

TRANSSEXUALS AND TITLE VII: PROPOSING AN  
INTERPRETATION OF *SCHROER V. BILLINGTON*

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## INTRODUCTION

The Title VII<sup>1</sup> interpretation of discrimination based on sex should be expanded to include discrimination because of an individual’s transsexuality.<sup>2</sup> The statute is no longer interpreted to only protect discrimination against “women because they are women and against men because they are men,”<sup>3</sup> and logically can be applied to discrimination based on transsexuality. In an important step toward this end, a federal district court in *Schroer v. Billington* found that the Library of Congress (“the library”) violated Title VII by rescinding an employment offer to Diane Schroer after she revealed her intention to present as a woman and undergo sex reassignment surgery.<sup>4</sup> The court held that the library’s discrimination against Schroer violated Title VII under the theory of sex stereotyping and as literal discrimination based on sex.<sup>5</sup>

In Part I of this article, I address the facts of *Schroer v. Billington*. In Part II, I summarize the court’s holding which addressed both sex stereotyping and literal discrimination because of sex. *Schroer* introduced the concept that discrimination because of transsexuality is based on more than the performance of gender roles, and is discrimination because of sex under a literal application of the statutory language.<sup>6</sup> In Part III, I further explore the idea that

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

2. Throughout this article I discuss the application of Title VII protection to transsexual individuals. Because gender identity is complex and controversial, the use of terminology must be addressed preliminarily. While this term continues to be contested, I use transsexual to refer to anyone who desires to live as a member of the sex opposite to their chromosomal sex. *See, e.g.*, HARRY BENJAMIN, *THE TRANSEXUAL PHENOMENON* 9, 13 (1966); MILDRED L. BROWN & CHLOE ANN ROUNSLEY, *TRUE SELVES: UNDERSTANDING TRANSEXUALISM— FOR FAMILIES, FRIENDS, COWORKERS, AND HELPING PROFESSIONALS* 6-7 (1996); DAVE KING, *THE TRANVESTITE AND THE TRANSEXUAL* 63 (1993). A transsexual individual may or may not plan to undergo sex reassignment surgery or other medical procedures. This definition is consistent with the American Diagnostic and Statistical Manual of Mental Disorders’ criteria for gender identity disorder, *AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 532-34 (4th ed. 1994), and the World Health Organization’s definition of transsexualism, *WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS* Chapter 5, at F64 (2007), available at <http://www.who.int/classifications/apps/icd/icd10online> (follow “V F00-F99” hyperlink; then follow “F60-F69” hyperlink).

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

4. 577 F. Supp. 2d 293, 293-94, 296, 299 (D.D.C. 2008).

5. *Id.* at 308.

6. *Id.* at 306-08.

discrimination based on transsexuality is literally discrimination because of sex, and argue that the *Schroer* holding should be clarified, developed, and accepted. The court analogized transsexuality to religious conversion, and discussed Diane Schroer's decision to change "legally, culturally, and physically," from male to female.<sup>7</sup> Upon analyzing the problems and relevance of legal, cultural, and physical sex, I conclude in Part III that while each may be relevant, a Title VII analysis should focus primarily on an individual's cultural change.

In Part IV, I analyze the usefulness of the sex stereotyping theory, concluding that it is necessary, but not sufficient to ensure Title VII protection for transsexual individuals. After analyzing the holding in *Schroer*, precedent, and other legal issues surrounding transsexuality, I conclude in Part V that given the current lack of agreement regarding legal, social, and scientific sex, both theories set forth in *Schroer*—sex stereotyping and literal discrimination—benefit transsexual individuals seeking Title VII protection.

#### I. *SCHROER V. BILLINGTON*: THE FACTS

Diane Schroer applied for and was offered a position as a terrorism specialist for the Library of Congress.<sup>8</sup> She was extremely well qualified for the position and was unanimously recommended by the selection committee.<sup>9</sup> However, Diane applied for the job using her legal name, David.<sup>10</sup> Diane is a male-to-female transsexual who was in the process of presenting herself as female full-time and going through sex reassignment surgery.<sup>11</sup> Shortly after Schroer relayed this information to Charlotte Preece, the library's selecting official for the position, Preece rescinded the library's offer of employment.<sup>12</sup>

##### A. *Diane Schroer's background and gender identity transformation process*

Diane Schroer's qualifications as a terrorism specialist are impeccable. She graduated from the National War College and the U.S. Army Command and General Staff College, and has master's degrees in both history and international relations.<sup>13</sup> Schroer served in the U.S. Armed Forces in various capacities for twenty-five years and subsequently worked as a consultant on security projects.<sup>14</sup> During the course of her career, Schroer held command,

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7. *Id.* at 306-07.

8. *Id.* at 295-96.

9. *Id.*

10. *Id.* at 295.

11. *Id.* at 295-96.

12. *Id.* at 295-96, 299.

13. *Id.* at 295.

14. *Id.*

staff, and combat positions.<sup>15</sup> She directed an anti-terrorism organization and worked with senior officials, including the Joint Chiefs of Staff.<sup>16</sup>

After a diagnosis of gender identity disorder, Diane Schroer began the process of presenting as a female.<sup>17</sup> Schroer worked with a clinical social worker to develop a transition plan using the treatment protocols of the Harry Benjamin International Gender Dysphoria Association.<sup>18</sup> At the time of her interview with the library, Schroer used her legal name, David, because she was not yet presenting as a female full-time.<sup>19</sup> As part of her transition plan, Schroer intended to have facial feminization surgery before beginning her new job.<sup>20</sup> According to Schroer, this procedure would be finished and healed before her start date.<sup>21</sup> Schroer planned to undergo sex reassignment surgery only after presenting full-time as a female for approximately one year.<sup>22</sup> This surgery could be accomplished during a two-week vacation period.<sup>23</sup>

