or perceived, as manifested by identity, acts, statements, or associations." *Id.* at § 18(12). Perceived sexual orientation discrimination was ultimately incorporated in all subsequent ENDA bills.

37. Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995).

38. Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996). The bill would have passed but for an unexpected turn of events for Arkansas Senator David Pryor. He intended to vote for ENDA but had to remain in Arkansas on the day of the vote because his son was undergoing emergency cancer surgery. *See* Carolyn Lochhead, *Senate OKs Gay Marriage Restrictions, Job Discrimination Bill Fails By One Vote*, S. F. CHRON., Sept. 11, 1996, at A1.

history of non-support[39] by Congress, this near victory may have been the result of unseen political maneuvers in the Senate. ENDA's sponsor, Senator Edward M. Kennedy of Massachusetts, struck a deal with Republican Senators to permit the bill to come up for a vote in exchange for Democrat Senators agreeing to end a filibuster blocking a vote on the anti-gay Defense of Marriage Act ("DOMA"),[40] which would limit marriage under federal law to a union only between a man and a woman. On the same day ENDA was narrowly defeated, DOMA passed with a vote of 85 to 14.[41]

Since 1996, Congress has introduced ENDA legislation on four additional occasions,[42] with the hope that popular support[43] would eventually lead to its passage. In 2007, after a decade-long effort to pass ENDA, Representative Barney Frank of Massachusetts introduced a new version of ENDA that prohibited discrimination on the basis of sexual orientation, actual or perceived, and gender identity.[44] The proposed bill would have required employers to provide adequate shower or dressing facilities to employees who are transitioning.[45] The Act did not prohibit employers from imposing reasonable dress or

39. The non-support reference not only refers to the numerous attempts to pass employment protections for gays and lesbians, but also to the fact that any such legislation had never been successfully brought to the floor of either the House or Senate. In fact, there was only one hearing conducted in 1993 because Senator Edward M. Kennedy of Massachusetts permitted one hearing before the Senate Labor and Human Resources Committee. *See* Nicol C. Rae, *A Right Too Far? The Congressional Politics of DOMA and ENDA, in* CONGRESS AND THE POLITICS OF EMERGING RIGHTS 65, 75 (Colton C. Campbell & John F. Stack, Jr. eds. 2001).

40. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

41. *See* Jill Lawrence, *Anti-Gay Marriage Bill OK'd Senate Then Rejects Bid to Ban Job Bias*, U.S.A. TODAY, Sept. 11, 1996, at A1.

42. Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003); Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001); Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999); Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997). None of these bills included transgender or gender identity within the scope of protection.

43. Scholar Amin Ghaziani reported that popular support for ENDA was on the rise during this time. He cites, for example, a 1995 and 1996 *Newsweek* poll that showed that eighty-four percent of respondents supported workplace rights for gays and lesbians. Similarly, a Princeton Survey Research Associates poll found that eighty-three percent of Americans believed that gays and lesbians deserved equal employment rights. AMIN GHAZIANI, THE DIVIDENDS OF DISSENT 205 (2008).

44. Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007). The bill defined "gender identity" as "the gender-related identity, appearance, or manner-isms or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth." *Id.* at § 3(a)(6).

45. Although the latest version of ENDA includes a provision concerning shower and dressing facilities, this provision was included in H.R. 2015, but ultimately eliminated along with other gender identity provisions. The relevant section reads:

grooming standards but provided that employers allow transitioning employees to adhere to their new gender's dress or grooming standards.

According to Representative Frank, a survey of House members revealed that the bill would fail to garner enough support, but that a bill solely banning discrimination based on sexual orientation was likely to pass.[46] As a result, Representative Frank introduced a new bill protecting sexual orientation but not gender identity.[47] After revising ENDA to omit gender identity,[48] the House of

CERTAIN SHARED FACILITIES.—Nothing in this Act shall be construed to establish an unlawful employment practice based on actual or perceived gender identity due to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable, provided that the employer provides reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established with the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later.

H.R. 3017, 111th Cong. § 8(a)(3) (2009). Based on the hearings in 2007, one stated reason for opposition to a gender identity inclusive ENDA was the alleged safety issues and potential damage to employee relations. Diane Gramley, President of the American Family Association of Pennsylvania, claimed, without statistical support, that small businesses would suffer financial strain. She noted reluctance for a fully inclusive law and claimed "radical transgender activists would demand to use shower facilities in the workplace." *The Employment Non-Discrimination Act of 2007 (H.R. 2015): Hearing Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Education and Labor*, 110th Cong. 74 (2007) (statement of Diane Gramley, President, American Family Association of Pennsylvania).

A second concern was raised by Representative John Kline of Minnesota. He claimed that ENDA would include "gender identity" as a protected class but the definition was "vague and could result in significant uncertainty." *Id.* at 6. Representative Kline, like Gramley, believed that the requirements for shower and dressing facilities for transgender or transitioning employees could raise privacy or financial concerns for employers. *Id.* (statement of Representative John Kline Senior Republic Member, Subcomm. on Health, Employment, Labor and Pensions).

46. 153 CONG. REC. H11383 (daily ed. Oct. 9, 2007) (statement of Representative Barney Frank) ("[W]e have the votes to pass a bill today in the House that would ban discrimination in employment based on sexual orientation, but sadly, we don't yet have it on gender identity.").

47. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

48. *Id.* The text of House Bill 3685 provided, inter alia:

SEC 4. EMPLOYMENT DISCRIMINATION PROHIBITED

(a) Employer Practice: It shall be unlawful employment practice for an employer
(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation; or
(2) to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation.

Representatives passed it on November 7, 2007, by a vote of 235 to 184.[49]

Although the ENDA was not taken up by the Senate after the House vote, there has been a reenergized campaign in the legislative and executive branches for a fully inclusive bill. On January 22, 2009, President Barack Obama posted his 100-days agenda on the White House website, proclaiming his support for a gender identity inclusive-ENDA.[50] Furthermore, congressional lawmakers reintroduced a fully inclusive ENDA similar to the original legislation introduced in 2007.[51] Despite this momentum, lawmakers acknowledge the political hurdles in garnering support for such legislation. Representative Frank is hopeful that a fully inclusive ENDA will pass, but in an interview he said that "[e]fforts to include transgender people have failed in New York, Massachusetts and Maryland. . . . It doesn't get easier when you throw in South Carolina and Utah."[52] Simply put, he said "[t]here's no certainty in politics."[53]

Even though a stand-alone bill reinforces the idea that sexual orientation and transgender discrimination are separate forms of discrimination, the passage of ENDA would still mark a significant victory for workplace equality. More importantly, passing ENDA with "per-

49. Final Votes for Roll Call 1057, http://clerk.house.gov/evs/2007/roll1057.xml (last visited June 18, 2009).

50. The White House, http://www.whitehouse.gov/agenda/civil_rights (last visited Feb. 28, 2009). Additionally, President Obama's previous legislative efforts, as an Illinois State Senator, prove his willingness to support a fully inclusive ENDA. He sponsored legislation in the Illinois State Senate to prohibit employment discrimination on the basis of sexual orientation and gender identity. Human Rights Amendment for Sexual Orientation, S.B. 2597, 93d Gen. Assem. (Ill. 2004). This amendment to the Illinois Human Rights Act provided discrimination protections for persons on the basis of sexual orientation, which was an umbrella term for "actual or perceived heterosexuality, homosexuality, bisexuality or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." *Id.* at § 1-103. This legislation prohibited discrimination in employment and housing.

