Spring 2009

Transitional Discrimination

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*TRANS*ITIONAL DISCRIMINATION

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INTRODUCTION

Meet Diane Schroer:[1]

> Schroer is a graduate of both the National War College and the Army Command and General Staff College and she holds masters degrees in history and international relations. During Schroer's twenty-five years of service in the U.S. Armed Forces, she held important command and staff positions in the Armored Calvary [sic], Airborne, Special Forces and Special Operations Units, and in combat operations in Haiti and Rwanda. Before her retirement from the military in January 2004, Schroer was a Colonel assigned to the U.S. Special Operations Command, serving as the director of a 120-person classified organization that tracked and targeted high-threat international terrorist organizations. In this position, Colonel Schroer analyzed sensitive intelligence reports, planned a range of classified and conventional operations, and regularly briefed senior military and government officials, including the Vice President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. At the time of her military retirement, Schroer held a Top Secret, Sensitive Compartmented Information security clearance, and had done so on a continuous basis since 1987. After her retirement, Schroer joined a private consulting firm, Benchmark International, where . . . she [worked] as a program manager on an infrastructure security project for the National Guard. Diane Schroer was qualified for a position as the Specialist in Terrorism and International Crime with the Congressional Research Service ("CRS") at the Library of Congress, a position for which Schroer applied in August 2004, while working at Benchmark International.[2]

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This Essay was an invited contribution to the *Temple Political & Civil Rights Law Review*'s 2008 symposium, Intersections of Transgender Lives and the Law: Critical Perspectives on Legal and Social Challenges. We wish to thank Natalie Hrubos for inviting our participation in this Symposium issue. In addition, we wish to thank participants at the *Touro Journal of Race, Gender, and Ethnicity* Symposium on transgender rights and Leandra Lederman for helpful comments on this Essay.

1. *See* Schroer v. Billington, 577 F. Supp. 2d 293, 295 (D.D.C. 2008).
2. *Id.* at 295.

Despite Schroer's stellar credentials, CRS rescinded Schroer's job offer.[3] CRS's decision not to hire Schroer was not because she was not qualified for the job, which she was.[4] The decision was not made because Schroer did not receive "the highest interview score of all eighteen candidates" that CRS interviewed for the position, which Schroer did.[5] The decision also had nothing to do with the fact that after receiving several writing samples and a list of references from Schroer, "the members of CRS's selection committee unanimously recommended that Schroer be offered the job," which the committee did.[6] Instead, CRS's decision not to hire Diane Schroer was made because Schroer was transitioning from male to female.[7]

Diane Schroer is not the first transgender[8] plaintiff to win an employment discrimination claim under Title VII.[9] For instance, Jimmie Smith,[10] a transgender firefighter from Salem, Ohio, and Phelicia Barnes,[11] a transgender police officer in Cincinnati, Ohio, both won discrimination claims in recent years. Smith and Barnes won their cases by framing their discrimination claims in terms of their gender-nonconformity, with both alleging that they were discriminated against for being effeminate men.[12] Although Jimmie Smith and Phelicia Barnes paved the way for Diane Schroer to win her case, Schroer was able to accomplish something that no other transgender plaintiff has ever done before. What distinguishes Diane Schroer from plaintiffs like Smith and Barnes is that Diane Schroer convinced the courts that she was entitled to protection for being discriminated against in her capacity as a transgender person.[13]

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3. *Id.* at 299.

4. *Id.* at 297 n.1.

5. *Id.* at 296.

6. *Id.*

7. *Schroer*, 577 F. Supp. 2d at 299 (citing a proposed draft of the selecting official's email to Schroer, rescinding the job offer).

8. Because the term "transgender" has been observed to "simultaneously encompass various definitions," we should pause here to define what we mean by it. Ming-Yu Bob Kau, *Transgender Rights edited by Paisley Currah, Richard M. Juang, and Shannon Price Minter, Minneapolis: University of Minnesota Press, 2006, 368 pp. $19.95 paper*, 22 BERKELEY J. GENDER L. & JUST. 274, 274 (2007) (book review). We borrow a broad and inclusive definition of the term from Professor Anna Kirkland, who has defined transgender to include "gender variant people who have not necessarily sought to alter their bodies but nonetheless feel a disjunction between their biologically and socially gendered selves." Anna Kirkland, *Victorious Transsexuals in the Courtroom: A Challenge for Feminist Legal Theory*, 28 LAW & SOC. INQUIRY 1, 2 (2003). This term is considered broader than, and to include within its definition, the term "transsexual," which "refer[s] to people who identify as [transsexual] and who seek to alter their physiological gender status through surgery or hormones in order to bring it into line with their social and emotional gender status."

9. The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253 (as amended at 42 U.S.C. §§ 2000e-2000e-17) (providing in § 2000e-2, known as Title VII, that "[i]t shall be an unlawful practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin").

10. Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (transgender plaintiff Jimmie Smith).

11. Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005) (transgender plaintiff Phelicia Barnes).

12. *See generally Smith*, 378 F.3d 566.

13. *Compare Schroer*, 577 F. Supp. 2d at 308 (holding that Title VII prohibits discrimination based on an individual's transgender status), *with Smith*, 378 F.3d at 578 (holding that the plaintiff's

In reaching the conclusion that Diane Schroer was discriminated against in violation of Title VII, the *Schroer v. Billington*[14] court analogized the discrimination that she suffered to the discrimination suffered by a religious convert.[15] In the same way that discriminating against an employee who had converted from Christianity to Judaism would constitute discrimination "because of religion" in violation of Title VII, so, too, reasoned the *Schroer* court, discrimination against an employee who had transitioned from male to female would constitute discrimination "because of sex" in violation of Title VII.[16] In so doing, the court conceptualized Schroer's identity by focusing on its transitional state.[17] While transgender employees before Diane Schroer have won discrimination lawsuits against their employers, their victories have not offered a stable basis for protecting against transgender discrimination. As a result, as we highlight in other work, transgender individuals who have been discriminated against cannot rely on the law's protection from discrimination.[18]

Transgenderism is in transition. We mean this in both a narrow and a broad sense. In a narrow sense, a transgender person's identity often is literally in transition, as a person transitions from one sex or gender to another. And in a broader sense, the transgender rights movement is also in transition, particularly with respect to the ways in which transgender plaintiffs are framing their discrimination claims. Although the recent decision in *Schroer* offers transgender plaintiffs hopeful precedent, it is unclear whether other courts will rule the same way in cases of transgender discrimination.[19] This Essay argues that in order to ensure more consistent results in cases of transgender discrimination, courts should embrace an understanding of transitional identity.

Transitional identity is identity that has aspects of one or more extant identities, but which is inchoate, in that the identity does not express fully any of

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allegations sufficiently constituted a claim of *sex* discrimination rooted in the Equal Protection Clause and pursuant to Title VII), *and Barnes*, 401 F.3d at 739 (finding that plaintiff was a member of the protected class, as a man or a woman, and thus has standing to bring a Title VII claim).

14. 577 F. Supp. 2d 293.

15. *Id.* at 306-07.

16. *See id.* ("No court would take seriously the notion that 'converts' are not covered by the statute. Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that 'transsexuality' is unprotected by Title VII.").