### B. *The hiring process*

Schroer applied for the position and interviewed at the library as “David J. Schroer” and wore traditionally male clothing to the interview.<sup>24</sup> Schroer received the highest score of all the candidates, a unanimous recommendation by the selection committee, and an offer of employment, which she accepted.<sup>25</sup> Before finalizing the paperwork to confirm the hire, Schroer met with Charlotte Preece to inform Preece of Schroer’s transition plan.<sup>26</sup> Schroer arrived dressed as a man.<sup>27</sup> At this meeting, Preece initially praised Schroer’s experience and qualifications, expressing excitement over hiring someone with Schroer’s skills and contacts.<sup>28</sup> Schroer then informed Preece that she would be transitioning from male to female and intended to start work as Diane.<sup>29</sup> Schroer explained her diagnosis, her transition plan, the timing of her surgeries, and that nothing would interfere with her employment.<sup>30</sup> Schroer provided examples of friends

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15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* The Harry Benjamin International Gender Dysphoria Association is now The World Professional Association for Transgender Health (WPATH). *See* The World Professional Association for Transgender Health, Inc. (WPATH) Home Page, <http://www.wpath.org> [hereinafter WPATH].

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

20. *Id.* at 296.

21. *Id.*

22. *Id.*

23. *Id.* at 296-97.

24. *Id.* at 295-96.

25. *Id.* at 296.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 296-97.

who had transitioned while retaining security clearance<sup>31</sup> and showed Preece photos of her in traditionally female professional attire.<sup>32</sup> Additionally, Schroer proffered her therapist as a resource to address any further questions or concerns.<sup>33</sup> Preece ended the conversation by saying, ““you’ve given me a lot to think about. I’ll be in touch.””<sup>34</sup>

After this meeting, Preece discussed her concerns with several library employees.<sup>35</sup> Cynthia Wilkins, the library’s personnel security officer, agreed to look into potential security clearance issues, but never received the personal data necessary to access Schroer’s clearance history.<sup>36</sup> Wilkins later told Preece that although she did not know what the clearance issues would be, she would not approve a waiver to allow Schroer to begin work before clearance was finalized.<sup>37</sup>

### C. Rescission of the job offer

Charlotte Preece subsequently rescinded Schroer’s employment offer, telling Schroer she was not a ““good fit.””<sup>38</sup> The library argued that the hiring decision resulted from five concerns.<sup>39</sup> Preece was concerned with (1) Schroer’s security clearance, (2) Schroer’s trustworthiness because she initially withheld her transsexual status and her transition plan, (3) the potential for Schroer’s transition to distract her from her job, (4) Schroer’s credibility when testifying before Congress, and (5) the fact that some of Schroer’s previous contacts may no longer want to associate themselves with her.<sup>40</sup> Preece testified that the security clearance issues were her first concern, but even without them she would have ““leaned against”” hiring Schroer because the alternate candidate had ““fewer complications,”” in that he was not transitioning from male to female.<sup>41</sup>

## II. THE COURT’S HOLDING IN *SCHROER V. BILLINGTON*

After her job offer was rescinded, Diane Schroer filed suit in federal court claiming the library violated Title VII of the Civil Rights Act of 1964.<sup>42</sup> Schroer’s suit against the library alleged discrimination based on sex in

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31. *Id.* at 297; *see also id.* at 300 (“It is uncontested that the ability to maintain or receive security clearance is a requirement for the terrorism specialist position.”).

32. *Schroer*, 577 F. Supp. 2d at 297.

33. *Id.*

34. *Id.*

35. *Id.* at 297-98.

36. *Id.* at 297.

37. *Id.* at 298.

38. *Id.* at 299.

39. *Id.* at 297.

40. *Id.* at 297-98.

41. *Id.* at 299.

42. *Id.* at 295; *see* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

violation of Title VII, both as sex stereotyping and as a literal violation of the statutory language.<sup>43</sup> The relevant portion of the statute states that it is unlawful for an employer “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.”<sup>44</sup> The court issued a two-part holding, concluding there was discrimination under both the theory of sex stereotyping and a literal interpretation of the statute.<sup>45</sup>

*A. The library’s purportedly valid reasons for rescission were pretextual or facially discriminatory*

The court addressed all five of the library’s reasons for rescinding Schroer’s employment, and held each reason was invalid.

1. Security clearance and time pressure

The court dismissed the library’s concerns about Schroer’s ability to maintain security clearance as pretextual.<sup>46</sup> The library provides reciprocity for security clearance between government agencies if the previous investigation was timely, had the appropriate scope, and there were no significant breaks in service.<sup>47</sup> In this case, the library failed to investigate whether reciprocity would apply.<sup>48</sup> Even without reciprocal security clearance, the library may grant a waiver allowing a new hire to begin work on a conditional basis.<sup>49</sup> The library refused to grant such a waiver in Schroer’s case.<sup>50</sup>

The court further held that the library’s purported time pressure for hiring was not credible.<sup>51</sup> Approximately five months elapsed between posting the job and offering it to Schroer.<sup>52</sup> Final security clearance was not immediately required for Schroer to begin employment. The person who previously held the job did so for six months before receiving clearance.<sup>53</sup> The person ultimately hired instead of Schroer received final clearance “several months” after beginning work.<sup>54</sup> Thus, the security clearance issues and time pressures offered by the library as reasons for rescinding Schroer’s position were deemed invalid.

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43. *Schroer*, 577 F. Supp. 2d at 302.

44. 42 U.S.C. § 2000e-2(a)(1).

45. *Schroer*, 577 F. Supp. 2d at 300.

46. *Id.*

47. *Id.*

48. *Id.* at 301.

49. *Id.*

50. *Id.* at 298.

51. *Id.* at 302 (the library claimed they were operating under time pressures to fill the position with a person who had full security clearance, rather than a provisional waiver).