51. The legislation was originally introduced on June 23, 2009, with Representative Frank as the sponsor and ten others as co-sponsors. Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong. (2009). However, the legislation was reintroduced on June 24, 2009, this time with 123 co-sponsors. H.R. 3017, 111th Cong. (2009). In addition, on August 5, 2009, the Senate introduced a fully inclusive ENDA with Senator Jeff Merkley as the sponsor and thirty-nine others as co-sponsors. S. 1584, 111th Cong. (2009).

52. Chris Johnson, *Gay Rights Bills Remain Stalled in Congress*, The Washington Blade, May 29, 2009, http://www.washblade.com/2009/5-29/news/national/14609.cfm?page=2.

53. *Id.* Although Representative Frank's concerns are justified, he was somewhat inaccurate in the state support concerning gender identity protections; Massachusetts and the District of Columbia both have laws that prohibit discrimination on the basis of gender identity. For a more detailed overview of gender identity employment protections, see *infra* text accompanying note 54. **R**

ceived sexual orientation" and "gender identity" would also mark a shift in law making. That shift would be characterized by legislators recognizing that gay, lesbian, and transgender employees are not necessarily discriminated against because of actual sexual orientation per se—or, in the words of ENDA, "actual sexual orientation"—or transgender status but rather these individuals tend to deviate from societal expectations of masculinity and femininity, and, as a consequence, are presumed to be homosexual. Such discrimination is rooted in gender stereotyping, which has been historically eschewed by judges.

II. The Efficacy of ENDA[54] and the Application of Sex and Gender by Federal Courts

A law that recognizes perceived sexual orientation discrimination would allow gay and lesbian plaintiffs to successfully pursue claims that are premised on gender nonconformity[55] but would not adequately protect transgender individuals. The following is a presentation of case law involving homosexual and transgender litigants who proceeded under a Title VII sex stereotype theory of liability. These cases show that courts have been unwilling to apply the *Price Waterhouse* precedent when appropriate. In cases involving gay and lesbian plaintiffs, courts conflate gender identity and sexual orientation to preclude plaintiffs from succeeding in sex discrimination suits because these courts mistakenly believe that the plaintiffs are using Title VII as a way to "bootstrap" a claim of sexual orientation onto a sex

54. The analysis in this Article pertains exclusively to federal cases invoking Title VII. However, some state legislatures are treating sexual orientation and gender identity differently for purposes of prohibiting discrimination on those bases in private employment. Currently, twenty-one states and the District of Columbia have statutes that prohibit discrimination on the basis of sexual orientation in private employment. Further, only twelve states and the District of Columbia have statutes that prohibit discrimination on the basis of gender identity in private employment. For a more detailed discussion of state employment discrimination protections, see Human Rights Campaign—Workplace Laws, http://www.hrc.org/issues/workplace/workplace_laws.asp (last visited Aug. 26, 2009).

55. In this particular section, the term "gender nonconformity" is used to refer to individuals who do not appear or act in accordance with societal gender norms. *See supra* note 4. One obvious implication of a gender identity-exclusive ENDA is that it would preclude transgender plaintiffs from using this law; however, there are two reasons why the conflation of sexual orientation and gender does not apply to such plaintiffs. First, courts tend to adopt a more biological interpretation of sex when confronted with transgender plaintiffs invoking Title VII protections. *See infra* text accompanying notes 89–91. Second, there have been a few cases in which courts have extended sex stereotyping in transgender cases. *See infra* notes 104–14. One explanation of these cases is the fact that transgender does not denote homosexuality, thus reassuring judges that these individuals are not using sex stereotyping to indirectly obtain relief for sexual orientation discrimination. R

stereotype theory. In cases involving transgender individuals, courts have deferred to biology and the plain meaning of "sex" to deny recovery. In these cases, transgender plaintiffs are discriminated against by virtue of their physical appearances and mannerisms and not necessarily because of sex or sexual orientation, per se. An overview of these cases, in light of ENDA, demonstrates how the notion of gender nonconformity would be inconsistently applied if the law permitted recovery on the basis of perceived sexual orientation but not gender identity.

A. Conflating Gender and Sexual Orientation to Preclude Plaintiffs from Recovery

While a sex stereotype theory of liability permits plaintiffs to pursue claims of sex discrimination, courts have been unwilling to apply their own precedent in cases where gender stereotyping is intertwined with sexual orientation.[56] Recall that the Supreme Court in *Price Waterhouse* found a viable discrimination claim when Ann Hopkins' employer refused to promote her based on her gender nonconformity—her overly masculine mannerisms and dress.[57] However, many lower court judges have been concerned that homosexual plaintiffs will "bootstrap" a claim of sexual orientation discrimination onto the sex stereotyping theory in order to obtain relief in federal court.[58] Therefore, despite the *Price Waterhouse* precedent, courts will conflate

56. *See infra* text accompanying notes 72–80.

57. Ann Hopkins' nonconformity was not only one of appearance—the fact she did not style her hair, wear jewelry, or dress femininely—but also one of behavior. Her coworkers claimed that she was abrasive, "macho," and "overcompensated for being a woman." Price Waterhouse v. Hopkins, 490 U.S. 228, 235 (1989). It is clear that the partners evaluating Hopkins ascribed particular behaviors to males and females, most notably their complaints over her use of profanity simply because "it's a lady using foul language." *Id.*

58. *See* Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 23–24 (1995). Valdes' analysis reveals that courts will use gender nonconformity as the basis to preclude recovery for plaintiffs who are perceived to be of a particular sexual orientation. He claims sexual orientation becomes the "loophole" for courts to avoid ruling on cases involving gender-bias discrimination. A review of discrimination cases reveals that defendants will concede sexual orientation bias and not gender bias, knowing that the former is not protected under Title VII. *See id.* at 136–61. *See also* Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 572 (2007). Turner accounts for a similar trend with transgender cases. She believes courts experienced confusion about the distinctions between gender nonconformity, sexual orientation, and transgender status; transgender was also used interchangeably with homosexuality to deny recovery also on the basis of sexual orientation.

gender and sexual orientation to preclude recovery for these individuals.[59]

This trend is troubling because gender nonconformist plaintiffs currently have no alternative remedy of recovery under federal employment law. Legally recognizing sexual orientation under federal employment law would obviate this concern and improve the efficacy of anti-discrimination protections involving gender nonconforming plaintiffs. Specifically, prohibiting employment discrimination on the basis of "perceived sexual orientation" would permit gender nonconforming plaintiffs to pursue discrimination claims that are based on sex stereotyping. To this end, judges would not be permitted to conflate sexual orientation and gender bias as a way to preclude recovery for plaintiffs who deviate from societal expectations of masculinity and femininity. A review of Title VII case law involving homosexual[60] plaintiffs attempting to use the sex stereotyping theory of liability suggests that these individuals are victims of discrimination not because of their actual sexual orientation but because they exhibit nonconforming traits. This is the precise theory afforded to heterosexual, female plaintiffs who are gender nonconformists.