17. *See id.* (analogizing change in religion to change in gender to emphasize the transitional state).

18. *See* Elizabeth M. Glazer & Zachary A. Kramer, *Trans Fat*, LAW & SOC. INQUIRY (forthcoming 2010) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1337129) (reviewing ANNA KIRKLAND, FAT RIGHTS: DILEMMAS OF DIFFERENCE AND PERSONHOOD (2008)) (arguing that both fat and transgender plaintiffs share the frustration that anti-discrimination law sees them differently from how these plaintiffs see themselves) [hereinafter, Glazer & Kramer, *Trans Fat*]; Elizabeth M. Glazer & Zachary A. Kramer, *The Awkward Phase of Anti-Discrimination Law* (in progress) (explaining that anti-discrimination law, as currently conceived, has failed to protect groups such as transgender, and bisexual individuals, who fall outside of, in-between, or who are invisible to its spheres of protection) [hereinafter Glazer & Kramer, *The Awkward Phase*].

19. *See Schroer*, 577 F. Supp. 2d at 308 (holding that plaintiff was protected under Title VII for being discriminated against because she was transgender).

those extant identities. For instance, a religious convert has a transitional identity, because her identity has aspects of the religion from which she is converting as well as the religion to which she will convert. Similarly, a transgender person has a transitional identity, because the person's identity has aspects of the gender or sex[20] from which the person is transitioning, as well as the gender or sex to which the person will transition. An understanding of transgender identity as transitional may strike some as controversial. In this Essay, we argue that such an understanding is preferable—in that it provides a more stable foundation on which to fight the battle against transgender discrimination—to the prevalent understanding of transgender identity as gender nonconformity.

An overview of transgender discrimination cases in Section I demonstrates the confused conception of transgender identity that has animated courts' decisions. Section II describes what is meant by "transitional identity," and explains how an understanding of transitional identity in anti-discrimination law benefits not only transgender plaintiffs, but anti-discrimination law as a whole. Though the *Schroer* court introduced the concept of transitional identity by analogy, this Essay hopes to anchor that concept to a theory that is familiar to the anti-discrimination law literature—intersectionality theory. Section III draws on intersectionality theory in developing a theory of transitional discrimination, which is discrimination on the basis of transitional identity. A brief conclusion summarizes the Essay's ideas.

I. TRANSGENDERISM IN TRANSITION: FROM *ULANE* TO *SCHROER*

As we have explained elsewhere,[21] we are witnessing an important moment in the legal recognition of gender identity.[22] For a long time, courts were quite suspicious of discrimination claims brought by transgender employees.[23] Indeed, it was nearly impossible for transgender employees to bring actionable sex discrimination claims because courts assumed that transgender individuals were bringing sex discrimination claims as a means to bootstrap protection for gender identity into Title VII.[24] The prime example of this is the Seventh Circuit's

20. Because the definition of "transgender" used in this Essay includes those who transition biologically as well as psychologically, an individual's transitional identity could borrow from both sexes, if the individual transitions biologically, or from both genders, if the individual transitions psychologically, or both.

21. *See* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 233-42 (2009) (discussing the relationship between heterosexuality and Title VII and proposing a new approach for courts in considering discrimination claims based in part on an individual's sexual orientation).

22. *See* Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 567-72, 577-84 (2007) (articulating the history of Title VII discrimination cases involving transgender plaintiffs both leading up to and following *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and noting that the majority of the cases were decided in favor of the transgender plaintiffs).

23. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1086-87 (7th Cir. 1984) (concluding that Title VII's prohibition against "sex" discrimination does not cover discrimination based on gender identity); Sommers v. Budget Mktg., Inc., 667 F.2d 748, 750 (8th Cir. 1982) (same); Kirkpatrick v. Seligman & Latz, Inc., 636 F.3d 1047, 1050-51 (5th Cir. 1981) (same); Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977) (same); 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) (same).

24. *See, e.g.*, *Ulane*, 742 F.2d at 1085-87 (holding that Title VII's prohibition of discrimination

decision *Ulane v. Eastern Airlines, Inc.*,[25] which was handed down in 1984. Yet courts' attitude toward discrimination claims brought by transgender plaintiffs has changed considerably since *Ulane*. In this Part, we trace the transformation of courts' understanding of transgender identity from *Ulane* to *Schroer v. Billington*.[26] We demonstrate that courts' understanding of transgender identity has developed in a rather confusing way. Because earlier cases of transgender discrimination were decided in radically different ways, later courts have relied on an inconsistent understanding of transgender identity when deciding cases.[27] This Section lays the foundation for the remainder of the Essay, where we argue that courts should embrace an understanding of transgender identity as a transitional identity.

A. No Protection for Transsexuality

In *Ulane*, the plaintiff, a male-to-female transsexual, was fired from her job as a pilot for Eastern Airlines after she returned to work following sex reassignment surgery.[28] She brought a discrimination claim under Title VII based on her sex and her transsexuality.[29] Though the trial court ruled in her favor, the appellate court reversed, concluding that Title VII's prohibition against discrimination because of sex does not encompass discrimination on the basis of transsexuality.[30] Moreover, the court also concluded that Karen Ulane was not discriminated against on the basis of her sex,[31] thereby foreclosing relief under Title VII.[32]

B. Conflating Gender Nonconformity with Transgender Identity

Since *Ulane*, courts have begun to address transgender cases from a different perspective. There is an emerging strand of case law that breaks from *Ulane*, holding that transgender employees can bring actionable discrimination claims

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because of sex does not protect against discrimination because of transsexuality).

25. 742 F.2d 1081.

26. 577 F. Supp. 2d 293.

27. *Compare Ulane*, 742 F.2d at 1085-87 (holding that discrimination based on transsexuality is not the same as discrimination "because of sex" and therefore is not prohibited under Title VII), *with* Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 394-96 (N.Y. Sup. Ct. 1995) (specifically declining to follow the *Ulane* court's reasoning and holding that a transsexual may state a sex discrimination claim under Title VII).

28. *Ulane*, 742 F.2d. at 1082-83.

29. *Id.* at 1082.

30. *Id.* at 1085-87. According to the court, "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. Only Congress can consider all the ramifications to society of such a broad view . . . . If Congress believes that transsexuals should enjoy the protection of Title VII, it may so provide. Until that time, however, we decline on behalf of the Congress to judicially expand the definition of sex as used in Title VII beyond its common and traditional interpretation." *Id.* at 1086.

31. *Id.* at 1087.

