TRANSGENDER EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Steve Stanton was the city manager of Largo, Florida for fourteen years.[1] On February 27, 2007, the City Commission of Largo started the three-step process to remove Stanton from his position.[2] Less than a week before, Stanton announced he was a

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1. Associated Press, *Official Fired Over Plans to Get Sex Change*, MSNBC, Mar. 1, 2007, http://www.msnbc.msn.com/id/17405646.

2. Phil Davis, *Vote Targets Transsexual City Manager*, ORLANDO SENTINEL, Feb. 28, 2007, at B6.

transsexual and was planning to seek sexual reassignment surgery.[3] Two members of the Commission, including the Mayor of Largo, stated that Stanton had properly performed as city manager and fulfilled his duties to the city.[4] Those in favor of his dismissal described Stanton as lacking integrity.[5] Citizens of Largo, armed with signs in support of Stanton, lined the Largo city building in protest.[6] Their efforts were in vain. The City Commission decided to remove Stanton less than a week after he revealed he was a transsexual.[7]

In trying to combat adverse employment actions like those experienced by Steve Stanton, the transgender population has limited avenues of recourse to pursue. About one-third of the United States population is covered by transgender-inclusive anti-discrimination laws, varying from state-wide protection to city ordinances.[8] There is a recent trend at the state level to pass transgender-inclusive anti-discrimination laws, but there has been no consistency in the legislative language used by the states in providing protection.[9] Currently, nine states provide transgender citizens protections in the workplace; the most recent, New Jersey, amended its Law Against Discrimination in December of 2006.[10] The federal government has failed to extend special coverage to transgender employees.[11]

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3. Lorri Helfand, *Largo Official Plans Sex Change*, ST. PETERSBURG TIMES (Florida), Feb. 22, 2007, at 1A.

4. *See* Associated Press, *supra* note 1.

5. *Id.*

6. *See* Eileen Schulte, *350 Rally to Protest City Manager's Ouster*, ST. PETERSBURG TIMES (Florida), Mar. 7, 2007.

7. *See* Associated Press, *supra* note 1.

8. *All New Jersey Residents and Now One-Third of the U.S. Covered by Transgender-Inclusive Anti-Discrimination Protections*, NAT'L CTR. FOR TRANSGENDER EQUAL., Dec. 14, 2006, http://nctequality.org/news.asp [hereinafter *All New Jersey Residents*].

9. *See* NAT'L GAY & LESBIAN TASK FORCE, TRANSGENDER LAW & POLICY INST., SCOPE OF EXPLICITLY TRANSGENDER-INCLUSIVE ANTI-DISCRIMINATION LAWS (2006), http://www.transgenderlaw.org/ndlaws/ngltftlpichart.pdf (noting that California used the word "sex" to cover transgender employees, the District of Columbia, New Mexico, and Rhode Island used the words "gender identity" or "gender identity or gender expression" to cover transgender employees, and Illinois, Maine, Minnesota, and Washington used the words "sexual orientation" to cover transgender employees).

10. *All New Jersey Residents*, *supra* note 8; Act of Dec. 19, 2006, ch. 100, 2006 N.J. Sess. Law Serv. (West) (codified at N.J. STAT. ANN. 10:2-1 (West 2008)).

11. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 394 (N.Y. Sup. Ct. 1995) (explaining that all federal courts that have considered the issue have ruled that Title VII does not extend to a transgender person claiming discrimination based on his or her status as transgender).

There is no consensus among the courts or state legislatures regarding whether to extend and if so, how to extend, anti-discrimination laws to protect the transgender population. Working from the assumption that protection should be provided, a survey of current methods used by courts and legislatures can be summarized as follows: using broadly interpreted court opinions to cover transgender employees, enacting new legislation, fitting transgender employees within the statutory framework currently in existence, or covering the transgender population under anti-disability discrimination laws.[12]

This Article argues that the Title VII definition of "sex" should be expanded and thus interpreted to include transgender, thereby providing coverage for the transgender community throughout the United States. Such an approach would provide immediate relief for transgender individuals and would alleviate many of the hurdles other vehicles for relief have constructed.[13]

Part II will examine the history and background necessary to understand the problem facing transgender employees. Part III will describe the different approaches to the problem taken by federal, state, and local governments. Part IV will focus on why transgender should be included within the definition of "sex," thus providing broad, consistent anti-discrimination coverage in the most expedient manner and consequently providing a framework for judicial analysis.

Steve Stanton is just one example of a transgender individual making the news in recent years. Along with his story, the story of Mike Penner, an *L.A. Times* sports columnist, made na-

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12. *See* Francine Tilewick Bazluke & Jeffrey J. Nolan, *"Because of Sex": The Evolving Legal Riddle of Sexual vs. Gender Identity*, 32 J.C. & U.L. 361 (2006) (discussing multiple approaches to transgender treatment under Title VII and discussing the disability approach); Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of* Price Waterhouse v. Hopkins, 14 DUKE J. GENDER L. & POL'Y 205, 222–25 (2007) (discussing the optimism stemming from certain cases following *Price Waterhouse v. Hopkins*); Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001) (evaluating the multiple approaches argued in support of providing protection to the transgender population); Leslie A. Farber, *A Primer to Transgender Legal Issues and Practice*, N.J. LAW. MAG., Apr. 2006, at 39 (discussing federal and state approaches to transgender discrimination).

13. *See* Dunson III, *supra* note 12, at 478 (noting that, although *Price Waterhouse* expanded the definition of sex, "all of the Title VII transgender jurisprudence interprets 'sex' in a much narrower fashion than the Supreme Court did in *Price Waterhouse*"). The comment also discusses the wide variation in legislation being passed as well as a possible lack of feasibility in altering current legislation. *See generally id.*

tional news as he told the public he was undergoing sexual reassignment surgery.[14] A relatively short time thereafter, ABC 20/20 News spent an hour documenting the lives of a selected few transgender children.[15] This recent media attention directed towards the transgender population, coupled with the relative infancy of the applicable state legislation and judicial opinions, makes examination of the transgender population in the employment context all the more pertinent and necessary.