Courts have long been concerned about the discrimination over a plaintiff's gender nonconformity, particularly a plaintiff's effeminate appearance,[61] but have ultimately rejected these claims on the basis of

59. *See* Valdes, *supra* note 58, at 135. According to Valdes, Western society conflates sexual orientation and gender such that "sexual gender typicality" is associated with heterosexuality while "atypicality" is associated with homosexuality. As a consequence, courts will be persuaded by defendants who engage in a "conflationary framing" of a discrimination case; courts will not consider a plaintiff's effeminate appearance, but instead will defer to sexual orientation as the premise of discriminatory behavior. *Id.* at 140–41. *See also* Case, *supra* note 5, at 2–3. Case suggests that the law conflates sex and gender which has the consequence of differential treatment between masculine females and effeminate men. She claims that a "man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so." *Id.* at 3. Accordingly, courts continue to be skeptical of men who pursue gender bias discrimination, despite the United States Supreme Court's ruling that sex stereotyping is unlawful under Title VII. *Id.* at 3 n.3. R R

60. This is not to say that ENDA should be limited to individuals who are gay and lesbian. The inclusion of perceived sexual orientation discrimination would permit recovery for heterosexual employees who are misperceived to be homosexual based on gender stereotypes. *See, e.g.*, Humphries v. Consol. Grain & Barge Co., 412 F. Supp. 2d 763 (S.D. Ohio 2005) (rejecting the sex harassment and discrimination claims of a married, heterosexual male who was physically beaten and called "Gay Ray," "Cocksucker," and "Slurpy Boy," on the grounds that there was no comparative evidence of differential treatment of the *sexes* in the workplace).

61. *See* Case, *supra* note 5, at 2. The central thesis of Case's scholarship on effeminate men suggests that individuals who deviate from typical traits assigned to their sex will be perceived as homosexual. While females, most notably Ann Hopkins of the *Price Waterhouse* R

sexual orientation.[62] For example, the court in *Smith v. Liberty Mutual Insurance Co.*[63] conflated the plaintiff's gender with his sexual orientation to support its conclusion that Title VII was inapplicable. The court reached this conclusion despite the defendant's admission that it relied on stereotyping when claiming that Smith's effeminacy did not make him well-suited for the position as a mail clerk.[64] The trial court debated whether to apply a plain meaning of sex in this case, recognizing that this was not the typical case of sex discrimination;[65] Smith was not hired on the basis of his gender nonconformity, not his sex.[66] Ultimately, the court adopted a strict interpretation of discrimination "because of sex" and concluded:

case, will receive protection for acting more masculine, the courts tend to deny discrimination protections to effeminate men.

62. *See, e.g.*, Vickers v. Fairfield Med. Ctr., 453 F.3d 757, 764 (6th Cir. 2006) (denying effeminate male plaintiff's sexual harassment and discrimination claims of sex stereotyping because recognition of such claims "would have the effect of *de facto* amending Title VII to encompass sexual orientation"); Kay v. Independence Blue Cross, 142 Fed. App'x 48, 51 (3d Cir. 2005) (affirming summary judgment for defendant because, although co-workers made comments about plaintiff's earring and sexuality, "the only reasonable reading of this record compels the conclusion that the reprehensible conduct . . . was motivated by sexual orientation bias rather than gender stereotyping"); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1063–65 (7th Cir. 2003) (denying relief for a heterosexual plaintiff who was called a "faggot" and was told by co-workers he had a "high-pitched voice" because such comments were targeted at his perceived sexual orientation); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 257–61 (1st Cir. 1999) (rejecting plaintiff's claims of discrimination based on effeminate traits such as a high-pitched voice and feminine mannerisms because he did not mention gender stereotyping or present any considered support); DeSantis v. Pac. Tel. & Tel. Co., Inc., 608 F.2d 327, 331–32 (9th Cir. 1979) (concluding that effeminacy, like homosexuality, does not fall within the purview of Title VII, thus rejecting plaintiff's claim that he was terminated from his job as a nursery school teacher because he wore an earring); Prowel v. Wise Bus. Forms, No. 2:06-cv-259, 2007 WL 2702664, at *5 (W.D. Pa. Sept. 13, 2007) (concluding that an effeminate gay male's reliance on *Price Waterhouse* sex stereotyping is not justified because that case did not involve sexual orientation); Klein v. McGowan, 36 F. Supp. 2d 885, 890 (D. Minn. 1999) (concluding that if gender and sex were equivalent under Title VII, the law would prohibit harassment of an effeminate male or the perception of homosexuality, but Title VII does not have such protection).

63. 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978).

64. *Id.*

65. *Id.* at 1101.

66. *Id.* Although this case preceded *Price Waterhouse*, the *Smith* decision foreshadows the courts' conflation of sexual orientation and gender, particularly in cases involving effeminacy and sexual stereotypes. *See* Joel W. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 221–22 (2007). Furthermore, Valdes suggested that the *Smith* decision highlighted how courts will render decisions that uphold cultural expectations of gender. In so doing, courts will "recycle" traditional conceptions of sex and gender to maintain and perpetuate "hetero-patriarchy." Valdes, *supra* note 58, at 139. R

> The intent of the Civil Rights Act insofar as it applies to sex . . . is "the guarantee of equal job opportunity for males and females." Whether or not the Congress should, by law, forbid discrimination based upon "affectional or sexual preference" of an applicant, it is clear that the Congress has not done so.[67]

Although *Smith* was decided before the adoption of sex stereotyping-based discrimination, this decision foreshadowed a recurring problem even after the Supreme Court's ruling in *Price Waterhouse*.

Courts do not apply *Price Waterhouse* in such cases because they emphatically stress that sex stereotyping should not serve as an end-around Title VII's inapplicability to sexual orientation or sexual preference.[68] Such concern is evident in the Second Circuit's decision to affirm summary judgment in favor of an employer faced with a female employee's claim of sexual stereotyping. In *Dawson v. Bumble & Bumble*,[69] the court rejected a lesbian hairstylist's claim that her failure to conform her appearance[70] to feminine stereotypes resulted in her termination. The court recognized the applicability of *Price Waterhouse* in this case, stating that an individual may have a claim under Title VII where an employer acts out of animus toward an employee's "exhibition of behavior considered to be stereotypically inappropriate for their gender."[71] The court nevertheless declined to apply the appropriate precedent, expressing concern over the possibility that a homo-

67. *Smith*, 395 F. Supp. at 1101 (citation omitted).