32. Commenting on *Ulane*, William Eskridge and Nan Hunter asked: "What could be a more logical example of 'sex discrimination' than firing a pilot because her sex as presented is not the same as the sex as the employer understood it?" They go on to suggest that: "This seems in many respects more of a core sex discrimination than the firing of a female pilot because the employer thinks that women do not fly as well as men." WILLIAM N. ESKRIDGE, JR. & NAN D. HUNTER, SEXUALITY, GENDER, AND THE LAW: TEACHER'S MANUAL 193 (2d ed., 2004) (on file with authors).

under Title VII.[33] The impetus for this change was the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[34] where the Court established the gender-stereotyping theory of sex discrimination.[35] In *Price Waterhouse*, the Court expanded the reach of Title VII's sex discrimination jurisprudence by holding that Title VII prohibits employment decisions based on an employee's failure to conform to gender stereotypes.[36] The case revolved around Ann Hopkins, who was denied partnership at her consulting firm despite a strong work record.[37] In rejecting Hopkins's candidacy, the partners expressed uneasiness about—and in certain cases outright hostility toward—Hopkins's appearance and demeanor, criticizing her for her lack of femininity.[38] The most egregious example was the advice given to Hopkins so she could improve her chances for partnership in the future: she was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[39]

Ruling in favor of Hopkins, the Court developed a new theory of sex discrimination, which has come to be known as the gender-stereotyping theory of sex discrimination.[40] According to the Court, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."[41] The thrust of the gender-stereotyping theory is that employers violate Title VII when they base employment decisions on an employee's failure to conform to stereotypical expectations of how men and women are supposed to look and behave in the workplace.[42] Since *Price Waterhouse*, courts have applied the gender-stereotyping theory in cases involving lesbians and gay men.[43]

After *Price Waterhouse*, transgender employees began basing their discrimination claims not on their transgender status—a basis which had proved unsuccessful in *Ulane*[44]—but instead on their gender-nonconformity. Consider an

33. *See, e.g.*, *Smith*, 378 F.3d at 572-73 (concluding that a transgender plaintiff can state an actionable gender-stereotyping claim); *Barnes*, 401 F.3d at 737 (affirming *Smith* on the same grounds).

34. 490 U.S. 228.

35. *Id.* at 250-52.

36. *Id.*

37. *Id.* at 233-34.

38. *Id.* at 234-35.

39. *Id.* at 234 (quotations omitted).

40. *See generally* Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. ILL. L. REV. 465 (2004) (discussing the gender-stereotyping theory and applying it to cases involving lesbians and gay men).

41. *Price Waterhouse*, 490 U.S. at 251.

42. *Id.* at 250-52. Under the gender-stereotyping theory, Price Waterhouse violated Title VII because it discriminated against Hopkins for not appearing and acting feminine enough in the workplace. As their advice showed, the partners expected Hopkins to dress and act femininely. *Id.* at 235. But because she was more masculine than feminine, she failed to conform to their sex-based expectations, and they rejected her partnership bid because of it. Thus they acted on the basis of her sex in violation of Title VII.

43. *See, e.g.*, Centola v. Potter, 183 F. Supp. 2d 403, 408-10 (D. Mass. 2002) (holding that an effeminate gay man could avail himself of the gender-stereotyping theory); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223-25 (D. Or. 2002) (holding that a masculine lesbian woman could avail herself of the gender-stereotyping theory).

44. *See supra* notes 28-32 and accompanying text.

example of where a transgender plaintiff successfully employed this strategy. Jimmie Smith was suspended from her[45] job as a firefighter after she informed her supervisors that she intended to transition from male to female.[46] At the time of her suspension, Smith was a lieutenant in the Salem Fire Department, in Salem, Ohio, where she had worked for over seven years without any negative incidents.[47] By the time Smith decided to tell her supervisors about her situation, she was already "expressing a more feminine appearance on a full-time basis," and her coworkers had begun to ask questions and make comments about her changing appearance.[48] Shortly after this meeting, Smith's supervisors hatched a plan to get rid of her.[49] Instead of terminating her directly, the supervisors decided that Smith would have to undergo three separate psychological evaluations.[50] They hoped that Smith would either refuse to follow the order or resign.[51] If she refused to comply with the order, they planned to fire her for insubordination.[52] After hearing about the department's plan, Smith hired a lawyer, who contacted the department to inform them of Smith's legal representation.[53] Shortly thereafter, the department suspended Smith.[54]

Basing her claim on the gender-stereotyping theory that grew out of *Price Waterhouse*, Smith brought a sex discrimination claim under Title VII. Smith alleged that she was discriminated against for failing to conform to stereotypical notions of how a man should look and act. In a break from a long line of cases concluding that transgender plaintiffs cannot raise actionable sex discrimination claims,[55] the *Smith* court held that Smith's transgenderism did not prevent her from raising an actionable claim.[56] According to the court, the analysis in these older cases had been "eviscerated" by the Supreme Court's decision in *Price Waterhouse*.[57]

After *Price Waterhouse*, the *Smith* court reasoned, "employers who discriminate against men because they . . . 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."[58] And because *Price Waterhouse* did not

45. Though Jimmie Smith and her attorney decided to use male pronouns for Jimmie Smith throughout the *Smith* litigation, we refer to Jimmie Smith in this Essay using female pronouns. Because we urge courts to see transgender plaintiffs as they see themselves, we, along with our editors, feel that this Essay should not be yet another forum in which Jimmie Smith must mask her identity in order to obtain relief from discrimination suffered. Telephone Interview with Miranda Bernabei, Attorney for Jimmie Smith, in Bedford, Ohio (Mar. 20, 2009).

46. *Smith*, 378 F.3d at 568-69.

47. *Id.* at 568.

48. *Id.* (quotations omitted).

49. *Id.* at 568-69.

50. *Id.* at 569.

51. *Id.*

52. *Smith*, 378 F.3d at 568-69.

53. *Id.*

54. *Id.* at 569.

55. *See* Bernabei, *supra* note 45.

56. *Smith*, 378 F.3d at 574-75.

57. *Id.* at 573.

58. *Id.* at 574.

"provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is transsexual,"[59] a plaintiff's transgender identity will not spoil the plaintiff's sex discrimination claim so long as the plaintiff has suffered discrimination on the basis of a failure to conform to gender stereotypes.[60] Thus, the *Smith* court concluded, "discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman."[61]

Jimmie Smith is not alone. Since the *Smith* case was handed down, several courts have adopted the approach taken by the *Smith* court, concluding that transgender identity is not a bar to bringing an actionable sex discrimination claim.[62] For instance, in *Barnes v. Cincinnati*,[63] a case which came directly on the heels of *Smith*, the Sixth Circuit ruled that Phelicia Barnes, a police officer in Cincinnati, Ohio, could bring a gender-stereotyping claim against the police department for failing to promote her to the rank of sergeant.[64] As in *Smith*, the court in *Barnes* accepted the discrimination claim brought by a male-to-female transsexual on the basis of *Price Waterhouse* gender-stereotyping.

C. Reviving Ulane*?*

In 2007, three years after *Smith* was decided, Krystal Etsitty, a pre-operative male-to-female transsexual and former employee of Utah Transit Authority ("UTA"), brought an unsuccessful claim against UTA and her former supervisor for discriminating against her in violation of Title VII's prohibition against sex discrimination.[65] Etsitty worked for UTA as an extra-board operator, which meant that she would fill in for regular operators who were on vacation or who had called in sick. As a result of her position, Etsitty drove many of UTA's 115 to 130 bus routes in the Salt Lake City area over a period of approximately ten weeks. UTA employees used public restrooms while on their routes.[66] According to Etsitty's supervisor, the primary reason for her termination was Etsitty's intent to use women's restrooms along her bus route.[67]

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59. *Id.* at 575.