II. BACKGROUND

A. *A Strict Definition of Sex*

Title VII of the Civil Rights Act of 1964, as amended in 1991, makes it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[16] While race, color, religion, and national origin fostered much debate on the floor of Congress, the debate on "sex" had much more humble beginnings.[17] Those proposing the addition of "sex" as a protected classification were in fact attempting to prevent the passage of the legislation.[18] Courts that have examined what "sex" means under Title VII often comment on the limited legislative history.[19]

When first faced with defining "sex" under Title VII, courts in the 1970s and 1980s determined that "sex" took its most traditional meaning, defining "sex" discrimination as a male being discriminated against because he is a male, or a female being

14. Mike Penner, *Old Mike, New Christine*, L.A. TIMES, Apr. 26, 2007, at D2. Mike Penner returned from surgery and now pens his articles under the name "Christine Daniels."

15. *See 20/20: My Secret Self: A Story of Transgender Children* (ABC television broadcast Apr. 27, 2007).

16. 42 U.S.C. § 2000e-2(a)(1) (2000).

17. *See* Sommers v. Budget Mktg., 667 F.2d 748, 750 (8th Cir. 1982) (noting that the legislative history did not show congressional intent to include transsexualism in Title VII (citing, *inter alia*, Note, *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971)).

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

19. *See, e.g.*, *id.* (noting the "dearth of legislative history" demonstrating that "sex" should not be interpreted to include "discrimination based on . . . sexual identity . . . or discontent with the sex into which [one was] born"); *see also* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662 (9th Cir. 1977); Voyles v. Ralph K. Davies Med. Ctr., 403 F. Supp. 456, 457 (N.D. Cal. 1975).

discriminated against because she is a female.[20] The courts believed they were using the definition which most accurately reflected the definition of "sex" Congress envisioned when it included "sex" as a protected classification.[21] Congress has since modified the definition of "sex" through the amendment of Title VII in 1978 to include pregnancy discrimination.[22] The Supreme Court has also modified the traditional definition of "sex" through judicial interpretation to include gender nonconforming behavior.[23]

Attempts to amend Title VII to include coverage for sexual orientation have failed on the floor of Congress.[24] As such, Title VII remains somewhat unchanged from its original form presented in 1964 regarding the meaning of "sex." Many state and local courts have followed the federal interpretation, which adheres to the traditional definition of "sex," in interpreting their respective state anti-employment discrimination statutes.[25]

B. *Transgender: What Is It?*

In addition to the legislative and judicial treatment of the word "sex" and its connection to the transgender population in the employment context, understanding what it means to be transgender is necessary for a proper consideration of the issues driving the ideas behind this Article. Transgender is an umbrella term used to cover transsexuals, cross-dressers, and transgender

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20. *See, e.g.*, *Ulane*, 742 F.2d at 1085.

21. *See, e.g.*, *id.* (explaining that Congress envisioned "sex" to apply only to the traditional concept of sex because Congress never mentioned homosexuals, transvestites, or transsexuals in the course of legislative debates).

22. Act of Oct. 31, 1978, Pub. L. No. 95-555, 92 Stat. § 2076 (codified at 42 U.S.C. § 2000e(k) (2008)) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes").

23. Price Waterhouse v. Hopkins, 490 U.S. 228, 250–51 (1989) (explaining that gender nonconforming behavior or sex stereotyping is the belief that a woman has or does not have certain characteristics because she is a woman, or a man has or does not have certain characteristics because he is a man; such a discrepancy in actual behavior and the applicable stereotype can be the basis for a discrimination claim).

24. *Ulane*, 742 F.2d. at 1085.

25. *See, e.g.*, Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284, 288 (E.D. Pa. 1993) (analyzing a Pennsylvania employment discrimination statute in line with the federal circuits' approach limiting "sex" to its traditional meaning).

people.[26] Transgender generally means that a person's physiological sex is at odds with his or her psychological view of his or her sex.[27] Being transgender is not the equivalent of being a homosexual.[28] Sexual orientation describes the sex a person is attracted to, while transgender describes the "disjunction between an individual's sexual organs and sexual identity."[29] This "disjunction" can be medically diagnosed as "Gender Identity Disorder" or "Gender Dysphoria," and a doctor will prescribe or suggest methods of treatment.[30] A diagnosis is not always sought by a transgender person both because of the social stigma attached to such a diagnosis, and because treatment in the form of sexual reassignment surgery is medically risky and may not be an option for financial reasons.[31]

C. *Optimism Following the Announcement of the "Sex Stereotype Theory"*

The transgender community hoped the Supreme Court's decision in *Price Waterhouse v. Hopkins*[32] signaled a change for the transgender population in the workplace by offering a gender nonconformity theory to advance under Title VII.[33] Ann Hopkins was a senior manager at Price Waterhouse, a nationwide accounting firm.[34] Price Waterhouse denied Hopkins partnership after five years of employment and two rounds of candidacy.[35] The evaluation process included the submission of comments

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26. *See* Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 393 (N.Y. Sup. Ct. 1995) (citing Richard Green, *Spelling "Relief" for Transsexuals: Employment Discrimination and the Criteria of Sex*, 4 YALE L. & POL'Y REV. 125 (1985)).

27. *Id.*

28. *Id.*

29. Smith v. City of Salem, 369 F.3d 912, 914 (6th Cir. 2004) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 576–82 (4th ed. 2000)).

30. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 578 (4th ed. 2000).

31. Gale Encyclopedia of Psychology, 2d ed. Gale Group, 2001 (social stigma); Anne A. Lawrence, *Self-Reported Complications and Functional Outcomes of Male-to-Female Sex Reassignment Surgery*, 35 ARCHIVES OF SEXUAL BEHAVIOR 717-27 (2006).

32. 490 U.S. 228 (1989).

33. *See* Friedman, *supra* note 12, at 211 (arguing that *Price Waterhouse* now allowed a plaintiff to argue that he was the "victim of sex-based discrimination by establishing that the employer's challenged action had been triggered by her failure to conform to its sex-stereotyped expectations").

34. *Price Waterhouse*, 490 U.S. at 231.