68. One reason the courts view sexual orientation and gender stereotyping as mutually exclusive is to prevent litigants from using a *Price Waterhouse* sex stereotyping theory as a way to "bootstrap protection for sexual orientation into Title VII." Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (quoting Simonton v. Runyon, 233 F.3d 33, 38 (2d Cir. 2000)); *see also* Kiley v. Am. Soc. for Prevention of Cruelty to Animals, 296 Fed. App'x 107, 109 (2d Cir. 2008); EEOC v. Family Dollar Stores, Inc., No. 1:06-CV-2569-TWT, 2008 WL 4098723, at *22 (N.D. Ga. Aug. 28, 2008); Partners Healthcare Sys., Inc. v. Sullivan, 497 F. Supp. 2d 29, 39 (D. Mass. 2007); Prowel v. Wise Bus. Forms, Inc., No. 2:06-cv-259, 2007 WL 2702664, at *5 (W.D. Pa. Sept. 13, 2007); Ianetta v. Putnam Inv., Inc., 183 F. Supp. 2d 415, 422 (D. Mass. 2002); Martin v. N.Y. State Dep't of Corr. Serv., 224 F. Supp. 2d 434, 446 (N.D.N.Y. 2002); Samborski v. W. Valley Nuclear Serv. Co., No. 99-CV-0213E(F), 2002 WL 1477610, at *3 n.11 (W.D.N.Y. June, 25, 2002); Doe v. United Consumer Fin. Serv., No. 1:01 CV 1112, 2001 WL 34350174, at *4 (N.D. Ohio Nov. 9, 2001).

69. 398 F.3d 211 (2d Cir. 2005).

70. Dawson described how co-workers referred to her as "Donald," suggesting that she appeared more masculine than what is expected of a female. *Id.* at 222. Another co-worker commented that she wore her sexuality like a costume. *Id.* at 215. Both statements suggest that it was her physical appearance that led her employer to discriminate against her gender nonconformity and, necessarily, her sexual orientation. *Id.*

71. *Id.* at 218. The court goes on to state that, "[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance." *Id.* at 221.

sexual plaintiff will use sex stereotyping as a way to "bootstrap"[72] a claim for sexual orientation discrimination that is not within the scope of Title VII.

This potential for bootstrapping has led courts to ostensibly have a "threshold" which must be met before a case is considered as one of gender stereotyping instead of sexual orientation discrimination.[73] In *Trigg v. New York City Transit Authority*,[74] a male employee alleged that he was demoted and harassed after his supervisor made derogatory comments, calling him unmanly and a "faggot ass," despite the fact the employee had never disclosed his sexual orientation to anyone at work.[75] Similarly, in another case, a federal district court also rejected a sex stereotyping theory of liability. The court viewed the plaintiff's accusations as based on sexual orientation and not on gender bias, even though the plaintiff proffered evidence that his co-workers mocked him by speaking with high-pitched voices and made feminine gestures.[76]

The "threshold" implicitly applied by courts is a difficult standard to satisfy. For example, the Third Circuit Court of Appeals reversed the lower court's decision and found in favor of the defendants in the case of *Kay v. Independence Blue Cross*.[77] The court held that the discriminatory conduct the plaintiff alleged was motivated by sexual orientation rather than gender stereotyping. The plaintiff claimed he was the victim of gender stereotyping when his coworkers left a flyer for a gay sex phone line in his mailbox with the following typewritten message: "A real man in the corporate world would not come to work

72. *Id.* at 218 (citing Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000)). However, other courts have been more lenient about sex stereotyping claims made by lesbians. *See, e.g.*, Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (concluding that the lesbian plaintiff stated a Title VII claim simply by alleging that because she dated other women, she did not conform to her supervisor's notion of how a woman should act).

73. *See, e.g.*, Kay v. Independence Blue Cross, 142 Fed. App'x 48, 51 (3d Cir. 2005) (finding the use of gender-related jokes and abusive anti-gay comments fell short of the "threshold" needed to succeed on a sex stereotyping theory under Title VII); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000) (rejecting the plaintiff's hostile work environment claim and finding the hostile statements, taunting, and graffiti he endured were based only on his perceived homosexuality, not his sex); Higgins v. New Balance Athletic Shoe., Inc., 194 F.3d 252, 258 (1st Cir. 1999) (concluding that the plaintiff failed to demonstrate a hostile work environment claim despite the plaintiff's claim of verbal harassment and mocking due to his homosexuality).

74. No. 99-CV-4730, 2001 WL 868336 (E.D.N.Y. July 26, 2001), *aff'd*, 50 F. App'x 458 (2d Cir. 2002).

75. *Id.* at *17.

76. *Higgins*, 194 F.3d at 261.

77. 142 Fed. App'x 48 (3d Cir. 2005).

with an earring in his ear. But I guess you will never be a 'real man'!!!!!!"[78] The court acknowledged that this comment could be interpreted as gender stereotyping, and yet the court relied on *Trigg* to conclude that the abusive language and gender-related jokes fell short of the threshold needed for gender stereotyping.[79]

These rulings are examples of courts inappropriately conflating gender and sexual orientation and are antithetical to the *Price Waterhouse* precedent set by the Supreme Court nearly twenty years ago.[80] Based on the *Smith* and *Dawson* precedents, an employer could easily defend an employment discrimination case by claiming that its employment decision was motivated on permissible sexual stereotyping. However, ENDA's passage with perceived sexual orientation language would prohibit employers like Liberty Mutual Insurance Company and Bumble & Bumble from hiring and firing employees because of gender nonconforming physical attributes. Simply put, under ENDA, an employer could not insulate himself from liability by arguing that his employment decision was rooted in gender nonconformity and not sexual orientation.

Although previous case law has demonstrated courts' willingness to acknowledge that sexual orientation and gender conformity are often intertwined, this is not to say that all courts hold this view. The inextricable nature of gender and sexual orientation is clearly articulated in *Centola v. Potter*.[81] In that case the district court acknowledged that sexual orientation harassment is instigated precisely because of gender stereotyping, and explained:

> Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. . . . [O]ne paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn . . . .[82]

The conflation of sex stereotyping and sexual orientation has led to the muddling of case law in which no clear legal standard exists. Instead, litigants continue to engage in an exercise of artful pleading.[83] Importantly, many of the cases do not reveal the plaintiff's ac-

78. *Id.* at 50.

79. *Id.* at 51.

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

81. 183 F. Supp. 2d. 403 (D. Mass. 2002).

82. *Id.* at 410.