60. *Id.*

61. *Id.*

62. *See, e.g.*, *Barnes*, 401 F.3d at 736 (holding that the lower court did not err in instructing the jury that it could find discrimination against a transsexual plaintiff based on sex-stereotyping); *Schroer*, 577 F. Supp. 2d at 308 (holding that plaintiff was protected under Title VII for being discriminated against because she was transgender); Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 F. Supp. 2d 653, 659-61 (S.D. Tex. 2008) (finding that a transgender employee does have a cause of action under Title VII given that the plain language of Title VII and *Price Waterhouse* fail to distinguish between transgender employees and a feminine male or a masculine female).

63. 401 F.3d 729.

64. *Id.* at 737.

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

66. *Id.* at 1219.

67. Brian P. McCarthy, Note, *Trans Employees and Personal Appearance Standards Under Title VII*, 50 ARIZ. L. REV. 939, 949 (2008) (citing *Etsitty*, 502 F.3d at 1219).

Etsitty argued that she was protected under Title VII because a person's identity as a transsexual is directly connected to the sex organs she possesses, meaning that discrimination against her because of her transsexuality was discrimination against her because of sex.[68] In rejecting Etsitty's claim, the Tenth Circuit reiterated the holding of cases like *Ulane*—not *Smith* or *Barnes*—by holding that transsexuals did not fall within Title VII's protective reach.[69] As a result, the *Etsitty* court held that Title VII did not protect transsexuals in general, and did not protect Etsitty in particular.[70] The court also rejected Etsitty's claim that she was discriminated against because of her gender-nonconformity because it concluded that "Etsitty ha[d] not presented a genuine issue of material fact as to whether UTA's stated motivation for her termination [wa]s pretextual."[71]

D. The Schroer *Decision and Its Significance*

In light of conflicting decisions in *Smith* and *Barnes* on the one hand, and *Etsitty* on the other, the *Schroer* court could have ruled in any number of ways.[72] As we have noted elsewhere, *Schroer* is "at once consistent and inconsistent with the path laid out in *Smith*."[73] *Schroer* is consistent with *Smith* because the court concluded that Schroer, a pre-operative male-to-female transsexual, could raise an actionable claim under Title VII. However, *Schroer* is inconsistent with *Smith* because of the way the court in *Schroer* came to decide in Diane Schroer's favor.

In fact, while the outcome in *Schroer* is more consistent with the outcome in *Smith* and *Barnes*, the reasoning in *Schroer* is—perhaps counterintuitively—more consistent with the reasoning in *Ulane* and *Etsitty*. The *Schroer* court may have shared the *Smith* and *Barnes* courts' thought that the plaintiff before the court deserved Title VII's protection. However, the *Schroer* court shared both the *Ulane* court's and the *Etsitty* court's thought that the plaintiff before the court had a distinct transgender identity. Rather than require plaintiffs to cast themselves as gender-nonconforming men or women, the courts in *Ulane*, *Etsitty*, and *Schroer* saw these plaintiffs for who they were—transgender people. For all three courts, protecting transgender discrimination would require broadening the scope of Title VII's prohibition against discrimination "because of sex" to include transgenderism. While only *Schroer* held that Title VII's prohibition could be read so broadly, it is worth noting that all three cases shared the view that

68. *Etsitty*, 502 F.3d at 1221.

69. *Id.*

70. *Id.* at 1221-22.

71. *Id.* at 1224.

72. *Compare Smith*, 378 F.3d at 574-75 (holding that allegations of discrimination because of plaintiff's gender-nonconforming behavior were actionable under Title VII), *with Etsitty*, 502 F.3d at 1221-22 (holding that allegations of discrimination because of plaintiff's transsexuality were not actionable under Title VII as discrimination because of sex).

73. Kramer, *supra* note 21, at 241 (reasoning that *Schroer* is inconsistent with *Smith* because *Schroer* held that a transgender employee could raise a discrimination claim under Title VII, but that *Schroer* is inconsistent with *Smith* because *Schroer* held that the plaintiff's claim was actionable, not because of her gender nonconformity, but because of her sex).

transgenderism is a distinct identity, one that need not be grouped together with gender-nonconformity.

In order to amplify its acceptance of transgender identity as a distinct identity, the *Schroer* court offered an illuminating hypothetical:

> Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only "converts." That would be a clear case of discrimination "because of religion." No court would take seriously the notion that "converts" are not covered by the statute. Discrimination "because of religion" easily encompasses discrimination because of a *change* of religion. But in cases where the plaintiff has changed her sex, and faces discrimination because of the decision to stop presenting as a man and to start appearing as a woman, courts have traditionally carved such persons out of the statute by concluding that "transsexuality" is unprotected by Title VII. In other words, courts have allowed their focus on the label "transsexual" to blind them to the statutory language itself.[74]

In the above passage, the *Schroer* court makes implicit reference to the courts in *Ulane* and *Etsitty*, which have "traditionally carved [transgender or transsexual] persons out of the statute by concluding that 'transsexuality' is unprotected by Title VII."[75] However, in reaching the opposite conclusion from that reached in either *Ulane* or *Etsitty*, the *Schroer* court joined these courts' conception of transgender identity as a distinct identity.[76] In protecting Diane Schroer from the discrimination she suffered, the *Schroer* court argued that the "statutory language itself,"[77] the actual words of Title VII, encompassed her transgender identity.

II. TRANSITIONAL IDENTITY

Transgender plaintiffs are winning discrimination cases.[78] From the perspective of transgender rights advocates, this is a good thing. In this Essay, we do not mean to argue that the outcomes in cases like *Smith* and *Barnes* should change. But we are concerned with the path taken by courts in reaching these outcomes. Specifically, we take issue with the way in which courts conflate gender-nonconformity and transgender identity. As we argue throughout this paper, we believe that transgender rights should fall within the ambit of Title VII's existing protection against sex discrimination.

74. Schroer, 577 F. Supp. 2d at 306-07 (emphasis in original).

75. *Id.* at 307.

76. *See id.* (noting that *Ulane* and *Etsitty* refused to extend protection to transgender employees because Title VII was intended only to apply to the traditional applications of sex).

77. *Id.*

78. *See supra* notes 33-64 & 72-77 and accompanying text (briefly listing and discussing cases where claims brought by transgender plaintiffs succeeded).

The conflation of gender-nonconformity and transgender identity does not offer transgender plaintiffs a stable basis upon which to bring claims of transgender discrimination.[79] In this Essay, we argue that incorporating an understanding of transitional identity into anti-discrimination law will provide a firmer basis upon which to bring claims of transgender discrimination.[80] This Section explains transitional identity and situates it within the current conception of identity that animates anti-discrimination law. This Section demonstrates that an understanding of transitional identity benefits not only transgender plaintiffs and their advocates, but also the overarching structure of anti-discrimination law.