52. *Id.*

53. *Id.*

54. *Id.*

## 2. Trust and distraction

The court also held both the trustworthiness and distraction concerns of the library were pretextual.<sup>55</sup> Because Preece initially thanked Schroer for her honesty, the court held that the library's reported concerns regarding Schroer's trustworthiness were merely pretext.<sup>56</sup> Regarding possible distractions, the library conceded there was no indication that Schroer would be unable to handle the duties of her position, and "had no other co-morbidities or stressors that . . . would have presented any issue regarding her stability, judgment, reliability or ability to safeguard classified information."<sup>57</sup> The library staff made no effort to discuss their concerns about potential distractions with Schroer, her previous employer, her references, or her therapist.<sup>58</sup>

## 3. Credibility and contacts

Concerns about Schroer's credibility and ability to maintain her contacts were both pretextual and facially discriminatory.<sup>59</sup> The court held these rationales were pretextual because the library never contacted any of the high-ranking officials Schroer listed as references to investigate the legitimacy of these concerns.<sup>60</sup> Had the library found anything to justify their concerns, rescinding Schroer's employment offer still would have been impermissible discrimination. Deference to the biases of others is equally as discriminatory as acting on one's own biases.<sup>61</sup> The concern that members of Congress or Schroer's former contacts would somehow reject Schroer because of her transsexuality is facially discriminatory.<sup>62</sup>

Because the court decided the reasons advanced by the library for rescinding Schroer's employment offer were pretextual or facially discriminatory, the court addressed the merits of Schroer's Title VII claims.

### *B. The library's actions violated Title VII because they constituted impermissible "sex stereotyping"*

Diane Schroer advanced her Title VII claim under a sex stereotyping theory<sup>63</sup> which was first developed in *Price Waterhouse v. Hopkins*.<sup>64</sup>

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55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *Id.* at 302-03.

64. *Id.* at 303; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51, 258 (1989).

### 1. Precedent surrounding sex stereotyping claims

The United States Supreme Court in *Price Waterhouse v. Hopkins* held that discrimination based on “sex stereotyping” violated Title VII.<sup>65</sup> The employer in *Price Waterhouse* refused to re-propose partnership to a female employee<sup>66</sup> who was too “macho,” and told her acting more feminine would improve her chances for partnership.<sup>67</sup> The Court held the employer discriminated based on “sex stereotyping,” which violated Title VII.<sup>68</sup> Courts have recognized the *Price Waterhouse* sex stereotyping cause of action in claims made by both men and women who were harassed or discriminated against for failure to conform to the stereotypes of their respective sexes.<sup>69</sup> The Court of Appeals for the Sixth Circuit applied *Price Waterhouse* sex stereotyping to transsexual individuals, holding that

discrimination against a plaintiff who is 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. Sex stereotyping based on a person’s gender nonconforming behavior is impermissible discrimination, irrespective of the cause of that behavior.<sup>70</sup>

Sex stereotyping claims have often failed when extended to general sex-based treatment. In an earlier ruling rejecting the library’s motion to dismiss, the *Schroer* court expressed reservations about *Schroer*’s case, noting that *Price Waterhouse* did not establish a Title VII claim in all cases of sex stereotyping.<sup>71</sup> The court cited *Jespersen v. Harrah’s Operating Co.*, which held that gender-specific grooming standards did not constitute impermissible sex stereotyping when they imposed equal burdens on both sexes.<sup>72</sup> By ruling in favor of Diane Schroer, the court distinguished the equal burden rule in *Jespersen*—which was based on general gender-specific policies—from individual hiring decisions based on non-conformity to sex stereotypes.<sup>73</sup>

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65. 490 U.S. at 250-51, 258.

66. *Id.* at 231-32.

67. *Id.* at 235.

68. *Id.* at 250-51.

69. *See, e.g.*, *Schroer v. Billington*, 577 F. Supp. 2d 293, 303 (D.D.C. 2008); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997).

70. *Schroer*, 577 F. Supp. 2d at 303-04 (quoting *Smith v. City of Salem*, 2004 FED App. 0262A, 15 (6th Cir.)).

71. *Schroer v. Billington*, 424 F. Supp. 2d 203, 208 (D.D.C. 2006).

72. *Schroer*, 577 F. Supp. 2d at 304; *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1076, 1083 (9th Cir. 2004).

73. *Schroer*, 577 F. Supp. 2d at 304-05.

## 2. Sex stereotyping and *Schroer*

The *Schroer* court, in decisions denying the library's motions to dismiss, warned that to succeed on a sex stereotyping claim under Title VII, the claimant must show that discrimination was in reaction to the employee's appearance, the employee's conduct, or the employer's stereotypical perceptions, rather than solely from the disclosure of gender dysphoria disorder.<sup>74</sup> This burden was met during the course of the *Schroer* trial. The court held in its conclusions of law that the rescission of Diane Schroer's employment offer "was infected by sex stereotypes."<sup>75</sup>

The evidence strongly indicated that the discrimination against Diane Schroer was based on sex stereotyping.<sup>76</sup> Charlotte Preece testified that when she saw the photos of Schroer in traditionally female professional attire, she only saw a man dressed as a woman.<sup>77</sup> Preece expressed difficulty in comprehending Schroer's transsexuality, believing a man with a Special Forces background to be especially masculine.<sup>78</sup> Additionally, Preece's idea that other employees, members of Congress, and congressional staff would not take Schroer seriously was based on the belief that they would see a man in women's clothing.<sup>79</sup> The court held that whether the library's actions were because Schroer was "an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender non-conforming transsexual," they were based on sex stereotypes in violation of Title VII.<sup>80</sup>

### C. *The library literally discriminated "because of ... sex" in violation of Title VII*

Diane Schroer's second claim was that the library literally violated the language of Title VII by rescinding her employment offer.<sup>81</sup> The *Schroer* court agreed that the library's actions literally violated Title VII's prohibition on discrimination "because of . . . sex."<sup>82</sup> While courts previously separated discrimination based on transsexuality from discrimination based on sex, the *Schroer* court held this was a distinction without a difference. The *Schroer* court contended that "courts have allowed their focus on the label 'transsexual' to blind them to the statutory language itself,"<sup>83</sup> which clearly prohibits discrimination based on sex. The library hired Schroer when he was a man, but

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74. *Schroer*, 424 F. Supp. 2d at 211, 213; *Schroer v. Billington*, 525 F. Supp. 2d 58, 63, 65 (D.D.C. 2007).

75. *Schroer*, 577 F. Supp. 2d at 305.