35. *See id.* at 233 n.1.

from other partners regarding their opinions of the candidate.[36] Some of the comments regarding Hopkins highlighted her "strong character, independence and integrity,"[37] while other comments focused on her "macho" tendencies,[38] or reflected a belief that she "overcompensated for being a woman."[39] Price Waterhouse told Hopkins that her chances of becoming a partner would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[40]

The Supreme Court announced that gender could not play a role in making employment decisions,[41] emphasizing that using sexual stereotypes in making employment decisions was the equivalent of making employment decisions based on "sex."[42] The Court described Price Waterhouse's actions as originating from a belief that women should act a certain way,[43] and Hopkins' divergence from the stereotypes of a woman, as shown through the comments of her fellow employees, was the reason she was denied partnership.[44] The Court held that an employer who acts on a belief that a woman does not, or cannot, have a certain characteristic, has acted on the basis of gender, thus violating Title VII.[45] In holding that the actions of Price Waterhouse violated Title VII, the Court developed a new theory through which plaintiffs could prevail in sex discrimination claims.[46]

The sex stereotype theory, or gender nonconformity theory, created some optimism for the transgender community regarding claims of employment discrimination.[47] It was believed that the Supreme Court articulated a rule that prohibited employers from making employment decisions based on a perceived disconnect between one's actual behavior, dress, and appearance and one's

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36. *Id.* at 232.
37. *Id.* at 234.
38. *Id.* at 235.
39. *Id.*
40. *Id.*
41. *Id.* at 240.
42. *Id.* at 250.
43. *Id.*
44. *Id.* at 251.
45. *Id.*
46. *See* Kelly Robert Dahl, Note, Price Waterhouse, Wright Line, *and Proving a "Mixed Motive" Case Under Title VII*, 69 NEB. L. REV. 869, 881 (1990).
47. *See* Friedman, *supra* note 12, at 205.

expected behavior, dress, and appearance.[48] Therefore, when an employer discriminates against a transgender employee because the employer's perception of the employee does not meet the employer's expectation of the employee, the employer has acted in an impermissible manner giving rise to a Title VII cause of action for the employee.[49]

The conception of the sex stereotype theory for employer liability created high expectations in the transgender community, because it seemed the Supreme Court had expanded the definition of "sex" to include gender.[50] But most federal circuits have refused to extend the sex stereotype theory to include claims by transgender persons.[51]

III. The Problem with Transgender Employees and Employment Discrimination

The courts and legislatures of the United States have taken many approaches to transgender discrimination. Therefore, it is necessary to examine the prevailing federal view, the sex stereotyping approach, and various state approaches to understand the status of transgender anti-discrimination laws.

A. *Transgender, as Transgender, Is Not Protected under Title VII*

As stated above, all the federal circuits that have examined the issue of whether Title VII covers transgender people as transgender employees have emphatically stated that it does not.[52] The 1984 Seventh Circuit case of *Ulane v. Eastern Airlines, Inc.*[53]

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48. *See id.*

49. *See id.*

50. *See id.*

51. *See, e.g.*, Etsitty v. Utah Transit Auth., No. 2:04CV616 DS, 2005 WL 1505610, at *5 (D. Utah 2005) ("[A] man who is attempting to change his sex and appearance to be a woman . . . [is taking a] drastic action [that] cannot be fairly characterized as a mere failure to conform to stereotypes"). *But see* Smith v. City of Salem, 369 F.3d 912, 918 (6th Cir. 2004) (allowing a transgender employee to prevail on a sex stereotype claim based on the plaintiff's transgender status).

52. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 394 (N.Y. Sup. Ct. 1995) (listing cases such as Ulane v. E. Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984); Sommers v. Budget Mktg., 667 F.2d 748 (8th Cir. 1982); Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977); Grossman v. Bernards Twp. Bd. of Educ., 538 F.2d 319 (3d Cir. 1976), Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993); and Powell v. Read's, Inc., 436 F. Supp. 369 (D. Md. 1977) to support the statement that Title VII does not protect transgender employees).

53. 742 F.2d 1081 (7th Cir. 1984).

provides the clearest explanation and rationale for this denial. Kenneth (later Karen) Ulane was a male pilot for Eastern Airlines.[54] Eleven years after beginning employment with Eastern Airlines, Ulane was diagnosed as a transsexual.[55] Ulane began treatment for Gender Identity Disorder, which progressed from taking female hormones to undergoing sexual reassignment surgery.[56] Eastern Airlines learned of Ulane's transsexualism after she returned from her surgery, and fired her.[57]

Ulane argued that "sex" under Title VII includes sexual identity; the district court agreed, stating "'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual."[58] The district court determined that Eastern Airlines terminated Ulane because of her transsexuality and that such action violated Title VII.[59] The Seventh Circuit reversed, stating that "sex" under Title VII does not include "sexual identity," and Congress did not intend to extend protection to those with sexual identity issues.[60] The Seventh Circuit viewed the lack of legislative history concerning "sex" as proof that Congress intended nothing more than protecting "a biological male or a biological female."[61]

The prevailing federal approach under Title VII, as evidenced by *Ulane*, adheres to a traditional definition of "sex." It appears that courts have done so for two reasons: the legislative history of Title VII and the consistent failure of Congress to include sexual orientation as a protected classification.

First, the federal courts have found support for such a limited view by examining the legislative history. The courts have justified their reliance on the strictest definition of "sex" because of the absence of any discussion regarding an expansive interpretation of "sex." However, the absence of any meaningful legislative history does little in providing a clear definition of "sex." As mentioned above,[62] the addition of "sex" as a protected classification was a strategic proposal to derail the entirety of Title VII.

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54. *Id.* at 1082.
55. *Id.* at 1082–83.
56. *Id.* at 1083.
57. *Id.* at 1083–84.
58. *Id.* at 1084.
59. *Id.*
60. *See id.* at 1086–87.
61. *Id.* at 1087.
62. *See supra* note 18 and accompanying text.

The last-minute addition, coupled with the later amendment to include pregnancy within the definition of "sex,"[63] shows that "sex" means something more than male and female. Congress would not have amended the definition of "sex" to include more than biological sex, if "sex" was intended only to mean male or female. By amending the definition of "sex," Congress recognized that the original Act was passed without giving proper consideration to all of the facets of the definition of "sex." It is ironic, then, that courts have been reluctant to recognize that "sex" means something more than biological sex when examining transgender claims, despite being willing to understand that "sex" means more than biological sex as related to pregnancy.