A. Identity in Anti-discrimination Law

Anti-discrimination law protects individuals through statutes like Title VII of the 1964 Civil Rights Act, which protects employees from discrimination at work.[81] If an individual believes he has suffered discrimination at work, in order to avail himself of the protections offered against such discrimination by Title VII, the individual must determine whether he fits within a category against which Title VII prohibits discrimination.[82] The categories protected by Title VII, according to the statute's plain words, are "race, color, religion, sex, or national origin."[83] In order to articulate a discrimination claim under Title VII, plaintiffs must satisfy the statute's causation requirement, meaning that plaintiffs must claim that the discrimination suffered was "because of" their membership in a particular protected category.[84] For instance, "[i]n order to state an actionable sex discrimination claim, a plaintiff must prove that she suffered unlawful discrimination 'because of' sex and not 'because of' some other characteristic that is not protected by Title VII, such as eye color or whether she is a Chicago Cubs fan."[85]

Of course, discrimination "because of" one's membership in a particular category group against which Title VII prohibits discrimination can occur for a number of different reasons. For instance, an employer might discriminate against a black employee when deciding not to hire her or to fire her simply because the employee is black. Or the employer might also discriminate against a black employee when requiring that the employee stop wearing cornrows in her hair.[86] Thus, discrimination in violation of Title VII can occur on the basis of either status (i.e., the status of one's membership in a group represented by one of Title VII's

79. *See* discussion *infra* Section II.B-C.

80. *See* discussion *infra* Section III.A-B.

81. 42 U.S.C. § 2000e-2 ("It shall be an unlawful practice for an employer . . . to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").

82. *Id.*

83. 42 U.S.C. § 2000e-2(a)(1).

84. *See* Kramer, *supra* note 21, at 212.

85. *Id.*; *see generally* David S. Schwartz, *When Is Sex Because of Sex: The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1709-14 (2002) (discussing the requirement of sex as a motivating factor in discrimination).

86. Kenji Yoshino, *Covering*, 111 YALE L.J. 769, 779-80 (2002) (citing Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981); Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365 (1991)).

protected categories) or conduct (i.e., the conduct one might display that is constitutive of one's membership in a group represented by one of Title VII's protected categories).[87] As we have argued elsewhere, these two types of discrimination—status and conduct discrimination—are often referred to as first and second generation discrimination, respectively.[88]

Civil rights lawyers and scholars have, in large part, turned their attention away from what is referred to as "first generation" discrimination.[89] In the "second generation" of discrimination law, the "[s]moking guns – the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'– are largely things of the past."[90] The move from first to second generation discrimination has been characterized as "'progress: individuals no longer need[] to *be* white, male, straight, Protestant, and able-bodied; they need[] only to *act* white, male, straight, Protestant, and able-bodied.'"[91]

> The disaggregation of sex from gender, the awareness of demands placed upon individuals who display traits that are constitutive of their group identity to downplay or "cover" the adjectives that make them the nouns that they are, and the trait discrimination movement generally, have offered discrimination law great gains "in analytic clarity and in human liberty and equality."[92]

However, the pervasiveness of those gains has obscured a loss: the fact that second generation discrimination harms are assessed by reference to the first generation categories to which they respond. Combating discrimination on the basis of conduct is a worthy enterprise, because an ideal body of anti-discrimination law would encourage individuals to be their most authentic selves.[93] But if the conduct to which attention is turned in the second generation of anti-discrimination law is only conduct that corresponds to categories of individuals whose protection is codified in Title VII, some problems are likely to arise.

First, as Professor Russell Robinson has noted, refocusing anti-discrimination law to battle the harms of its second generation, "which relies on individualized, subjective definitions of 'authenticity' in order to avoid the charge of essentializing

87. *Cf.* Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1419-32 (2008) (discussing homosexuality in terms of status discrimination and conduct discrimination).

88. *Id.*

89. *Id.* at 1419. One scholar has notably termed status-based discrimination "ontological" discrimination. *See* Kimberly A. Yuracko, *Trait Discrimination as Sex Discrimination: An Argument Against Neutrality*, 83 TEX. L. REV. 167, 170 n.15 (2004) (defining "ontological discrimination" as "discrimination that is status-based in the most basic sense—all women or men are excluded because of their status as such").

90. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-60 (2001).

91. Glazer, *supra* note 87, at 1420 (quoting KENJI YOSHINO, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 22 (2006)).

92. *Id.* (internal citations omitted).

93. *See* YOSHINO, *supra* note 91, at 184-87 (discussing U.S. Supreme Court cases sympathetic to authenticity and the authentic self).

or stereotyping identity . . . risks reinscribing the very majority norms that [proponents of a focus on second generation discrimination harms, like Yoshino] oppose . . . ."[94] In other words, a likely effect of battling conduct that is taken to be constitutive of group membership is the reinforcement of stereotypes that have come to define members of particular groups.

Second, shifting the attention of anti-discrimination law away from its first generation and toward its second generation suggests that the categories upon which first generation discrimination occurs—namely, the categories upon which discrimination is prohibited by statute[95]—are sufficient. After all, if second generation discrimination harms are predicated upon the categories that the first generation of anti-discrimination law protects, an exclusive focus on conduct discrimination may substitute the equally worthy enterprise of criticizing the institution of the categories themselves. A growing community of scholars has begun to engage in the project of criticizing anti-discrimination law's categories.[96] These scholars have started to ask not how plaintiffs can fit into the current categories but instead how anti-discrimination law may make room within its protective ambit for plaintiffs—like fat, transgender, and bisexual plaintiffs—who cannot fit into the molds that current categories offer.[97] A fuller exploration of this group of awkwardly situated plaintiffs is outside the scope of this Essay, and is the subject of a sister project of ours.[98] For now, we wish simply to make the point that the progression of anti-discrimination law from its first to its second generation has caused some scholars to re-examine the categorical structure upon which this progression is based.

B. Transitional Identity Defined

A critic of anti-discrimination law's categorical structure could approach her criticism from a variety of angles. For instance, she might argue that the categories are insufficient because there are too few of them.[99] Alternatively, she might argue

94. Russell K. Robinson, *Uncovering Covering*, 101 NW. U. L. REV. 1809, 1815 (2007) (reviewing YOSHINO, *supra* note 91).

95. *See supra* notes 81-87 and accompanying text (discussing the mechanics of Title VII, including those protected classes covered by the statute).

96. *See, e.g.*, DEBORAH HELLMAN, WHEN IS DISCRIMINATION WRONG? 7-9 (2008) (arguing that discrimination, broadly defined, is wrong when it demeans the individuals it affects); KIRKLAND, *supra* note 18, at 53-54 (determining which differences matter and which do not, for the purposes of anti-discrimination law, by examining "logics of personhood" rather than categories and applying those logics to the liminal category of fatness); E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 500 (1998) (advocating a paradigm of wholism (and not one of intersectionality), because the author argues that "[g]roup definition or group confinement is the essence of discrimination"); Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 801 (1996) (explaining that the "essence of discrimination . . . is not just how members of disadvantaged minorities feel about themselves; it is also how they are viewed by members of the dominant majority").

97. *See supra* note 18 and accompanying text.

98. *See* Glazer & Kramer, *The Awkward Phase*, *supra* note 18.

99. This would be one way to read Professor Anna Kirkland's critique in *Fat Rights*. In her book, Professor Kirkland at once criticizes anti-discrimination law's categorical structure and proposes the addition of "fatness" to its list of protected categories. For further elaboration of this point, *see* Glazer &

that one or more of the categories that anti-discrimination law protects are not the correct categories. A third option might be for her to argue that the currently protected categories are not being used properly. It is this third option that most accurately characterizes our critique of anti-discrimination law, as well as its particular conception of transgender identity. In order to articulate our critique, we introduce the concept of transitional identity.