83. *See* JOEL W. FRIEDMAN, THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS 424 (6th ed. 2007).

tual sexual orientation, but rather merely a perception of the plaintiff's sexual orientation based on their gender conformity. For example, in *Hamm v. Weyauwega Milk Products, Inc.*,[84] the court rejected the plaintiff's claim of discrimination on the basis of sex stereotyping. Despite the plaintiff's assertion of sex stereotyping, his pleadings suggested that he was a victim of sexual orientation discrimination.[85] This linguistic slippage on the part of the plaintiff suggests the common inescapable relationship between gender and homosexuality. Thus, disaggregating these concepts in discrimination law leads to litigation, where a predominant factor in the success of a plaintiff's claim is dependent on using the correct wording. ENDA could remedy this inequity. If courts are forced to consider perceived sexual orientation, and thereby forced to engage in a sex stereotyping analysis, then they will be prevented from encountering the potential pitfall of inconsistently conflating and disaggregating gender identity and sexual orientation to prevent a homosexual plaintiff from legal recovery.

B. The Extreme Case of Gender Nonconformity: Transgender Rights Under a Stereotyping Theory of Liability

A gender identity inclusive ENDA would permit transgender plaintiffs to pursue a federal employment discrimination claim that is currently not expressly available to them. Courts have traditionally excluded transgenders from the protection of sex discrimination law in favor of a strict, biological interpretation of the term "sex."[86] In the seminal case on transgender employment discrimination, *Ulane v.*

84. 332 F.3d 1058 (7th Cir. 2003).

85. *See* FRIEDMAN, *supra* note 83, at 424–25. R

86. *See, e.g.*, Johnson v. Fresh Mark, Inc., 98 Fed. App'x 461, 461 (6th Cir. 2004); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982); Holloway v. Arthur Anderson & Co., 566 F.2d 659, 662 (9th Cir. 1977); Oiler v. Winn-Dixie Louisana, Inc., No. Civ. A. 00-3114, 2002 WL 31098541, at *6 (E.D. La. Sept. 16, 2002); Rentos v. Oce-Office Systems, No. 95 CIV. 7908, 1996 WL 737215, at *6 (S.D.N.Y. Dec. 24, 1996); James v. Ranch Mart Hardware, Inc., No. 94-2235-KHV, 1994 WL 731517, at *1 (D. Kan. Dec. 23, 1994); Underwood v. Archer Mgmt. Servs., Inc., 857 F. Supp. 96, 98 (D.D.C. 1994); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 287 (E.D. Pa. 1993); Emanuelle v. U.S. Tobacco Co., No. 85 C 8165, 1987 WL 19165, at *1 (N.D. Ill. Oct. 27, 1987); Doe v. U.S. Postal Service, Civ. A. No. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985); Powell v. Read's, Inc., 436 F. Supp. 369, 371 (D. Md. 1977); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978); Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975), *aff'd*, 538 F.2d 319 (3d Cir. 1976).

Eastern Airlines, Inc.,[87] the court deferred to the biological definition of "sex," and held it should be interpreted narrowly because "[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."[88] As a result of this holding in *Ulane*, most courts have since employed a plain meaning definition of sex and the statute's legislative history to reach the same conclusion.

A consequence of the *Ulane* decision is that courts are unwilling to include transgenders in their view of sex and sex stereotype discrimination. One scholar, Richard Green, explicates the complexity of defining an individual's sexual identity by stating it can be determined by multiple criteria including the sex chromosomes, the gonads, hormonal levels, genital appearance, and internal reproductive structures.[89] Considering this, Green claims transgender plaintiffs encounter a legal "Catch-22" in which they cannot allege gender discrimination because courts will conclude that they are being discriminated against because of their gender identity, nor can they allege transgender discrimination because such protections are not statutorily available under Title VII.[90] Moreover, "[s]ince transsexualism is a statement about gender, the requirement that the transsexual employee alternatively prove discrimination based on status as a woman

87. 742 F.2d 1081 (7th Cir. 1984). The case involved Kenneth Ulane, an airline pilot who worked for the airline for twenty-two years but was fired shortly after undergoing gender reassignment surgery in 1980. *Id* at 1082–83.

88. *Id.* at 1085. *But see* Kristine W. Holt, *Reevaluating* Holloway*: Title VII, Equal Protection, and the Evolution of a Transgender Jurisprudence*, 70 TEMP. L. REV. 283, 296–97 (1997). Holt's research demonstrates that the Seventh Circuit has inconsistently applied "sex." Holt discussed the court's holding in *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194 (7th Cir. 1971), which involved a company policy in which female flight attendants could not be married; there was no such policy for men. *Id.* at 1198. The court in *Sprogis* expanded "sex" to include sexual stereotypes. The court noted that sex "is not confined to explicit discriminations based 'solely' on sex. . . . Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* However, thirteen years later, in *Ulane*, the same circuit refused to extend the scope of Title VII. In reaching its determination, the court made scathing remarks about Title VII protections for transgender plaintiffs:

> Congress has a right to deliberate on whether it wants such a broad sweeping of the *untraditional* and *unusual* within the term "sex" as used in Title VII. . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline in behalf of the Congress to judicially expand the definition of sex as used in Title VII.

Ulane, 742 F.2d at 1086 (emphasis added).

89. Richard Green, *Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125, 126 (1985).

90. *Id.* at 134.

or man *and* as a transsexual both creates and enforces an artificial distinction."[91]

In earlier cases involving transgender individuals, the courts exhibited this "Catch-22" standard in several dispositive motions. *James v. Ranch Mart Hardware, Inc.* ("*Ranch Mart*")[92] was the first[93] of two Title VII transgender cases decided after *Price Waterhouse*. In *Ranch Mart*, Barbara Renee James claimed that she was fired after and because she notified her employer that she intended to begin living and working full-time as a man. The court ignored *Price Waterhouse* and instead cited precedent that adopted a plain-meaning interpretation of sex discrimination, which, as a consequence, reiterated that employment discrimination based upon transsexualism is not prohibited by Title VII.[94] The court stated, "[e]ven if plaintiff is psychologically female, Congress did not intend 'to ignore anatomical classification and determine a person's sex according to the psychological makeup of that individual.' "[95] This reference to anatomy as a way of defining Title VII's "sex" ignores *Price Waterhouse*'s recognition that sex discrimination is as much about the behaviors, actions, and outward appearance of a plaintiff as his or her genitals.

Likewise, in *Broadus v. State Farm Insurance Co.*,[96] the court questioned the applicability of the *Price Waterhouse* precedent and found transgender discrimination different than impermissible sex stereotyping. In *Broadus,* a transitioning female-to-male transsexual claimed that his supervisor harassed him because of his masculine appearance.[97] The facts presented in this case are strikingly similar to the facts in *Price Waterhouse*. In evaluating the defendant's motion for summary judgment, the court recognized that *Price Waterhouse* found

91. *Id.* at 130.

92. No. 94-2235-KHV, 1994 WL 731517 (D. Kan. Dec. 23, 1994).

93. While *Ranch Mart* may be one of the earliest post *Price Waterhouse* cases to involve transgender employment discrimination, there was an earlier case in which the courts adopted a broader definition of "sex." Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000). In that case, a transgender prisoner alleged that she was sexually assaulted by a guard in an all-male prison. She sued the guard and other prison officials under the Gender Motivated Violence Act, a statute that parallels Title VII. *Id.* at 1202. The court ruled in favor of the plaintiff, noting that although federal courts had initially distinguished sex from gender, that "the logic and language" of the Supreme Court's decision in *Price Waterhouse* had overruled this approach, and, consequently, the court held that Title VII encompasses both sex and gender. *Id.* at 1201.