Second, the federal courts have inferred from the congressional failure to amend Title VII to include sexual orientation that the current definition of sex could not include transgender.[64] It is erroneous to infer from such failure a congressional intent to exclude transgender individuals. The two classifications are diametrically different: "sexual orientation" refers to the sex one is attracted to, while "transgender" refers to the conflict between one's physiological sex and one's psychological interpretation of one's sex.[65]

Federal courts have inflated the definition of sexual orientation to include transgender. By inflating the definition, the courts feel justified in making a single determination regarding the applicability of Title VII to the two classifications, ultimately disposing of an individualized determination of the applicability of Title VII to each separate classification. By disposing of individualized examinations, the courts have failed to address the differences between the two groups and how those differences relate to the meaning of "sex." Regardless of the status of sexual orientation as a protected classification, transgender should be included within the definition of "sex." Transgender refers to gender identity, and gender concepts go hand-in-hand with sex.[66] The Supreme Court has even recognized that sex and gender are

63. *See supra* note 22 and accompanying text.

64. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 394 (N.Y. Sup. Ct. 1995).

65. *See supra* Part II.A.

66. *Ulane*, 742 F.2d at 1084 (noting that the district court made its holding based on the fact that "'sex is not a cut-and-dried matter of chromosomes,' but is in part a psychological question—a question of self-perception; and in part a social matter—a question of how society perceives the individual").

intertwined.[67] Failing to prohibit discrimination based on gender identity fails to acknowledge such recognition.[68]

B. *Sex Stereotype Theory Protection—At Least in the Sixth Circuit*

Though the federal circuit courts have made it clear that "sex" under Title VII does not include transgender employees, one circuit has granted relief to transgender employees using the sex stereotype theory promulgated in the 1989 Supreme Court case of *Price Waterhouse v. Hopkins*.[69] In *Smith v. City of Salem*, the Sixth Circuit ruled a transgender employee could proceed with a sex discrimination claim under Title VII based on sex stereotyping.[70] Jimmie Smith was a male lieutenant in the Salem Fire Department.[71] After seven years of employment with the City of Salem, Smith was diagnosed with Gender Identity Disorder and began "expressing a more feminine appearance" at work.[72] Smith's co-workers began commenting that he was no longer acting "masculine enough."[73] Smith contacted his supervisor and explained his diagnosis and change in appearance.[74] After a series of meetings between Smith's supervisors and a suspension for violating department policy, Smith filed suit alleging the department was forcing him to resign, and such actions violated Title VII.[75]

Smith argued he was discriminated against because he did not meet his co-workers' and supervisors' stereotypes of "how a man should look and behave."[76] Smith argued his co-workers' comments manifested their belief that he was "not being masculine enough."[77] The district court dismissed Smith's claim, ruling

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67. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 250 (1989) (stating that an employer who discriminates against an employee because he or she does not conform to sex stereotypes has discriminated against that person on the basis of gender).

68. *See id.*

69. *See id.*

70. Smith v. City of Salem, 369 F.3d 912, 918 (6th Cir. 2004).

71. *Id.* at 914.

72. *Id.* at 914–15.

73. *Id.* at 915.

74. *Id.*

75. *Id.* 915–16, 919.

76. *Id.* at 918.

77. *Id.* at 919.

that the sex stereotype claim was "an end run around his 'real' claim, which . . . was 'based on his transsexuality.'"[78]

The Sixth Circuit reversed, stating that Smith had pled sufficient facts under a sex stereotype theory.[79] The court found that if Smith had experienced the adverse employment actions because of his gender nonconforming behavior, as Smith had alleged in his complaint, this would constitute actionable sex discrimination.[80]

The Sixth Circuit first found support for its position from the language of the Supreme Court in *Price Waterhouse*, emphasizing that the Court made clear that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms" is equivalent to discrimination based on one's sex.[81] The Sixth Circuit stated it was a mistake for the district court to fail to examine a sex stereotype theory in the case of a transsexual employee, explaining that the applicability of a sex stereotype theory is not conditioned on whether the complaining party is a transsexual or not.[82]

Second, the Sixth Circuit took the theory further, despite not being presented the issue, and addressed how it would evaluate a claim based on discrimination solely because one identifies as a transsexual:

> Even if Smith had alleged discrimination based only on his self-identification as a transsexual—as opposed to his specific appearance and behavior—this claim too is actionable pursuant to Title VII. By definition, transsexuals are individuals who fail to conform to stereotypes about how those assigned a particular sex at birth should act, dress, and self-identify. Ergo, identification as a transsexual is the statement or admission that one wishes to be the opposite sex or does not relate to one's birth sex. Such an admission—for instance the admission by a man that he self-identifies as a woman and/or that he wishes to be a woman—itself violates the prevalent sex stereotype that a man should perceive himself as a man.[83]

The Sixth Circuit announced that by stating a claim of discrimination based on a person's identification as a transsexual,

78. *Id.* at 918.
79. *Id.* at 919.
80. *Id.*
81. *Id.* at 920.
82. *Id.* at 921.
83. *Id.* (emphasis omitted).

the employee is claiming the ultimate sex stereotype.[84] The court advanced a theory that society believes that one's sex (one's organs) must coincide with his or her gender (the social classification of a person as belonging to one sex or another).[85] When a person's sex does not coincide with the gender he or she exhibits, and he or she is treated discriminatorily as a result, the stereotype is the force behind the discriminatory actions.[86] Therefore, in asserting a claim that he was discriminated against as a transsexual, Smith successfully claimed a form of sex discrimination, unlawful under Title VII.[87] The Sixth Circuit has subsequently followed the precedent of *Smith*,[88] although other circuits have not.[89]

The Sixth Circuit's interpretation of *Price Waterhouse*[90] was a major step in providing protection for the transgender population.[91] Noting that "sex" encompasses gender notions is an advantage for a transgender person because this view looks beyond the physiological sex, and recognizes that the sex one displays is grounded in self-perception and the perception of others.[92] Recognition that a sex stereotype claim is available to a transgender person is consistent with the holding of *Price Waterhouse*,[93] and provides relief for a transgender employee.[94]

But in all circuits, including the comparatively progressive Sixth Circuit, a transgender individual's sex stereotype claim rests on the complaining party's ability to point to sufficient facts to establish a prima facie case of discrimination. If the plaintiff cannot point to specific statements by co-workers or supervisors regarding his or her gender nonconforming behavior, the claim

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84. *Id.* at 921–22.