76. *See id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 302, 306.

82. *Id.* at 306; *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

83. *Schroer*, 577 F. Supp. 2d at 307.

rescinded the offer when informed that Schroer would be “legally, culturally, and physically, a woman.”<sup>84</sup> By analogizing the gender transition process to religious conversion, the court held that sex changes are protected by the language of Title VII.<sup>85</sup> Firing someone for converting from one religion to another is discrimination “because of . . . religion,”<sup>86</sup> despite an employer’s insistence that the decision was based on the conversion itself rather than either religion.<sup>87</sup> Similarly, revoking an employment offer when an individual transitions from one sex to another is discrimination “because of . . . sex.”<sup>88</sup>

The *Schroer* court recognized a split among federal circuits interpreting the word “sex” in Title VII.<sup>89</sup> Several courts held that discrimination because of a sex *change* is not impermissible discrimination based on sex.<sup>90</sup> These courts held that because Congress never anticipated or intended the statute to protect transsexual individuals, interpreting Title VII this way goes against the “manifest purpose” of the statute.<sup>91</sup> The *Schroer* court held these interpretations are too narrow, and the restriction of Title VII to only its “manifest purpose” is “no longer a tenable approach to statutory construction.”<sup>92</sup> Noting that Congress’ failure to pass legislation specifically addressing gender identity discrimination can be interpreted in several ways, the court held that the absence of legislation should not be dispositive.<sup>93</sup> The United States Supreme Court has applied Title VII to other claims that were not anticipated when Congress passed the statute.<sup>94</sup> Examples include male-on-male sexual harassment, racial discrimination by members of the same race, and discrimination because of interracial marriage.<sup>95</sup>

Thus, although the *Schroer* court refused to rule on whether gender identity is a component of sex or sexuality, the court held that *Price Waterhouse* destroyed the notion that “sex” in Title VII only applies to anatomical or chromosomal sex.<sup>96</sup> The extended meaning of “sex” from *Price Waterhouse* allowed the *Schroer* court to decide that the library literally

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84. *Id.* at 306.

85. *Id.* at 306-07.

86. 42 U.S.C. § 2000e-2(a)(1).

87. *Schroer*, 577 Supp. 2d at 306.

88. *See id.* at 306-08; 42 U.S.C. § 2000e- 2(a)(1).

89. *Schroer*, 577 F. Supp. 2d at 307.

90. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 659, 664 (9th Cir. 1977); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1082, 1084-85 (7th Cir. 1984).

91. *Holloway*, 566 F.2d at 662-63; *Ulane*, 742 F.2d at 1084-85. *But see Etsitty*, 502 F.3d at 1221 (explaining that the plain language of the statute and not the intent of Congress guides the Title VII interpretation, but still concluding that “discrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII.”).

92. *Schroer*, 577 F. Supp. 2d at 307.

93. *Id.* at 308.

94. *Id.* at 307.

95. *Id.* at 307, 307 n.8.

96. *Id.* at 306, 308.

violated Title VII when they revoked Schroer's employment offer because of her change of sex.

*D. End result of Schroer*

Following the holding that the library violated Title VII in two ways, the court granted Schroer's motion for relief. Schroer received \$183,653 in compensation for back pay and employment-related benefits, \$300,000—the maximum available—for non-pecuniary losses including emotional pain and suffering, inconvenience, mental anguish, and loss of enjoyment of life, and \$7,537.80 for past pecuniary losses for therapy and repairs for stress-triggered dental issues.<sup>97</sup>

III. EXPANDING UPON *SCHROER*: DISCRIMINATION AGAINST TRANSSEXUAL INDIVIDUALS IS LITERALLY DISCRIMINATION BASED ON SEX

*A. Clarifying Schroer's precedent*

Though it seems to increase protection of transsexual individuals from discrimination, the *Schroer* decision requires clarification. The court indicated a willingness to throw out previous distinctions between discrimination based on sex and discrimination based on a change of sex,<sup>98</sup> but the decision's language remains ambiguous and problematic. The court's analogy to religious conversion implies that when Title VII protects against discrimination based on an identity, it also extends to discrimination based on a *change* to that identity.<sup>99</sup> This focus on change raises questions that remain unanswered in *Schroer*. At the time of writing this article, no decision has followed *Schroer*'s holding that discriminating against a transsexual individual is literally discrimination because of sex under Title VII.<sup>100</sup>

Without resolving the scientific dispute of what components make up "sex," the *Schroer* court held that the library discriminated "because of . . . sex" by hiring a man but rescinding the offer when that man revealed an intention to "legally, culturally, and physically" become a woman.<sup>101</sup> The court neglected to address how to weigh a "change" in each of these categories or how to prove the intent to change. What combination of sex "changes" must a person undergo to prove a literal violation of Title VII? The answer to this

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97. *Schroer v. Billington*, No. 05-1090, slip op. at 5-6, 9, 11 (D.D.C. Apr. 28, 2009).

98. *Schroer*, 577 F. Supp. 2d at 306, 308.

99. *Id.* at 306-07.

100. *But see* Glenn v. Brumby, 632 F. Supp. 2d 1308, 1315 (N.D. Ga. 2009) (citing *Schroer*, 577 F. Supp. 2d 293, for the validity of a sex stereotyping claim, but explicitly declining to follow the holding on literal discrimination based on sex, stating "this Court has held as a matter of law that transsexuals as a group are not a suspect class based on sex.>").

101. *Schroer*, 577 F. Supp. 2d at 306.

question requires a discussion of the three components listed by the court: legal, physical, and cultural sex.<sup>102</sup>

*B. Legal, physical, and cultural sex, and why a “cultural” sex change should be the most important of the factors listed in Schroer*

No consensus exists regarding whether—and to what extent—one can legally change his or her sex, or the appropriate medical procedures for physically changing one’s sex. The nature of discrimination suggests that the proper emphasis should be on the perceptions held by the discriminator, rather than the legal or medical formalities of the transsexual individual. In light of these considerations and because sex changes are extremely individualized processes, courts should emphasize the transsexual individual’s cultural sex change when considering the relevance of the three factors listed in *Schroer*.