Simply put, transitional identity is identity in transition. The religious convert whom the *Schroer* court referenced has a transitional identity.[100] The convert's identity has aspects of the religion from which she is converting as well as the religion to which she will convert.[101] Diane Schroer also has a transitional identity. For that matter, so do Karen Ulane, Jimmie Smith, and Krystal Etsitty.[102] A transgender person has a transitional identity because the person's identity has aspects of the gender or sex from which the person is transitioning as well as the gender or sex to which the person will transition. Transitional identity is identity that has aspects of one or more extant identities, but which is inchoate, in that the identity does not express fully any of those extant identities.

The incorporation of transitional identity into anti-discrimination law may strike some as controversial. Not all religious converts identify as converts, but may instead wish to assimilate into the religion to which they have converted.[103] Not all transgender individuals identify as transgender, but may instead wish to assimilate into what will become their surviving gender or sex.[104] This is a point we take especially seriously because we argue in other work that the purpose of anti-discrimination is to see plaintiffs asserting discrimination claims in the way those plaintiffs see themselves.[105] However, we contend that an understanding of transgender identity as transitional is preferable to the prevalent understanding of transgender identity as gender nonconformity for two reasons. First, such an understanding specifically addresses the transitional aspect of transgenderism. Second, our proposal that anti-discrimination law adopt an understanding of transitional identity does not preclude a gender-nonconforming transgender person from claiming that she was discriminated against as a result of her gender-

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Kramer, *Trans Fat*, *supra* note 18.

100. *See Schroer*, 577 F. Supp. 2d at 306-07 (comparing the transition of a transgender person to the transition experienced by a religious convert).

101. *See id.* (noting that an individual in the midst of a religious conversion would be protected under Title VII).

102. *See Smith*, 378 F.3d at 567 (bringing a sex discrimination claim as a self-identified transsexual plaintiff); *Ulane*, 742 F.2d at 1082 (bringing separate sex discrimination claims as a transsexual and as a female); *Schroer*, 502 F.3d at 1218 (bringing the claim as a self-identified "pre-operative transgendered individual").

103. *Cf. Etsitty*, 577 F. Supp. 2d at 306-07 (discussing how courts would not treat religious converts differently from those "born" into their religion).

104. *Cf. id.* (drawing a parallel between transsexuality and how the law would not differentiate between religious converts and those "born" into their religion). The "surviving" gender or sex means the gender or sex into which the individual ultimately assimilates, if any. In this way the word "surviving" is used in the way that the term is often used in the corporate mergers and acquisitions context, where an entity into which another entity has merged survives the merger.

105. *See* Glazer & Kramer, *Trans Fat*, *supra* note 18.

nonconformity. Transitional identity is meant to open up, not to close off, avenues of available relief for discrimination's victims.

C. *The Invisibility of Transitional Identity in Anti-discrimination Law*

An advocate for transgender rights may hail Jimmie Smith's case as a watershed moment for the transgender rights movement. We think this is a shortsighted view of the *Smith* case and its progeny. In this Section we criticize the *Smith* court's analysis, focusing on the way the court understands Smith's sex and gender identity. Specifically, we argue that the court's analysis, while seemingly progressive on its face, is potentially harmful to Smith—and by extension, all transgender plaintiffs—because of its reductionist approach to Smith's identity. A better approach to the case, we argue, would have incorporated the concept of transitional identity.

As it has developed, the gender-stereotyping theory used in cases like *Smith* and *Barnes* has adopted a fairly rigid approach to a plaintiff's sex and gender.[106] Of course, by "sex" we refer to biological differences, while we understand "gender" in terms of cultural roles, such as femininity and masculinity.[107] The gender-stereotyping theory unfolds in three steps. The starting point is to determine the plaintiff's "anchor gender," that is, the gender commonly associated with a person's sex.[108] The anchor gender for men is masculinity, while femininity is the anchor gender for women.[109] The second step is to determine a plaintiff's "expressive gender," that is, the plaintiff's particular gender expression.[110] For Ann Hopkins, the plaintiff around whom the gender-stereotyping theory was built, her expressive gender was masculinity, as her coworkers perceived her as excessively masculine in terms of her personal appearance and behavior.[111] The third and final step of the theory is to compare the plaintiff's anchor and expressive genders.[112] If the employer acted because these genders do not correspond, then the plaintiff has suffered discrimination on the basis of his or her failure to conform to stereotypical notions of gender.[113]

This theory is problematic for someone in Jimmie Smith's position because Smith's sex and gender are not stable identities. Indeed, the gender-stereotyping theory presupposes that a person's sex and gender are fixed traits. But at the time of her case, Smith's sex and gender were quite literally in a state of transition.

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106. *See, e.g.*, Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1, 2-4 (1995) (criticizing sex discrimination law for assuming that male and female identities are different from masculine and feminine identities).

107. *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, 20-27 (1995) (discussing "(mis)understandings of the use of equating sex with gender").

108. *See* Kramer, *supra* note 40, at 484.

109. *Id.*

110. *Id.* at 484-85.

111. *See Price Waterhouse*, 490 U.S. at 235 (noting that coworkers found Hopkins to be "macho" and described her as "a tough-talking somewhat masculine hard-nosed" manager).

112. *See* Kramer, *supra* note 40, at 485.

113. *Id.* at 485-86.

Born biologically male, Smith had begun the process of transitioning to female.[114] And as a part of that process, Smith began expressing a more feminine gender expression in her daily life.[115] But how do we determine what Smith's sex is? Although she was born male, Smith never really felt like a man, identifying more as a woman trapped in a man's body. And what is Smith's gender? The answers to these questions are elusive. In the case, the court takes the path of least resistance. It concludes that because Smith was a man who wanted to wear women's clothing, her anchor gender was masculinity and her expressive gender was femininity.[116] Thus Smith's case was an easy one for the court.

Our difficulty with the *Smith* case is that the court reduces Smith's transgender identity to little more than a fashion choice to wear women's clothing. Under the court's approach, Smith's reasons for wanting to change her appearance in the workplace simply did not matter; the only thing that did matter for the court's theory to work is that Smith wanted to dress and behave in a way that is incompatible with stereotypical expectations of masculinity. Professor Anna Kirkland stated the issue well in her book, *Fat Rights*, noting that, "Transsexuals or transgender people per se do not really exist in the *Smith* opinion; there just happen to be some men out there who want to wear dresses."[117] Moreover, in an earlier article on the topic, Kirkland elaborated that

> the real problem [which the *Smith* case goes out of its way to avoid] . . . is that nontrans people find [trans] people threatening, horrifying, aesthetically shocking, and deviant. An employer fires a trans person *as* a trans person, not as a man who wants to wear women's clothing.[118]

Because, as we argue elsewhere, we favor a system of anti-discrimination laws in which the plaintiff's sense of herself rather than the defendant's perception of her forms the basis for an actionable discrimination claim, it matters very little to us why individuals discriminate against transgender people.[119] However, in *Smith* and other cases involving discrimination against transgender plaintiffs, the transgender identity that these plaintiffs have tried to assert has been ignored entirely by courts. Our claim is that anti-discrimination law cannot offer meaningful relief to transgender individuals without recognizing the core of their identity. After all, transgenderism is not a fashion choice. Even though transgender people must make complicated decisions about how they will present themselves to the world, their

114. *Smith*, 378 F.3d at 568.