85. *Id.*

86. *Id.*

87. *Id.* at 922.

88. *See* Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (following *Smith*). Barnes was a biological male working as a police officer who recovered on her suit alleging discrimination based on gender non-conforming behavior after providing facts demonstrating that her co-workers commented on her masculinity and lack of a feminine appearance. *See id.*

89. *See supra* note 52 and accompanying text.

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

91. *See* Dunson III, *supra* note 12, at 477.

92. *See id.* at 476.

93. *See Price Waterhouse*, 490 U.S. at 251 (holding that a claim of sex discrimination can be based on impermissible sex stereotyping).

94. Dunson III, *supra* note 12, at 476–77.

will be dismissed because Title VII does not protect a transgender person as a transgender person.[95]

For example, in *Myers v. Cuyahoga County*, the Sixth Circuit affirmed the dismissal of a sex discrimination case filed by a transgender employee because she was unable to present sufficient evidence of employer or co-worker sex stereotyping.[96] Susan Meyers, a transsexual woman, was an employee of the Cuyahoga County Department of Health and Human Services.[97] She was hired in 1982, and during the hiring process she informed the Department that she was a transsexual.[98] In 1998, Myers applied for a supervisory role and was denied the position.[99] Myers alleged that after she was denied the promotion, her new supervisors began a campaign to constructively discharge her.[100] Myers alleged her employer and supervisors mounted the campaign because she "did not conform to their gender/sex stereotyped expectations."[101] Myers based these allegations on evidence of a conversation overheard by a fellow employee, referring to Myers as a "he/she," as well as evidence demonstrating that her "transsexualism was a topic of office gossip."[102] Myers argued the comment and interest in her transsexualism showed her supervisors' disapproval of her gender nonconforming behavior.[103] The district court granted summary judgment in favor of Cuyahoga County because "Myers . . . had not established a prima facie case of . . . sex discrimination."[104]

The Sixth Circuit affirmed the dismissal, agreeing there was insufficient evidence to support Myers' claim of sex discrimination.[105] The court recognized that "calling a transsexual or transgendered person a 'he/she' is a deeply insulting and offensive slur" and that "using that term is strongly indicative of a negative

95. *See, e.g.*, Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1084, 1087 (7th Cir. 1984) (ruling against plaintiff because her employer discriminated against her not because she was female, but rather because she was transsexual). The *Ulane* court clearly stated that Title VII does not prohibit discrimination against transsexuals. *Id.* at 1087.

96. Myers v. Cuyahoga County, 182 Fed. App'x 510, 520 (6th Cir. 2006).

97. *Id.* at 512.

98. *Id.* at 512, 518.

99. *Id.* at 512.

100. *Id.*

101. *Id.*

102. *Id.* at 518–19.

103. *Id.*

104. *Id.* at 514.

105. *Id.* at 520.

animus towards gender nonconforming people."[106] But the court concluded this isolated "he/she" remark, without more, was not enough to sustain a claim of sex discrimination based on a sex stereotype theory.[107]

Myers was different from *Smith v. City of Salem*[108] because Myers was unable to point to any comments showing disapproval of her female characteristics. The only evidence Myers had was the "he/she" comment and that her "transsexualism was a topic of office gossip."[109] In contrast, Smith was able to point to comments describing his lack of masculinity, indicating his co-workers' disapproval of his behavior and appearance.[110]

More problematic than the evidentiary standard required, is the failure of the other circuits to even acknowledge that a transgender plaintiff may prevail under a sex stereotype theory. The Sixth Circuit stands alone in this approach because all the other federal circuits have ruled this theory a backdoor method to obtain Title VII relief that the courts have consistently refused to grant.[111] A sex stereotype theory is only as useful as the specific facts the plaintiff can present. The approach hinges on an evidentiary issue which, unfortunately, has only ever arisen in one circuit.

C. *"Sex" Includes Transgender*

Despite the limited success of the transgender population in federal courts, the transgender population has experienced some success on the state and local levels. In *Maffei v. Kolaeton Industry, Inc.*, a New York supreme court held transsexuals can assert a sex discrimination claim alleging they have been discriminated against because they are transsexual.[112] Diane (later Daniel) Maffei started working at Kolaeton in 1986 as a female, and in 1994 underwent sexual reassignment surgery.[113] When Maffei returned to work after the surgery as a male, the company's president called him names, supervisors lowered his level of responsi-

106. *Id.*
107. *Id.*
108. 369 F.3d 912 (6th Cir. 2004).
109. *Myers*, 182 Fed. App'x at 518–19.
110. *Smith*, 369 F.3d at 918–19.
111. *See supra* note 52 and accompanying text.
112. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995).
113. *Id.* at 391.

bility, leading to an eventual demotion, and his co-workers consistently commented on their moral disapproval of Maffei.[114]

Maffei brought suit in state court alleging Kolaeton violated a state statute prohibiting discrimination because of "sex."[115] The court agreed that he was discriminated against because of his "sex."[116] First, the court interpreted the statute broadly because it was a remedial anti-discrimination statute.[117] The court focused on the general purpose of anti-discrimination laws and made the following analogy:

> [A]n employer who continually made derogatory comments regarding an employee's breasts could clearly be found to be in violation of the law's provisions against sexual harassment . . . . Thus, an employer who harasses an employee because the person, as a result of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex.[118]

Following the reasoning in *Maffei*, a New Jersey court also prohibited discrimination of a transsexual as a transsexual under a law that prohibited discrimination based on "sex."[119] In *Enriquez v. West Jersey Health Systems*, a New Jersey superior court held that sex discrimination provisions protect transgender employees.[120] Carlos (later Carla) Enriquez began working for West Jersey Health Systems in 1995 as a medical director.[121] After nearly a year of employment, Enriquez began the change from male to female, and soon after was diagnosed with Gender Dysphoria.[122] Co-workers commented about her change, stating "stop all this and go back to your previous appearance!"[123] Soon after, she was notified by West Jersey Health Systems that her employment contract would be terminated.[124] Enriquez contacted the managing company to obtain a new contract and was told, "[N]o one's going to sign this contract unless you stop this business that you're doing."[125] One month later, West Jersey