1. Alterations to legal sex

*Schroer* implies that a Title VII analysis should consider the claimant’s intent to undergo a legal sex change.<sup>103</sup> Problematically, some jurisdictions do not permit a legal change of sex. Justifications given for refusing to legally recognize sex changes include the public interest in preventing fraud<sup>104</sup> and an interest in preserving birth certificates as a “historical record of the facts as they existed at the time of birth.”<sup>105</sup> When allowed, the implications of a legal sex change vary. In some jurisdictions, a legal change merely affects legal documents, like birth certificates and drivers’ licenses.<sup>106</sup> Elsewhere, a legal sex change allows a person to marry another person of the same chromosomal sex but “opposite” legal sex.<sup>107</sup> Some courts recognize that legal sex is composed of more than simply biological or chromosomal sex.<sup>108</sup> Others do not, and do not

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102. *Id.* at 306, 308.

103. *Id.*

104. *Anonymous v. Weiner*, 270 N.Y.S.2d 319, 322 (App. Div. 1966).

105. *K. v. Health Div., Dep’t of Human Res.*, 560 P.2d 1070, 1072 (Or. 1977).

106. *In re Estate of Gardiner*, 42 P.3d 120, 123, 135-37 (Kan. 2002) (transsexual individual obtained new birth certificate and driver’s license in Wisconsin after sex reassignment surgery to become an anatomical female, but her subsequent marriage to a man was void and invalid in Kansas).

107. *See, e.g., M.T. v. J.T.*, 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976). *But see id.* at 207, 210 (stating sex reassignment surgery is one requirement before a marriage is legal between a male-to-female transsexual and a male).

108. *See Id.* at 208-09; *see also Kantaras v. Kantaras*, 884 So. 2d 155, 157 (Fla. Dist. Ct. App. 2004) (“Chromosomes are only one factor in the determination of sex and they do not overrule gender or self identity, which is the true test or identifying mark of sex.”).

recognize changes of sex.<sup>109</sup> For example, in New York City, the sex on a transsexual individual's reissued birth certificate is omitted entirely.<sup>110</sup>

Where permitted, the requirements for a legal sex change differ. Generally, a legal sex change is inextricably tied to a physical sex change. For example, a Maryland statute allows the amendment of birth certificates, but first requires a physical sex change "by [a] surgical procedure."<sup>111</sup> Washington, D.C.—where Schroer's case was heard—also requires surgery before an individual can legally change his or her sex.<sup>112</sup> Some jurisdictions issue a new birth certificate if the performing surgeon provides evidence of the sex reassignment surgery.<sup>113</sup>

Other jurisdictions require something resembling the "cultural" component before they recognize a legal sex change.<sup>114</sup> The Superior Court of New Jersey held that when a person is "physically and psychologically unified and fully capable of sexual activity consistent with her reconciled sexual attributes of gender and anatomy," then the person is recognized as being of that sex for the purposes of marriage.<sup>115</sup> Other states additionally require a court order for a legal sex change.<sup>116</sup> In at least one jurisdiction, a legal name change is required before attempting to change one's birth certificate.<sup>117</sup>

Legal action to change one's sex can take a considerable amount of time because most jurisdictions that allow for such a change require proof of a surgical procedure.<sup>118</sup> Problematically, a transsexual individual must present as the "opposite" sex for at least one year before undergoing sex reassignment surgery.<sup>119</sup> This leaves an extended period of vulnerability during which the individual may be without solid proof of intent to legally change his or her sex. If such proof is required, the individual will be left without recourse in the event that he or she is discriminated against.

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109. See, e.g., *In re Ladrach*, 513 N.E.2d 828, 832 (Ohio Prob. Ct. 1987) ("It is generally accepted that a person's sex is determined at birth by anatomical examination by the birth attendant."); *In re Estate of Gardiner*, 42 P.3d at 135, 137; *Littleton v. Prange*, 9 S.W.3d 223, 230-31 (Tex. App. 1999).

110. 24 RCNY § 207.05(a)(5) (2007); See also *Hartin v. Dir. of Bureau of Records & Statistics*, 347 N.Y.S.2d 515, 515-18 (App. Div. 1973).

111. MD. CODE ANN., HEALTH-GEN. § 4-214(b)(5) (LexisNexis 2009); see also *In re Heilig*, 816 A.2d 68, 84 (Md. 2003).

112. D.C. CODE § 7-217(d) (2001); see also *In re Taylor*, No. 03CA1753, 2003 WL 22382512, at \*1, \*5 (D.C. Super. Ct. Mar. 17, 2003) (mem.).

113. See, e.g., HAW. REV. STAT. § 338-17.7(a)(4)(B) (2008).

114. See *M.T. v. J.T.*, 355 A.2d 204, 205-11 (N.J. Super. Ct. App. Div. 1976) (deciding legal sex in the context of a divorce proceeding between a male-to-female transsexual and a self-identified and chromosomal male).

115. *Id.* at 211.

116. See, e.g., ALA. CODE § 22-9A-19(d) (2006); CAL. HEALTH & SAFETY CODE § 103425 (West 2006).

117. FLA. STAT. § 68.07(1), (4)-(5) (Supp. 2010).

118. See, e.g., ALA. CODE § 22-9A-19(d); ARIZ. REV. STAT. ANN. § 36-337(A)(3)(b) (2009); ARK. CODE ANN. § 20-18-307(d) (2005); CAL. HEALTH & SAFETY CODE § 103425.

119. BROWN & ROUNSLEY, *supra* note 2, at 102.

Laws relating to legal sex changes vary and the implications extend well beyond Title VII.<sup>120</sup> The ambiguities surrounding legal sex present interesting and complex issues, but for the purposes of this article it must only be acknowledged that there is no consensus on the legality, requirements, or procedures for a legal sex change. Decisions are made state-by-state, and because it is a hot-button issue fraught with wider political and legal implications, judges may avoid defining “sex,” just as the court did in *Schroer*.<sup>121</sup>

It is clear that issues surrounding legal sex changes can result in a discrimination claim.<sup>122</sup> However, an inquiry into alleged discrimination should focus primarily on the perceptions and motivations of the discriminator, rather than legal formalities of the individual. A legal change of sex should be only one factor in a Title VII analysis, weighed according to its availability in the jurisdiction. A court conducting a Title VII analysis must look to the laws of the relevant jurisdiction when deciding how to weigh the claimant’s intent to undergo a legal change of sex.