115. *Id.*

116. *Id.* at 574-75.

117. KIRKLAND, *supra* note 18, at 86; *see also* Anna Kirkland, *What's at Stake in Transgender Discrimination as Sex Discrimination?*, 32 SIGNS 83, 94-95 (2006) ("The [*Smith*] case reduces the story of gender oppression to a story about stereotypes and makes MTFs into men who wear dresses and makeup.").

118. Kirkland, *supra* note 117, at 108.

119. *See* Glazer & Kramer, *Trans Fat*, *supra* note 18.

identities cannot be reduced to a man's decision to wear a dress or a woman's decision to wear a tuxedo.

There is no doubt that a plaintiff like Jimmie Smith is in an awkward position. At the heart of Smith's case—indeed, the genesis of her case—was her desire to have her employer's support as she transitioned on the job.[120] Another way of thinking about the case is that Smith wanted the fire department to make an accommodation so that she could begin to assert a female identity in the workplace. Yet the gender-stereotyping theory, as endorsed by the court, effectively strips Smith of her transgender identity. In order to state an actionable claim, Smith must transform herself into a man who just wants to wear women's clothing.

Smith's transgenderism is not a label for gender-nonconforming behavior. It is an identity that Smith is affirmatively claiming. It is her sense of self. The court's causation analysis is only concerned with what Smith's supervisors perceived about Smith, not what Smith perceived about herself.[121] From the supervisor's perspective, a male employee had informed an employer that "he" planned to dress like a female employee at work. But this is quite different from how Smith perceived this exchange. From Smith's perspective, she was informing her supervisors about a fundamental change going on in her life, which was an essential part of who she was and how she saw herself. However, the *Smith* court's interpretation of anti-discrimination law did not have a mechanism to see Smith as a transgender person. By contrast, the concept of transitional identity allows future courts to see transgender people for who they are—transgender people.

III. TRANSITIONING TOWARD TRANSITIONAL IDENTITY

In order to begin to sort out the confusion generated by the current body of transgender discrimination cases,[122] and in order to resolve the problems generated by the rigidity of anti-discrimination law's categories,[123] courts must have available to them a stable theory through which to understand transgender identity. A stable theory of transgender identity must take into account the transitional reality of transgender identity. By drawing on intersectionality theory, which has hugely influenced anti-discrimination law in the recent past, this Section introduces a theory of discrimination on the basis of transgender identity: transitional discrimination.

A. Intersectionality Theory

The introduction of the theory of intersectionality, "an important elaboration of the relationship between law and identity that emerged in legal scholarship in the

120. *Cf. Smith*, 378 F.3d at 568 (discussing how Smith "approached [her supervisor] in order to answer any questions [he] might have concerning [Smith's] appearance and manner" thereby gaining support from her coworkers).

121. *See, e.g., Smith*, 378 F.3d at 572 (focusing on Smith's coworker's belief that Smith's dress and mannerisms were not masculine enough).

122. *See supra* Section I.

123. *See supra* Section II.

early 1990's,"[124] revolutionized anti-discrimination law.[125] Whereas anti-discrimination law traditionally referenced a single basis upon which a plaintiff articulated a discrimination claim, the introduction of the idea of intersectionality—namely, that individuals could fit into more than one of anti-discrimination law's protected categories—opened the door for intercategorical discrimination claims. In anti-discrimination law, an intersectional claim (or, a claim for intercategorical discrimination) is one that is based on at least two or more overlapping identity traits.[126]

An example of an intersectional claim that we have referenced in other work is a claim where gender-nonconformity and sexual orientation discrimination collide.[127] For instance, Dawn Dawson, a gender-nonconforming lesbian, brought a claim against her employer for discriminating against her because of her gender-nonconformity.[128] In rejecting her claim, the Second Circuit held that Dawson was discriminated against not because of her gender-nonconformity but because of her sexual orientation.[129] Further, because sexual orientation is not a protected trait under Title VII, the court held that Dawson failed to state an actionable discrimination claim.[130] According to the court, Dawson's sexual orientation was so integral to her gender-stereotyping claim that the former effectively overwhelmed the latter.[131] Thus, Dawson's ultimately unsuccessful claim against her employer for discrimination rested on an intersection of her gender-nonconformity and her sexual orientation.

However, not all intersectional claims are unsuccessful. In fact, the reason that Dawn Dawson's claim was unsuccessful was unique to the sexual orientation discrimination context. In that context, courts have had a tendency to stop what courts perceive as "bootstrapping" efforts on the part of homosexual plaintiffs to

124. Suzanne B. Goldberg, *Intersectionality in Theory and Practice*, *in* INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 124 (Emily Grabham et. al. eds., 2009).

125. *See* Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 704-14 (2001) (noting that Kimberlé Crenshaw's scholarship "remains the preeminent scholarship" in the area of intersectionality); *see also* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-discrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 150 (1989) (arguing that courts, civil rights thinkers, and feminists have as yet been "[u]nable to grasp the importance of Black women's intersectional experiences" and the Black woman's "compounded nature of . . . experience is absorbed into the collective experience of either" Blacks or women); *see* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality Identity Politics and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-43 (1991) (discussing how "[c]ontemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color").

126. *See* Carbado & Gulati, *supra* note 125, at 704-05; Gowri Ramachandran, *Intersectionality as "Catch 22": Why Identity Performance Demands Are Neither Harmless Nor Reasonable*, 69 ALB. L. REV. 299, 301-04, 328-33 (2005).

127. *See* Kramer, *supra* note 21, at 218-19.

128. Dawson v. Bumble & Bumble, 398 F.3d 211, 213 (2d Cir. 2005) [hereinafter *Dawson II*]; Dawson v. Bumble & Bumble, 246 F. Supp. 2d 301, 312 (S.D.N.Y. 2003).

129. *Dawson II*, 398 F.3d at 217-18.

130. *Id.* ("Thus, to the extent that she is alleging discrimination based upon her lesbianism, Dawson cannot satisfy the first element of a prima facie case under Title VII because the statute does not recognize homosexuals as a protected class.").

131. *Id.* at 217-21.

frame discrimination targeted at their sexual orientation as a claim of discrimination based on their gender-nonconformity.[132] Though courts have not embraced intersectionality theory as much as scholars have, some courts have been receptive to some intersectional discrimination claims. For instance, consider the discrimination experienced by Maivan Lam, an Asian American woman.[133] Lam, a law professor at the University of Hawaii's Richardson School of Law, applied twice for the position of Director of the Law School's Pacific Asian Legal Studies Program.[134] Despite a solid publication record and a record of experiences relevant to her desired position, she was not offered the directorship position.[135] Even if Lam's employer were not hostile toward Asian American men and white women, the employer may still harbor negative stereotypes about Asian American women in particular.[136] The *Lam* court[137] spoke specifically on this point, chastising the court below that had erred by treating separately Lam's claims of race and sex discrimination.[138] The *Lam* court went on to point out that other courts had recognized that "where two bases for discrimination exist, they cannot be neatly reduced to distinct components."[139] When identity traits are combined, as they were in Maivan Lam's case, "it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of that same race or of the same sex."[140]

Intersectionality theory, while very influential to the evolution of anti-discrimination law, finds itself in a "pivotal moment."[141] First, for a variety of reasons, the theory has not been embraced by courts as enthusiastically as it has been embraced by scholars.[142] Discrimination claims involve the determination of whether a particular individual was treated differently because of a particular trait. If a particular individual claims to have been treated differently because of the combination of two, or even three or four traits, courts would need to isolate more than a single variable differentiating the individual from similarly situated peers. Courts have resisted conducting such multiple determinations, perhaps because the introduction of multiple variables confounds the calculation of whether a particular individual was treated differently *because of* a particular trait. After all, it is harder

132. *See* Kramer, *supra* note 21, at 219-20.