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114. *Id.* at 392.
115. *Id.*
116. *Id.* at 396.
117. *Id.*
118. *Id.* (citation omitted).
119. Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).
120. *Id.*
121. *Id.* at 367.
122. *Id.* at 368.
123. *Id.*
124. *Id.*
125. *Id.*

Health Systems refused to renew her contract and cancelled Enriquez's patients for the next three months.[126]

The court upheld Enriquez's claim that she was discriminated against because of her "sex."[127] Emphasizing that the New Jersey statute used the word "sex" and not "gender," while recognizing the different definitions of each, the court determined that the definition of "sex" included gender.[128] The court made the inference based on *Price Waterhouse* in which the Supreme Court prohibited discrimination based on "socially-constructed gender expectations," consequently expanding the definition of sex to include gender.[129] Through this set of inferences the New Jersey Court concluded sex encompasses gender, and discrimination based on one's transsexualism is prohibited under the ban against discrimination because of one's "sex."[130]

As will be more thoroughly discussed in Part IV of this Article, including transgender within the definition of "sex" offers the best solution to the plight facing transgender individuals in the workplace. The inclusion would provide for a consistent definition of sex; it would utilize current legislation in place in all states, as well as on the federal level, thus providing an expedient solution; and it would provide a clear framework for all courts to evaluate such claims.

D. *Gender Expression or Identity, Orientation, and Sex—Local Approaches*

Six years after *Enriquez*, New Jersey explicitly announced protections for the transgender community by passing legislation prohibiting discrimination based on transsexuality.[131] Using the words "gender identity or expression," the New Jersey legislature prohibited discriminatory employment practices based on a person's transgender status.[132] The bill passed in the New Jersey Senate with a vote of 31 to 5 and in the New Jersey Assembly with a vote of 69 to 5.[133] New Jersey was the ninth state in the United States to pass transgender inclusive anti-discrimination statutes, following the lead of California, Hawaii, Illinois, Maine,

126. *Id.* at 368–69.
127. *Id.* at 373.
128. *Id.*
129. *Id.* at 371.
130. *Id.* at 373.
131. *See supra* note 10.
132. *Id.*
133. *Id.*

Minnesota, New Mexico, Rhode Island, and Washington; the District of Columbia also has passed such a statute.[134] However, there is no consistency in the language used by the states that have passed transgender-inclusive anti-discrimination legislation.[135]

Minnesota, like New Jersey, passed legislation to protect the transgender community. Minnesota's Human Rights Act provides protection for employees discriminated against in the workplace on the basis of sexual orientation.[136] In the Human Rights Act, "sexual orientation" is defined as "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[137] In *Goins v. West Group*, a male-to-female transgender employee brought suit under the Minnesota Human Rights Act, and the court interpreted discrimination based on "sexual orientation" to include her claim of discrimination based on her status as transgender.[138] Minnesota's legislation[139] is unique in defining sexual orientation to include transgender. The legislation reads:

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134. *Id.* Additionally, the following cities have ordinances prohibiting transgender discrimination: Lake Worth, FL; Milwaukee, WI; Palm Beach, FL; Saugatuck, MI; West Palm Beach, FL; Bloomington, IN; Cincinnati, OH; Easton, PA; Ferndale, MI; Hillsboro, OR; Lansdowne, PA; Lansing, MI; Swarthmore, PA; West Chester, PA; Gulfport, FL; Lincoln City, OR; Northampton, MA; Albany, NY; Austin, TX; Beaverton, OR; Bend, OR; Burien, WA; Oakland, CA; Miami Beach, FL; Carbondale, IL; Covington, KY; El Paso, TX; Ithaca, NY; Key West, FL; Lake Oswego, OR; Peoria, IL; San Diego, CA; Scranton, PA; Springfield, IL; University City, MO; Allentown, PA; Baltimore, MD; Boston, MA; Buffalo, NY; Chicago, IL; Dallas, TX; East Lansing, MI; New Hope, PA; New York City, NY; Philadelphia, PA; Salem, OR; Tacoma, WA; Denver, CO; Huntington Woods, MI; Rochester, NY; Atlanta, GA; Boulder, CO; DeKalb, IL; Madison, WI; Portland, OR; Ann Arbor, MI; Lexington, KY; Louisville, KY; Tucson, AZ; New Orleans, LA; Toledo, OH; West Hollywood, CA; York, PA; Cambridge, MA; Evanston, IL; Olympia, WA; Pittsburgh, PA; Ypsilanti, MI; Iowa City, IA; Grand Rapids, MI; San Francisco, CA; Santa Cruz, CA; St. Paul, MN; Seattle, WA; Harrisburg, PA; Los Angeles, CA; Urbana, IL; Champaign, IL; and Minneapolis, MN. *See* Transgender Law and Policy Institute, U.S. Jurisdictions with Laws Prohibiting Discrimination on the Basis of Gender Identity or Expression, http://www.transgenderlaw.org/ndlaws/index.htm (last visited Jul. 7, 2008); *see also* Transgender Law and Policy Institute, Transgender Issues: A Fact Sheet, http://www.transgenderlaw.org/resources/transfactsheet.pdf (last visited Jul. 7, 2008).

135. *See supra* note 9 and accompanying text.

136. MINN. STAT. ANN. § 363A.02(1)(a)(1) (West 2008).

137. MINN. STAT. ANN. § 363A.03(44) (West 2008).

138. Goins v. West Group, 635 N.W.2d 717, 722 (Minn. 2001).

139. *Id.* at 722 (noting that the Minnesota Human Rights Act prohibits discrimination on the basis of "self-image or identity not traditionally associated with one's biological maleness or femaleness").