## 2. Alterations to physical sex

The *Schroer* holding also implies that a physical sex change is relevant to the Title VII analysis.<sup>123</sup> Transsexuality was medicalized in the late 1800s.<sup>124</sup> With the development of synthetic hormones in the 1930s, medical sex change procedures expanded beyond simple castration.<sup>125</sup> Sex change operations were no longer experimental by the 1950s and became available to the public.<sup>126</sup> Over the last century, medical discoveries and new techniques have resulted in many choices for transsexual individuals seeking to change their physical sex.<sup>127</sup>

The variety of options complicates the standard for what constitutes a physical sex change. The language in *Schroer* indicates the importance of Diane Schroer’s intention to physically alter her “anatomical” sex.<sup>128</sup> The court failed to specify the weight given to physical alteration, what physical alterations are required, or how to prove an intent to physically change. Because of the emotional, financial, and physical complexities of medically altering one’s sex, intention to do so should be relevant, but not necessary, to show discrimination because of sex under Title VII.

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120. See Saru Matambanadzo, *Engendering Sex: Birth Certificates, Biology and the Body in Anglo American Law*, 12 CARDOZO J.L. & GENDER 213 (2005).

121. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

122. *Id.* at 299-300, 302.

123. *Id.* at 308.

124. KING, *supra* note 2, at 35.

125. *See id.* at 40-41.

126. JANICE G. RAYMOND, *THE TRANSEXUAL EMPIRE* 19 (1979).

127. *Id.* at 19-20.

128. 577 F. Supp. 2d at 308.

a. *Treatment protocols*

Most medical professionals follow the routinely updated Standards of Care issued by the Harry Benjamin International Gender Dysphoria Association.<sup>129</sup> Given the risks and permanence of medical treatments, the standards mandate a waiting period between seeking and receiving medical intervention.<sup>130</sup>

The process of “passing” as the “opposite” gender begins long before any surgical alterations.<sup>131</sup> Transsexual individuals take steps like haircuts, changes in clothing, altered body movements, and voice training to begin their transition.<sup>132</sup> An individual must undergo therapy for a minimum of three months before starting hormone treatments.<sup>133</sup> Sex reassignment surgery requires a longer waiting period and a more extensive transition process.<sup>134</sup> An individual must live full-time as the “opposite” sex for one year and a therapist must give approval before sex reassignment surgery is performed.<sup>135</sup>

b. *Medical procedures*

Physical transformations result from a variety of procedures. Hormone therapy can change secondary sex characteristics.<sup>136</sup> This treatment often but not always precedes some form of surgical alteration.<sup>137</sup> Because hormone treatments must be continued for life and have serious health risks, some choose not to pursue hormone therapy.<sup>138</sup> Many transsexual individuals pursue non-genital cosmetic surgery.<sup>139</sup> Available procedures include facial alterations such as rhinoplasty; changing the shape of the brow, forehead, or chin; modifying the jaw line; and even voice surgery.<sup>140</sup>

Sex reassignment surgery alters the breasts or genitalia.<sup>141</sup> In a male-to-female transsexual, surgeons can create genitalia indistinguishable from a chromosomal female through vaginoplasty and labiaplasty.<sup>142</sup> Female-to-male

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129. BROWN & ROUNSLEY, *supra* note 2, at 101-02; THE HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS 1-2 (6th ed. 2001), <http://wpath.org/Documents2/socv6.pdf> [hereinafter HARRY BENJAMIN STANDARDS]. The Harry Benjamin International Gender Dysphoria Association is now The World Professional Association for Transgender Health (WPATH). *See* WPATH, *supra* note 18.

130. BROWN & ROUNSLEY, *supra* note 2, at 102.

131. *See id.* at 132, 135.

132. *Id.* at 132-35.

133. *Id.* at 196-97.

134. *Id.* at 202.

135. *Id.*

136. *Id.* at 196.

137. *See id.* at 197, 200.

138. *Id.* at 200.

139. *Id.*

140. *Id.* at 201.

141. *Id.* at 202.

142. *Id.* at 202-04.

procedures involve the removal of all internal female reproductive organs and the construction of a penis and scrotum.<sup>143</sup> Urethroplasty allows for urination while standing up, though it is expensive and has high rates of complications.<sup>144</sup>

*c. Physical alterations should not be required for Title VII protection*

Individuals choose different combinations of the available medical treatments, and the decision to pursue sex reassignment surgery is personal.<sup>145</sup> Like any medical procedure, risks accompany the alteration of physical sex characteristics. The effects of a lifetime of hormone treatments are not yet fully understood,<sup>146</sup> and surgery involves potentially fatal or debilitating complications. An individual should not have to accept these risks in exchange for Title VII protection.

In addition to medical risks, alteration to physical sex characteristics can take an emotional and financial toll.<sup>147</sup> The treatment protocol standards require individualized counseling and transition plans precisely because everyone has different needs.<sup>148</sup> One should not have to choose between psychological well-being and legal protection, nor should one have to buy such protection. Sex reassignment surgeries can be prohibitively expensive.<sup>149</sup> Insurance may not cover any of the operation costs.<sup>150</sup> According to a 2001 survey of surgeons who perform sex reassignment surgeries, the average cost for a male-to-female surgery in the United States was \$10,306, and the average cost for a female-to-male surgery was \$8,507.<sup>151</sup> These prices do not include the costs of secondary surgeries, hormones, doctor visits, or mental health care.<sup>152</sup>

The emphasis on anatomical alterations in *Schroer*<sup>153</sup> is misleading. Because Diane Schroer disclosed her surgical plans to the library,<sup>154</sup> it was appropriate in this case for the court to consider the effect this had on the hiring decision. The language in the court's decision indicates a reliance on

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143. *Id.* at 206-08.