94. *Ranch Mart*, 1994 WL 731517, at *1.

95. *Id.* at *3 (quoting Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982)).

96. No. 98-4254CVCSOWECF, 2000 WL 1585257 (W.D. Mo. Oct. 11, 2000).

97. *Id.* at *1.

that sexual stereotyping that plays a role in an employment decision is actionable under Title VII. The court distinguished *Price Waterhouse* by noting that the plaintiff in that case, Ann Hopkins, was not a transsexual and that the current plaintiff was. The court noted, "[i]t is unclear . . . whether a transsexual is protected from sex discrimination and sexual harassment under Title VII."[98] The plaintiff ultimately lost on different grounds—he failed to establish the elements needed for a hostile work environment claim. However, this case demonstrates courts' uncertainty in extending *Price Waterhouse* to cases involving transgender individuals.[99]

Ranch Mart and *Broadus* presented opportunities for courts to utilize the Supreme Court's decision in *Price Waterhouse* to evaluate a Title VII claim by a transgender plaintiff. Both decisions, however, failed to do so. Thus, most Title VII transgender cases are grounded in a biological definition of "sex" that is much narrower than the Supreme Court's definition in *Price Waterhouse*.[100]

Courts have typically precluded recovery for transgender plaintiffs, but three cases have extended the sex stereotyping theory in transgender discrimination cases, suggesting that some judges recognize the link between sex stereotyping and transgender identity. The Sixth Circuit, for example, was the first circuit to hold that Title VII protected transgender employees. The plaintiff in *Smith v. City of Salem*[101] was a fire department lieutenant who had been diagnosed with gender identity disorder.[102] After informing his supervisor of the diagnosis, city officials tried to force him to resign by requiring him to undergo psychological evaluations and suspending him. The Sixth Circuit noted that courts had previously rejected Title VII claims in cases such as *Ulane* because the plaintiffs were victims of "gender" and not "sex" discrimination, and only the latter is actionable.[103] The court found that the Supreme Court's decision in *Price Waterhouse*

98. *Id.* at *4.

99. *Id.* As was already noted, the Court determined in *Price Waterhouse* that Ann Hopkins experienced sex discrimination based on her behaviors and actions—characteristics that constitute one's psychological composition. Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989).

100. *Price Waterhouse*, 490 U.S. at 251 ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." (quoting L.A. Dep't of Water & Power v. Manhart, 43 U.S. 702, 707 n.13 (1978))).

101. 378 F.3d 566 (6th Cir. 2004).

102. *Id.* at 568. According to the American Psychiatric Association, gender identity disorder is defined as "a disjunction between an individual's sexual organs and sexual identity." *See* AMERICAN PSYCHIATRIC ASS'N, *supra* note 10, at 655. R

103. *Smith*, 378 F.3d at 572–73.

"eviscerated" that distinction.[104] Thus, the Sixth Circuit determined that discrimination against a transgender person who fails to act in accordance with his or her anatomical sex was no different from the discrimination Ann Hopkins faced at Price Waterhouse.[105] Writing for the three-judge panel, Judge Cole stated that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."[106]

The recent decision in *Schroer v. Billington*,[107] although a victory, illustrates ongoing reluctance in the application of sex stereotyping claims involving transgender individuals. Diane Schroer, a male-to-female transgender formerly known as David, interviewed and was offered a job working for the Congressional Research Service at Library of Congress. When the supervisory employee learned about her upcoming sex reassignment surgery, the plaintiff's job offer was revoked. The person who hired the plaintiff withdrew the offer, argued that the plaintiff was untrustworthy and would be unable to focus on the job.[108] The District Court for the District of Columbia viewed these reasons as pretextual sex discrimination in violation of Title VII, but was unclear whether this adverse employment action was based on sex sterotyping, sex discrimination of both.[109] This decision was an interesting departure from Ulane precedent, and the court believed that this case was sex discrimination per se because:

> The evidence establishes that the Library was enthusiastic about hiring David Schroer—until she disclosed her transsexuality. The Library revoked the offer when it learned that a man named David intended to become, [sic] legally, culturally, and physically, a woman name Diane. This was discrimination "because of . . . sex."[110]

104. *Id.* at 573.

105. *Id.* at 575. As the court noted, "[i]t 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." *Id.* at 574.

106. *Id.* at 575. Similarly, in *Barnes v. City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005), the Sixth Circuit affirmed a jury verdict in favor of the plaintiff, a male-to-female transsexual police sergeant, because gender nonconformity is sex stereotyping and therefore unlawful. Barnes was demoted because, although he presented as a male on-duty and as a female off-duty, he occasionally came to work wearing makeup or lipstick. *Id.* at 734. Because of this, Barnes' supervisors told him he was not masculine enough and lacked "command presence," a term that was loosely interpreted to suggest that his appearance and demeanor did not conform to the job requirements sufficient for promotion. *Id.*

107. 577 F. Supp. 2d 293, 295–99 (D.D.C. 2008).

108. *Id.* at 298.

109. *Id.* at 300–06.

110. *Id.* at 306.

This case marks another victory in the fight for federal employment protections for transgenders, but it is questionable whether other lower courts will apply this precedent or simply employ a literal meaning as evidenced by a majority of transgender cases.[111]

Some scholars believe the *Smith* and *Schroer* decisions demonstrate a movement away from the biological concepts of sex and more toward a socially constructed understanding of gender.[112] The interesting and potential trend in future case law development is proffering medical documentation to prove one's transgender status. The plaintiff in *Smith* was medically diagnosed with gender identity dysphoria.[113] Schroer was also diagnosed with gender identity dysphoria and planned to undergo sex reassignment surgery.[114] Moreover, Barnes was a pre-operative transsexual.[115] This is consistent with the fact that an overwhelming number of courts reject the sex discrimination claims of transgender individuals,[116] despite the fact these are cases of gender nonconformity.

111. The court in this case expressed concern that all transgender plaintiffs do not have actionable claims simply because they mention sex stereotyping. *Id.* at 304 (citing Schroer v. Billington, 424 F. Supp. 2d 203, 208 (D.D.C. 2006)). In other words, the district court indicated that Title VII should not preclude transgenders from recovery, but did note that they still must prove that discrimination occurred because of their gender nonconforming physical appearance. *Id.* (citing *Schroer*, 424 F. Supp. 2d at 211).

112. *See, e.g.*, Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination?*, 32 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 83, 88 (2006).

113. Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004).

114. *Schroer*, 577 F. Supp. 2d at 295.