133. *See, e.g.*, Lam v. Univ. of Haw., 40 F.3d 1551, 1562 (9th Cir. 1994) (reversing district court's award of summary judgment to defendant acknowledging that Lam as an "Asian wom[a]n [was] subject to a set of stereotypes and assumptions shared neither by Asian men nor by white women").

134. *Id.* at 1554.

135. *Id.* at 1556-57.

136. *See* Carbado & Gulati, *supra* note 125, at 709 (discussing the example of discrimination aimed at an Asian American woman).

137. 40 F.3d 1551.

138. *See Lam*, 40 F.3d at 1561-62 (commenting that the district court "misconceived important legal principles").

139. *Id.* at 1562 (citing Jefferies v. Harris County Cmty. Action Ass'n, 615 F.2d 1025, 1032-34 (5th Cir. 1980); Graham v. Bendix Corp., 585 F. Supp. 1036, 1047 (N.D. Ind. 1984); Chambers v. Omaha Girls Club, 629 F. Supp. 925, 946 n.34 (D. Neb. 1986), *aff'd*, 834 F.2d 697 (8th Cir. 1987)).

140. *Lam*, 40 F.3d at 1562.

141. Goldberg, *supra* note 124, at 124.

142. *See* Suzanne Goldberg, *Categorical Instability: Identity-Based Discrimination and the Barriers to Complexity* (unpublished manuscript, on file with authors).

for a court to know whether a black woman was treated differently because she was black, because she was a woman, or because she was both black and a woman. Moreover, it is difficult for a court to know whether the discrimination claim brought by a black woman entitles her to relief against her employer because the court would need to determine whether she was treated differently because of her race *and* because of her sex. However, because transitional discrimination applies intersectionality theory to one particular trait, courts might not resist its application in this context, because this context does not generate the same "confounding variables" problem that an intercategorical application does. Moreover, perhaps courts will more readily conduct intersectional analyses in other contexts once they have become comfortable with its application in the transitional discrimination context.

A second reason that intersectionality theory finds itself in a pivotal moment is that the theory has been criticized by a number of scholars. For example, Professor Nancy Levit has criticized the theory for its "false coherence – ignoring the differences within identity categories that constitute the true variety of human experiences."[143] Professor Nancy Ehrenreich has built upon this criticism by describing what she calls intersectionality theory's "infinite regress problem: the tendency of all identity groups to split into ever-smaller subgroups, until there seems to be no hope of any coherent category other than the individual."[144] Addressing the validity of criticisms waged against intersectionality theory is beyond the scope of this Essay. However, another benefit of the theory of transitional discrimination is that it may strengthen intersectionality theory in the eyes of its critics.

B. Transitional Discrimination

In order to remedy the confused state of the law regarding transgender discrimination, this Essay has proposed a theory of transitional identity.[145] Discrimination on the basis of transitional identity is transitional discrimination. In order to articulate a cause of action for transitional discrimination, a plaintiff would need to follow similar steps to those a plaintiff would need to follow in stating any claim for discrimination. Thus, a plaintiff would need to determine whether the identities that make up his transitional identity constitute protected categories for the purposes of anti-discrimination law. A religious convert would determine that both Christianity, the religion from which he is converting, and Judaism, the religion to which he is converting, are both religions. Because religion is a protected category under Title VII, the discrimination experienced by the religious convert at the hands of his employer constitutes discrimination in violation of Title VII.

143. Nancy Levit, *Theorizing the Connections Among Systems of Subordination*, 71 UMKC L. REV. 227, 227 (2002).

144. Nancy Ehrenreich, *Subordination and Symbiosis: Mechanisms of Mutual Support Between Subordinating Systems*, 71 UMKC L. REV. 251, 267 (2002).

145. *See supra* Section II.B.

Similarly, a female-to-male transgender individual would determine that both being female, the sex from which the individual is transitioning, and being male, the sex to which the individual is transitioning, are both sexes. And because sex is a protected category under Title VII, the discrimination experienced by the transgender individual at the hands of the individual's employer constitutes discrimination in violation of Title VII.

In articulating a claim for transitional discrimination, a plaintiff who identifies transitionally finds himself in a position similar to that of a plaintiff who experiences discrimination on the basis of identifying with a combination of protected categories. In this way, transitional discrimination works similarly to intersectional discrimination. The difference between intersectional discrimination and transitional discrimination, of course, is that the former represents intercategorical discrimination while the latter represents intracategorical discrimination.

The application of intersectional discrimination claims intracategorically would seem to pose even less of a problem than their traditional intercategorical application. Intracategorical claims—that is, transitional discrimination claims—seem to possess at least three clear advantages over their traditional intercategorical counterparts. First, applying intersectional discrimination claims within categories would seem to appease commentators who have criticized anti-discrimination law for the rigidity of its categorical structure.[146] Second, and related, intracategorical discrimination claims would seem to appease commentators who have criticized intersectionality theory for its predication upon rigid identity categories.[147] Third, applying intersectionality theory intracategorically would remove the "confounding variables" problem that has arguably deterred courts from applying the theory intercategorically.[148]

Anti-discrimination law is currently equipped to provide transgender plaintiffs with a stable basis upon which to assert their identity. Whatever the benefits are to anti-discrimination law or theory as a whole, the principal advantage of a cause of action for transitional discrimination is the possibility it makes available for transgender plaintiffs to assert their transitional identity. As victims of discrimination began to transcend categories by occupying more than one of them, the law responded by offering to these plaintiffs relief from their intersectional discrimination. As victims of discrimination begin to transcend categories by falling in-between their parameters like transgender individuals do, the law must respond by offering to these plaintiffs relief from their transitional discrimination.

CONCLUSION

Transgender individuals are sometimes men in dresses. They are sometimes women in tuxedoes. They are sometimes men who used to be women and are sometimes women who used to be men. They are sometimes men, and they are

146. *See supra* notes 95-98 and accompanying text.

147. *See supra* notes 143-144 and accompanying text.

148. *See supra* Section III.A.

sometimes women. As much as identity itself is textured, so is transgender identity. In order to preserve for transgender individuals the right not to be discriminated against for being transgender, anti-discrimination law is in need of a more stable theory of transgender identity than the prevailing gender-nonconforming theory. This Essay has introduced a unique application of intersectionality theory, already familiar in anti-discrimination circles, to transgender identity. Intersectionality theory has broadened the scope of anti-discrimination law, by urging courts and commentators to take seriously intercategorical discrimination. The theory of transitional discrimination introduced in this Essay urges courts and commentators to take seriously intracategorical discrimination, as well.