144. *Id.* at 208.

145. *Id.* at 209-10.

146. *Id.* at 200.

147. *Id.* at 209-11.

148. See HARRY BENJAMIN STANDARDS, *supra* note 129, at 1-2.

149. See Wendy Sanford, *Introduction: Sexual Orientation and Gender Identity*, in OUR BODIES, OURSELVES 179, 181 (The Boston Women's Health Book Collective ed., 1998).

150. See Charles Thomas Little, *Transsexuals and the Family Medical Leave Act*, 24 J. MARSHALL J. COMPUTER & INFO. L. 315, 322, 322 nn.44-45 (2006) (discussing insurance coverage and sex reassignment surgery).

151. Mary Ann Horton, *The Cost of Transgender Health Benefits*, 4 (2008), <http://www.tgender.net/taw/thb/THBCost-OE2008.pdf>.

152. See *id.*; see also Stephanie Armour, *When an Employee Switches Gender, What's a Company to do?*, USA TODAY, June 10, 2005, at 1B (noting additional costs such as \$25,000 for electrolysis for male-to-female transsexuals or \$7,000 chest-reconstruction surgery for female-to-male transsexuals).

153. *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.C.C. 2008).

154. *Id.* at 296-97.

Diane Schroer's "anatomical" alterations,<sup>155</sup> but such alterations ordinarily should not be weighed heavily in a Title VII analysis. Because discrimination is external to the victim, courts should focus on the alleged discriminator's perceptions and behaviors rather than the victim's anatomy. Evidence of alterations to one's physical sex characteristics may be relevant to an inquiry into alleged discrimination, but should not be required for a successful Title VII claim.

### 3. Alterations to cultural sex

As is the case with the legal and physical changes, *Schroer* fails to elaborate on the meaning and importance of culturally changing one's sex.<sup>156</sup> Although somewhat vague, culture is arguably the most important component. It most closely comports with the nature of a discrimination claim because it focuses on the perceptions of the discriminator, and is less problematic for the transsexual individual than legal or physical changes.

While expressly refusing to decide what constitutes "sex," the *Schroer* court implied that sex has a cultural component.<sup>157</sup> The most intuitive interpretation of "cultural sex" is that it is what an individual presents to the general public. While self-identification may play a role in legal sex,<sup>158</sup> cultural sex depends on public perception, including that of the alleged discriminator. An alleged discriminator's knowledge of planned or completed legal and anatomical changes may contribute to this perception. Legal and anatomical changes may factor into a transsexual individual's cultural sex, but neither should be required.

The *Schroer* court's "cultural" component should dominate an inquiry into Title VII violations. The cultural component should carry the most weight, given the logical connection to the nature of discrimination and the lack of uniformity in legal and anatomical sex changes. By interpreting the *Schroer* court's "cultural" component in this way, Title VII protects transsexual individuals when they change the sex they present to the public.

## IV. THE SEX STEREOTYPING CLAIM REMAINS NECESSARY FOR PROTECTING TRANSSEXUAL INDIVIDUALS UNDER TITLE VII

Sex stereotyping remains an important component of Title VII protection. Aside from protecting individuals who do not identify as transsexuals, the sex stereotyping theory is an alternative approach to Title VII if proving anatomical, legal, or cultural change is difficult. Even if courts accept the above interpretation of *Schroer*, there will always be ambiguities as to whether a

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155. *Id.* at 308.

156. *Id.* at 306, 308.

157. *Id.*

158. *See* M.T. v. J.T., 355 A.2d 204, 210-11 (N.J. Super. Ct. App. Div. 1976) (holding that a person should be legally recognized as the "opposite" sex for marital purposes if that person is "physically and psychologically unified" through surgery).

person has “changed” into a member of the “opposite” sex. Furthermore, if *Schroer*’s holding—recognizing a literal violation of Title VII when transsexual individuals are discriminated against—is limited in future decisions, the sex stereotyping cause of action will be essential for Title VII protection of transsexual individuals.

*A. How courts have interpreted sex stereotyping in relation to transsexuals*

The circuits have come to different conclusions about the sex stereotyping claim as it applies to transsexual individuals.<sup>159</sup> However, the divide between circuits may not be as far apart as it appears the surface. Circuit court decisions that categorically deny the application of Title VII to transsexual individuals were made before *Price Waterhouse* introduced the sex stereotyping claim.<sup>160</sup>

In addition to the *Schroer* circuit, the Court of Appeals for the Sixth Circuit recognizes the sex stereotyping claim raised by transsexual individuals as valid.<sup>161</sup> In *Smith v. City of Salem*, the court of appeals held that the plaintiff, a chromosomal male who was suspended after presenting as a female, had a valid claim under Title VII.<sup>162</sup> Similarly, in *Barnes v. City of Cincinnati*, the same circuit upheld a jury verdict awarding damages, attorney’s fees, and costs to a preoperative male-to-female transsexual police officer who had been the victim of sex stereotyping.<sup>163</sup>

Circuits that recently declined to recognize Title VII protections for transsexual individuals under the sex stereotyping theory did so on procedural grounds.<sup>164</sup> For example, in *Etsitty v. Utah Transit Authority*, the plaintiff failed to raise an issue of material fact indicating the reasons given for her termination were pretextual.<sup>165</sup> The *Etsitty* court detailed the precedent applying sex stereotyping to transsexual individuals, indicating a willingness to apply the

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159. The court’s holding in *Schroer* falls on the same side as the Sixth Circuit’s holding in the earlier cited *Smith v. City of Salem*, 2004 FED App. 0262A, 7, 10 (6th Cir. 2004).

160. *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1083-85 (7th Cir. 1984) (holding that a pilot fired after sex reassignment surgery could not claim Title VII protection because Congress only intended to protect discrimination “against women because they are women and against men because they are men.”); *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (maintaining that “discrimination based on one’s transsexualism does not fall within the protective purview of the Act.”); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662, 664 (9th Cir. 1977) (stating that transsexuals are not a protected class under Title VII because Congress “had only the traditional notions of ‘sex’ in mind.”).