115. Barnes v. City of Cincinnati, 401 F.3d 729, 733 (6th Cir. 2005).

116. Although this Article uses the term transgender more broadly to encompass both transgenderism and transsexualism, most cases in which courts have extended Title VII sex stereotyping discrimination involved plaintiffs who were transsexual, and who each obtained a formal medical diagnosis of gender identity disorder. *See Smith*, 378 F.3d at 568; *Schroer*, 577 F. Supp. 2d at 295. *But see* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224–25 (10th Cir. 2007) (rejecting male-to-female transsexual's sex stereotyping claim by finding the transit authority offered a legitimate non-discriminatory reason for prohibiting the plaintiff from using the women's restrooms); Johnson v. Fresh Mark, Inc., 337 F. Supp. 2d 996, 1000 (N.D. Ohio 2003) (rejecting a male-to-female pre-operative transsexual's claim because forcing her to use the men's restroom did not constitute sex stereotyping).

A potential reason for this expansion of sex stereotyping discrimination liability by courts could be that transsexuals are individuals with sexual identity disorders, defined by a strong and persistent belief of having been born into the wrong body and a desire to live or be treated as the other sex. They seek psychotherapy, hormone treatments, change of legal status, and often sex reassignment surgery. A. Evan Eyler, *Primary Care of the Gender-Variant Patient*, *in* PRINCIPLES OF TRANSGENDER MEDICINE AND SURGERY 15–33 (Randi Ettner, Stan Monstrey & A. Evan Eyler eds., 2007). These supplementary steps may be the additional evidentiary proof judges were seeking to justify a sex stereotype discrimination theory of liability.

III. Implications of ENDA and Reexamination of the Role of Sex, Gender, and Sexual Orientation

A review of literature and case law shows that courts have a tendency to conflate sexual orientation and sex stereotyping for purposes of denying recovery under Title VII. Currently, gender nonconforming plaintiffs have been unsuccessful at obtaining relief even for sex stereotyping claims that facially resemble the facts in *Price Waterhouse*. However, the current iteration of ENDA would help cure this problem by forcing courts to consider gender nonconformity as a basis for proving a claim of perceived sexual orientation. Given the often inextricable relationship between gender identity (or "looking homosexual") and sexual orientation, this law would prevent the disaggregation of these categories. More importantly, a fully inclusive ENDA would result in a consistent application of sex stereotyping liability in all discrimination cases.

A. Sexual Stereotyping as a Legitimate Non-Discriminatory Reason?[117]

A gender identity inclusive-ENDA would resolve a history of ineffective application of sex stereotyping liability in transgender cases. This protection is necessary especially in light of the trend in which courts refuse to apply a sex stereotyping theory of liability and instead favor a biological interpretation of sex when considering sex discrimination cases involving transgender individuals. However, given the resistance to pass a fully inclusive ENDA, this Part highlights the consequences if transgender employees continue to remain unprotected under federal discrimination law.

By opposing a gender identity inclusive-ENDA, or at least the possibility of recovery for sex stereotyping, employers can and have used

117. Although this Article focuses on the consequences of not recognizing and including gender identity in ENDA, it is important to highlight the Title VII disparate treatment framework. According to Supreme Court precedent, in order to prevail on a Title VII action, the plaintiff must first make out a prima facie case by showing the following: (1) he is a member of a protected class as defined under Title VII; (2) he is qualified or able to perform his job; (3) there was an adverse employment action; and (4) circumstances that support an inference of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). Once the plaintiff establishes a prima facie case, the burden of production and persuasion shifts to the employer to provide a legitimate, nondiscriminatory reason for the employment decision at issue. *See* Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142 (2000). If the employer satisfies this requirement, the burden shifts back to the plaintiff to prove by a preponderance of the evidence that the employer's "proffered reasons [were] pretextual." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 530 (1993).

gender nonconformity as a legitimate non-discriminatory reason to terminate an employee. For example, the Ninth Circuit in *Holloway v. Arthur Anderson & Co.*[118] agreed that the employer could fire Ramona Holloway, not because she was transsexual, but because her "dress, appearance and manner . . . were such that it was very disruptive and embarrassing to all concerned."[119] The *Holloway* decision reveals that, under Title VII, an employer can legitimately fire an employer by alleging simply that the employee's gender nonconformity hinders productivity in the workplace.

The removal of gender protections from ENDA would also mean that employers could continue to use a dress code policy to legitimately terminate transgender individuals.[120] One notable case of such

118. 566 F.2d 659 (9th Cir. 1977).

119. *See, e.g.*, *id.* at 661 n.1; Sommers v. Budget Mktg., Inc., 667 F.2d 748, 748–49 (8th Cir. 1982) (noting the discovery that an employee was a male-to-female pre-operative transsexual led to an alleged disruption of the company's work routine, since a number of female employees indicated they would quit if Sommers used the women's restroom); Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975) (holding a male-to-female employee legitimately lost her job because of her change in gender); Voyles v. Ralph K. Davies Medical Center, 403 F. Supp 456, 456 (N.D. Cal. 1975) (finding employer legally fired a hemodialysis technician because the employee's desire to undergo a sex change "might have a potentially adverse effect on both the patients receiving treatment . . . and on plaintiff's coworkers caring for those patients").

120. This concern would be obviated with having dress code policies for transgender employees who transition on the job. House Bill 3017 includes this provision and provides, inter alia:

> DRESS AND GROOMING STANDARDS.—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.

H.R. 3017, 111th Cong. § 8(a)(5) (2009). This is significant because sex-specific dress codes enforced by employers and schools have been upheld by courts. *See, e.g.*, Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1112–13 (9th Cir. 2006) (holding that terminating an employee for failure to adhere to employer's sex-specific dress code did not amount to sex discrimination); Olesen v. Bd. of Educ., 676 F. Supp. 820, 822–23 (N.D. Ill. 1987) (upholding school's dress code policy that prohibited male students from wearing earrings). Such sex-specific dress codes are often proffered reasons by defendants to discriminate against transgender employees. *See, e.g.*, Creed v. Family Express Corp., No. 3:06-CV-465RM, 2007 WL 2265630, at *2 (N.D. Ind. Aug. 3, 2007) (male-to-female pre-operative transsexual told by the company to dress as a male or face termination); James v. Ranch Mart Hardware, Inc., 881 F. Supp. 478, 481 (D. Kan. 1995) (male-to-female transgender told by employer that the employer preferred that she come to work as a man and not wear her wig, dress, and makeup).

a termination involved Andria Adams Dobre, a male-to-female Amtrak employee who filed a lawsuit under Title VII and the Pennsylvania Human Rights Act.[121] Dobre claimed that Amtrak had discriminated against her once she began receiving hormone injections.[122] Her employer indicated that she had to dress as a male unless she provided a doctor's note. Even after Dobre provided a doctor's note, she still was not permitted to use the women's restroom. In other words, Dobre was permitted to present as a female but was still forced to use the men's restroom. The court concluded that Dobre could not successfully make a claim of discrimination because "the acts of discrimination alleged by the plaintiff were not due to stereotypic concepts about a woman's ability to perform a job nor were they due to a condition common to women alone."[123]

B. Reexamination of Sex, Gender, and Sexual Orientation

Sexual orientation and gender identity discrimination are never really about sex or sexual preference, but rather gender nonconformity. However, the most recent ENDA somewhat recognizes the similarity between discrimination on the basis of sexual orientation and on the basis of gender identity. Consequently, a gender identity inclusive-ENDA would only create a consistent application of gender nonconformity discrimination.