> "Sexual orientation" means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness. "Sexual orientation" does not include a physical or sexual attachment to children by an adult.[140]

On the local level, many cities and municipalities have passed local ordinances to protect the transgender population within their jurisdictions.[141] One such city is Cincinnati, Ohio. Cincinnati's Human Rights Ordinance was originally passed in 1992 to include sexual orientation.[142] Three years later the ordinance was amended, striking sexual orientation from the classes protected, and leaving religion, race, color, gender, age, disability, marital status, ethnicity, national origin, and Appalachian regional origin as protected classes.[143] After striking sexual orientation from the Human Rights Ordinance, Cincinnati passed anti-hate crime ordinances, including sexual orientation as a protected class which was defined to include transgender.[144] An amendment to the Human Rights Ordinance passed in 2006 reinstated sexual orientation and added transgender to the list of protected classes.[145] Cincinnati showed a clear intent to protect transgender people by specifically including transgender as a protected class, rather than including transgender within the definition of sexual orientation.[146]

The approach taken by some states to include the transgender population within its definition of sexual orientation is inconsistent with the distinct definitions of sexual orientation and transgender. As the court in *Maffei* noted, sexual orientation is

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140. MINN. STAT. ANN. § 363A.03(44).

141. *See* NAT'L GAY & LESBIAN TASK FORCE, *supra* note 9 (noting that cities within the states of Arizona, California, Colorado, Florida, Georgia, Indiana, Iowa, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oregon, Pennsylvania, Texas, Washington, and Wisconsin have passed ordinances protecting transgender people in the workplace).

142. Eric Resnick, *Cincinnati Passes LGBT Human Rights Ordinance*, GAY PEOPLE'S CHRON. (Ohio), Mar. 17, 2006, http://www.gaypeopleschronicle.com/stories06/march/0317061.htm.

143. *Id.*

144. Equality Cincinnati, Because Everyone Deserves Protection From Discrimination Under the Law, http://www.equalitycincinnati.org/because.php (last visited Mar. 11, 2007).

145. Resnick, *supra* note 142.

146. *See id.*

distinct from sexual identity or being transgender.[147] Minnesota's Human Rights Act is unique because it has included a specific definition of "sexual orientation" that reaches the transgender community. Including an expansive definition within the legislation is a benefit to the transgender community because a transgender employee can seek recourse under the statute. Unfortunately, this inclusion fails to recognize the unique characteristics of a transgender person.

Further, an expansive definition of sexual orientation creates practical problems because only a limited number of states provide protection to homosexuals. This expansive definition provides no guidance to other states in forming appropriate inclusive legislation without extending protection to two new groups, which may prove politically infeasible. This definition also detracts from any consistency that could be developed among the states in providing protection to the transgender community.

By contrast, the clearest way to provide protection to the transgender community through employment discrimination statutes is to explicitly include transgender in the list of protected classifications.[148] Though some states have taken this route, not all have, nor has the federal government.[149]

E. *Gender Identity Disorder as a Disability*

Another path transgender people have pursued in search of relief has been through state disability statutes. Recall *Enriquez*, the case from New Jersey discussed above in Part III, Section C. In addition to his claim based on sex discrimination under New Jersey's Law Against Discrimination, Enriquez alternatively pled that his employer discriminated against him because of a disability.[150] He argued Gender Dysphoria was a disability protected under New Jersey's Law Against Discrimination.[151] Enriquez focused on Gender Dysphoria as a diagnosable mental, psychological, or developmental condition.[152] The court recognized that the New Jersey statute was broadly worded and deserved a liberal

147. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 393 (N.Y. Sup. Ct. 1995).

148. Dunson III, *supra* note 12, at 501.

149. *See id.* at 481–82.

150. Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 373 (N.J. Super. Ct. App. Div. 2001).

151. *Id.* at 373–74.

152. *Id.* at 374.

interpretation as "remedial social legislation."[153] After extensive discussion on whether Gender Dysphoria constituted a mental disorder diagnosable by accepted medical techniques (the court concluded it did), the court compared Gender Dysphoria with other disorders the judiciary had determined fell within the ambit of the statute.[154] Ultimately the court ruled Gender Dysphoria was a disorder protected under the statute.[155] The case was remanded for further development of the facts, but the holding stands for the proposition that if the statute is broad enough, a person diagnosed with Gender Dysphoria has a cause of action under a disability statute.[156]

In contrast to New Jersey's Law Against Discrimination, which includes within its coverage transgender persons, such individuals are not protected by the federal Americans with Disabilities Act.[157] The Americans with Disabilities Act states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[158] Congress specifically excluded from coverage both transsexuals and those suffering from Gender Identity Disorder.[159] The legislation reads, "under this chapter, the term 'disability' shall not include . . . transsexualism . . . [or] gender identity disorders."[160]

Allowing a transgender person to pursue a claim under a disability statute is logical when the language of the statute is as broad as that used, for example, in New Jersey's Law Against Discrimination. Unfortunately, though, not all anti-discrimination statutes protecting the disabled are broadly worded, and the

153. *Id.*

154. *See id.* at 374–75 (noting that New Jersey courts have recognized emotional and mental conditions, such as depression, multiple personality disorder, substance abuse, and alcoholism, as disabilities under the New Jersey Law Against Discrimination).

155. *Id.* at 376.

156. *See id.* at 375 (referencing a Washington state court decision that interpreted its Law Against Discrimination to include Gender Dysphoria under its disability definition and stating that, like the New Jersey statute, it did not have a requirement that the disability substantially affect the plaintiff's major life functions).

157. *Id.* (citing 42 U.S.C. § 12211(b)(1) (2000)).

158. 42 U.S.C. § 12112(a) (2000).

159. 42 U.S.C. § 12211(b)(1) (2000).

160. *Id.*

federal government has specifically excluded transsexuality from the definition of disability. Without a broadly worded statute, a transgender person remains without recourse.

Also, not all transgender people are diagnosed with Gender Dysphoria or Gender Identity Disorder. A person claiming discrimination based on a disability may only succeed if there has been an accepted clinical diagnosis. Since for a transgender person such diagnosis does not always occur, this method provides only limited coverage for a limited number of transgender people. Moreover, relying on disability status for relief may be offensive to, and further stigmatize, some persons in the transgender community.

IV. Analysis and Proposal

Each of the approaches outlined above presents advantages and disadvantages in providing protection to the transgender community. A growing portion of the United States sees the lack of protection for the transgender population as troubling, as evidenced by the several states and cities that have amended their respective anti-discrimination laws to extend to transgender persons. The disquieting aspect of this growth is the lack of a consistent method in providing coverage. The lack of consistency furnishes no guidance to states or to the federal government in how to approach amending current legislation. Even more damaging to the transgender population is the sheer amount of time it is taking to develop a solution. In light of the lack of consistency, while being sensitive to the need for expediency, the best answer can be found in the legislation all fifty states and the federal government have in place.