More importantly, the passage of a fully inclusive ENDA would demonstrate a more contemporary understanding of the interplay between sex, gender, and sexual orientation. Scholars point out the un-

Although the issue of dressing room facilities may be somewhat resolved by ENDA, there is no provision concerning restroom facilities and the accommodations that should be made for transgender employees. In fact, House Bill 3017 expressly states that employers will not be required to build new facilities to accommodate transgender people. H.R. 3017, 111th Cong. § 8(a)(4) (2009). This provision may prove to be problematic because several controversies have involved transgender bathroom usage. *See, e.g.*, Kastl v. Maricopa County Cmty. College Dist., No 06-16907, 2009 WL 990760, at *1 (9th Cir. Apr. 14, 2009) (affirming the dismissal of plaintiff's claims because she did not provide sufficient evidence to rebut claims to ban her from the women's restroom); Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1224 (10th Cir. 2007) (upholding the firing of transwoman in part because employees expressed concern over her bathroom usage); Johnson v. Fresh Mark, Inc., 98 Fed. App'x 461, 461 (6th Cir. 2004) (upholding the prohibition of a transwoman from using the women's restroom and returning to work until she returned with a note from her doctor).

121. Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993).

122. *Id.* at 286.

123. *Id.* at 287. This case illustrates that even though the court recognizes gender nonconformity, it is unwilling to apply a sex stereotype theory of liability in this case.

due reliance on biology in sex discrimination cases,[124] but disagreement has emerged as to how to draw the boundaries between sex, gender, and sexual orientation in discrimination cases.[125] Admittedly such a task is a difficult one. On one hand, a bright-line set of definitions would aid courts in applying past precedent. On the other hand, the use of rigid definitions undermines the fluid nature of gender.[126]

Scholars agree that gender should be the focal point in sex discrimination claims. This agreement suggests two things. First, gender should always remain a point of inquiry in any discrimination laws pertaining to sex, sexual orientation, and gender identity. As demonstrated, the inescapable, pervasive nature of gender is such that eliminating it from inquiry would preclude viable recovery for many plaintiffs. To this end, conflating gender with another attribute such as sexual orientation or sex dispels some of the confusion courts face in determining what is actionable under the law. Second, considering gender also shows a more accurate description of the discriminatory animus that occurs in the workplace. In the case of sexual orientation, a person is not the victim of discrimination because co-workers know the person's sexual preference, rather it is because they exhibit differing, non-conforming traits and mannerisms. These deviations lead

124. *See* Franke, *supra* note 5, at 2. **R**

125. *See, e.g.*, Taylor Flynn, Trans*forming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395 (2001). Flynn asserts that gender should be a focal point of inquiry because sex and sexual orientation jurisprudence are unduly premised upon the traditional understanding of "sex" as determined by anatomy at birth. *See also* Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988) (suggesting that gender must be included in cases of sexual orientation discrimination because such discrimination is not based on the "condemnation of sexual behavior," but rather violating "prescriptions of gender role expectations"). *But see* KINGSLEY R. BROWNE, BIOLOGY AT WORK: RETHINKING SEXUAL INEQUALITY 44–45 (2002) (advocating that biological differences between men and women should be considered to provide a more illustrative picture of workplace inequality); Richard A. Epstein, *Gender is for Nouns*, 41 DEPAUL L. REV. 981, 990 (1992) (arguing that the term "sex" rather than "gender" should be used in discrimination jurisprudence in part because there are biological bases of behavior that cannot be attributed to gender).

126. *See, e.g.*, Kate Bornstein, GENDER OUTLAW: ON MEN, WOMEN, AND THE REST OF US 52 (1994) (arguing that gender can and should be viewed as more fluid); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 86–87 (2008) (proposing that acknowledging gender fluidity would recognize the diversity in gender identities, particularly transgender identity); 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, 311 (2005) (suggesting that relying on the "sex-gender" distinction only reaffirms the undue reliance on biology, making it difficult for gender nonconforming litigants in court).

people to assume that gender nonconformity is a mark of homosexuality.

In the case of transgender protections, adding gender identity within the purview of ENDA is the best strategy to prevent the inconsistent application of sex and gender in discrimination cases. An explicit prohibition of "gender identity" discrimination serves a dual purpose. First, the addition of gender identity gives legitimacy to claims that otherwise have and would have been inapplicable under federal law (e.g., Title VII not being applicable in transgender cases). Second, it provides a more contemporary understanding of the relationship between sex, gender, and sexual orientation; it is rare that discrimination is motivated by sex or sexual orientation, rather it is triggered in response to individuals who challenge the gender binary and societal construction of what it means to be a male or female.

Conclusion

The passage of a fully inclusive ENDA would serve as a victory for gay, lesbian, and transgender employees. However, and more importantly, ENDA would provide a better understanding of employment discrimination of gay, lesbian, and transgender plaintiffs. Such plaintiffs tend to be targets of discrimination in the workplace because they are gender nonconformists whose appearance and mannerisms deviate from traditional notions of masculinity and femininity. However, previous attempts for a gender identity inclusive ENDA should give pause as to whether law makers will actually retain this protection. Passing this law without gender identity protections would only create a disparate application of gender nonconformity discrimination and necessarily preclude transgenders from pursuing their claims at the federal level.

Some courts have extended Title VII sex stereotype discrimination protections to transgender employees, but more courts defer to biology and preclude recovery. Obviously, a gender identity inclusive ENDA would permit transgender employees—a more extreme case of gender nonconformity—a guaranteed outlet for legal redress. This is critical because, at this point, the only claims in which these individuals have been successful under Title VII have been those where the plaintiff had a medical diagnosis of gender identity dysphoria. Moreover, the current Title VII framework allows employers to provide a legitimate non-discriminatory purpose to defeat the plaintiff's prima facie case, and they can simply argue gender nonconformity (e.g., dress code, bathroom usage) is the precise reason for the adverse em-

ployment action. In other words, a gender identity exclusive ENDA would prohibit employers from discriminating against a homosexual employee on the basis of gender nonconformity, but employers could continue to discriminate against transgender individuals.

As the discussion of gender theory demonstrates, inconsistently applying gender bias in legal analyses leads to inconsistent outcomes that deny recovery for individuals who need protections in the workplace. In the case of ENDA, a law rooted in sexual orientation, actual and perceived, but not gender identity, does not fully recognize the fluidity of sex, gender (including transgender), and sexual orientation. The passage of ENDA, although successful in some respects, could legitimize the traditional bipolar, biological notion of men and women in others.