Like in *Maffei*[161] and *Enriquez*,[162] the analysis should begin by examining the overall purpose of employment anti-discrimination legislation. As those courts acknowledged, the goal of anti-discrimination laws is to provide protection to classes of individuals who are routinely subjected to adverse employment actions not because they are unqualified or incompetent, but because of personal characteristics not of their choosing. If the general purpose of social legislation is to eliminate employment discrimination for classes who are routinely discriminated against, there must be acknowledgement that those classes of

161. Maffei v. Kolaeton Indus., 626 N.Y.S.2d 391, 395 (N.Y. Sup. Ct. 1995).

162. Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 374 (N.J. Super. Ct. App. Div. 2001).

people will change as new groups emerge alleging discrimination. Therefore, in keeping with the general purpose of anti-discrimination legislation, the definitions of protected classes must expand as circumstances require. Courts like *Maffei*[163] and *Enriquez*[164] have pioneered this expansion.

With the broad purpose as a backdrop, a logical argument that "sex" includes gender can be structured. Courts would be required to recognize that one's sex does not stand in a vacuum and the proper analysis of a sex discrimination claim would require evaluating a person's self perception as well as society's perception of a person's sex. Courts at all levels interchange the terms "sex" and "gender," and the Supreme Court has also recognized that sex encompasses gender.[165] Therefore, within the statutory language of "sex," it is feasible to define sex as also including gender characteristics, and ultimately transgender. The statutory language interpreted as such takes the *Price Waterhouse* holding[166] to the next logical inference: that it is illegal to discriminate based on one's gender characteristics whether an anatomical male does not act masculine enough, an anatomical female does not act feminine enough, or an anatomical male or female acts like his or her psychological sex. If a woman can be said to have been discriminated against because she did not adhere to the societal norms regarding her biological sex, a transgender person is discriminated against because he or she does not adhere to the societal norms regarding his or her biological sex.

Multiple states have used the word "sex" to include transgender people. It is not a novel interpretation.[167] Ultimately such inclusion provides a more expedient resolution to the issue facing the transgender population. The national trend is to provide protection to the transgender community,[168] so, optimistically, the trend will materialize within each state and the federal government. But the time frame for such change cannot be pinpointed. The need to wait even longer for congressional change can be alleviated by allowing a broader interpretation of the defi-

163. *Maffei*, 626 N.Y.S.2d at 396.

164. *Enriquez*, 777 A.2d at 373.

165. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 239–40 (1989).

166. *Id.* (holding that sex stereotyping is a prohibited basis of discrimination under Title VII).

167. *See supra* Part III.C (discussing the approaches taken in New York and New Jersey).

168. *See* NAT'L GAY & LESBIAN TASK FORCE, *supra* note 9.

nition of "sex." There are four major benefits of including transgender within the definition of "sex": first, it would create consistency between state and federal government concerning the meaning of "sex"; second, a broad definition of "sex" would extend coverage to the entire transgender community rather than providing piecemeal protection as is currently in effect; third, it would provide an immediate answer to the problem facing the transgender community; and fourth, it would provide the courts with a usable framework to enforce discrimination prohibitions.

The first major benefit of including transgender within the definition of "sex" is the consistency it would provide between the state and the federal approaches. By providing for a single definition inclusive of transgender, there would be clear guidance to states and the federal government in forming legislation to protect the transgender community. Also, by providing a single definition of sex that is transgender inclusive, employers would be able to monitor their practices and implement policies that are consistent with the prohibitions as defined by the legislatures. A bright-line inclusive definition would also allow transgender employees to understand their rights and to enforce those rights when the circumstances of an adverse employment action are contrary to the prohibitions outlined by the state or federal government.

The second major benefit of including transgender within the definition of "sex" is the broad coverage it would provide the transgender community. Currently, only one federal circuit[169] and a limited number of states and cities[170] provide protection to a transgender employee who has suffered from employment discrimination. Many states provide no coverage for the transgender community.[171] The increase in the number of state and local governments offering protection under their employment discrimination statutes evinces the acknowledgment by citizens of those states that transgender people need protection in the workplace. By including transgender within the definition of "sex," coverage would then be provided under Title VII and the anti-employment discrimination statutes of every state such that every transgender person in the U.S. would be protected against employment discrimination based on his or her transgender status.

169. The Sixth Circuit. *See supra* Part III.B.

170. *See supra* notes 9, 135.

171. *See id.*

The third major benefit of including transgender within the definition of "sex" is the expedient manner in which coverage would extend to the transgender community. To wait for congressional action on the state and federal levels would extend this period of uncertainty, regarding the transgender community in the workplace, indefinitely. The need for change exists now; waiting for action on a state or national level would undermine the plight currently facing many transgender persons.

The fourth major benefit of including transgender within the definition of "sex" is the enforcement tool it would provide courts. Courts would be equipped with a framework to analyze and decide cases involving transgender employees. As it currently stands, there is disagreement within the circuits regarding what the correct definition of "sex" is, as well as disagreement over whether current theories of liability apply to the transgender community.[172] By providing a broad, transgender-inclusive definition of "sex," courts will have guidance in addressing such cases and creating proper remedies.

V. CONCLUSION

As evidenced by the situation facing Steve Stanton, the city manager of Largo, Florida who was removed from his position after revealing that he was a transsexual, a transgender employee leads a vulnerable existence in the workplace. Other protected classes are familiar with this taxing experience. That vulnerable existence is one of the reasons that protection under the laws of this country is necessary. The current protection afforded transgender persons varies from no protection at all to full protection under some state laws.

Transgender people deserve protection against discrimination, as other classes have deserved protection, because of a continued environment of hostility in the workplace. By including transgender within the definition of "sex," the entire transgender community would be protected. There would be consistency between federal and state legislation, and the courts would be equipped with an existing framework to enforce prohibitions against discrimination. Lastly, it would provide an expedient answer to the transgender community; an answer that the community has been waiting too long to hear.

172. *See supra* Part III.