161. *Schroer*, 577 F. Supp. 2d at 303-04.

162. *Smith*, 2004 FED App. at 3-8.

163. 2005 FED App. 0142P, 1 (6th Cir. 2005).

164. *See, e.g.*, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *James v. Ranch Mart Hardware, Inc.*, 881 F. Supp. 478, 480-82 (D. Kan. 1995) (granting summary judgment because James failed to present genuine material facts showing Ranch Mart’s reasons for firing her were pretext for discrimination); *Myers v. Cuyahoga County*, No. 05-3370, 2006 WL 1479081, at \*6-7 (6th Cir. May 31, 2006) (similarly holding that Myers failed to show that the reasons given for termination were pretextual).

165. 502 F.3d at 1224.

theory to transsexual individuals if a properly argued case were presented.<sup>166</sup> Several other cases were similarly disposed of.<sup>167</sup>

At the time of this writing, several federal district court decisions have cited *Schroer* regarding the sex stereotyping theory as it relates to transsexual individuals. In *Lopez v. River Oaks Imaging & Diagnostic Group, Inc.*, a case of first impression for the district, the district court cited *Schroer*'s denial of the motion to dismiss the sex stereotyping claim in holding the following: "[T]ranssexuality is not a bar to her sex stereotyping claim. Title VII is violated when an employer discriminates against any employee, transsexual or not, because he or she has failed to act or appear sufficiently masculine or feminine enough for an employer."<sup>168</sup> The court denied cross motions for summary judgment in this case.<sup>169</sup> Likewise, even in a district with precedent contrary to *Schroer*'s holding on literal discrimination, a federal district court recognized the validity of a sex stereotyping claim asserted by a male-to-female transsexual.<sup>170</sup>

Not every case that cites *Schroer* for sex stereotyping principles does so positively. *Creed v. Family Express Corp.* cited *Schroer* to note that a *Price Waterhouse* sex stereotyping claim cannot be based solely on the plaintiff's status as a transsexual.<sup>171</sup> The district court pointed out that controlling precedent ran contrary to *Schroer*'s ultimate holding that Title VII protects discrimination based on sexual stereotypes.<sup>172</sup>

*B. The importance of the sex stereotyping theory if there is a restricted interpretation of Schroer*

If courts decline to follow *Schroer* in holding that discrimination against transsexual individuals literally violates Title VII, the sex stereotyping theory will be of paramount importance.

While the *Schroer* court reasoned that the library literally violated Title VII because Diane Schroer intended to legally, physically, and culturally become a woman,<sup>173</sup> the literal violation doctrine is unclear and must be refined in subsequent cases. Part III of this article proposes one interpretation of the *Schroer* language. Courts may adopt a more restricted approach, in which case a sex stereotyping claim may be the only or most plausible claim for a transsexual individual who has experienced discrimination.

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166. *Id.* at 1223-24.

167. See *James*, 881 F. Supp. at 481-82; *Myers*, 2006 WL 1479081, at \*6-7.

168. 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008) (citing *Schroer v. Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007)).

169. *Id.* at 668.

170. *Glenn v. Brumby*, 632 F. Supp. 2d 1308, 1308, 1315-16 (N.D. Ga. 2009).

171. *Creed v. Family Express Corp.*, 101 Fair Empl. Prac. Cas. (BNA) 609, 611 (N.D. Ind. 2007) (citing *Schroer v. Billington*, 424 F. Supp. 2d 203, 209 (D.D.C. 2006)).

172. *Id.* at 611 n.2.

173. *Schroer v. Billington*, 577 F. Supp. 2d 293, 306, 308 (D.D.C. 2008).

Depending on how much courts limit the literal violation claim, it may be difficult or impossible for a claimant to effectively prove a sex “change.” As discussed above, the process of changing one’s sex happens gradually and to different extents. Legal changes are of uncertain permissibility, are procedurally complex, and nearly always require surgery. Physical alterations to sex characteristics can be risky, expensive, and psychologically complicated. A person’s transition plan is highly individualized and takes place over an extended period of time. Depending on the level of “change” required by future courts and the level of proof necessary to show an intent to change, sex stereotyping could be the only viable claim for many individuals.

*C. The role of the sex stereotyping claim if Schroer expands protection based on “cultural” sex*

If *Schroer*’s cultural component is emphasized in future decisions, as proposed in Part III, Title VII will protect more individuals facing discrimination in the work place. However, sex stereotyping would still retain a role in Title VII claims.

To some degree, the interpretation of the *Schroer* court’s “cultural” sex change proposed in this article blurs the line between a literal violation of the statutory language and sex stereotyping, however a distinction can be made. The literal violation of Title VII in *Schroer* emphasizes “change,” from one sex to another.<sup>174</sup> A “cultural” change requires a certain level of commitment on behalf of a transsexual individual, and a perception of “change” by the discriminator. Regardless of developments in this area of law, there will always be ambiguities as to whether a person has sufficiently “changed” his or her cultural sex. Given the individualized and somewhat private nature of the transformation process, an individual may still struggle to prove cultural change, and would thus benefit from the sex stereotyping claim.

For example, a person who begins presenting as the “opposite” sex but chooses not to announce an intention to become that sex may face discrimination, but may not have undergone a sufficient cultural change for the purpose of Title VII. A transsexual individual who cannot convince the court of a cultural change in identity and perception may offer sex stereotyping as an alternate theory. Because of these gaps and ambiguities, the sex stereotyping claim remains an important aspect of Title VII sex discrimination claims, though alone it does not sufficiently protect transsexual individuals.

Courts have traditionally struggled to distinguish between discrimination based on sex stereotyping and discrimination based on characteristics like homosexuality or transsexuality that have historically been unprotected.<sup>175</sup>

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174. *Id.*

175. *See, e.g.,* *Simonton v. Runyon*, 232 F.3d 33, 37-38 (2d Cir. 2000) (dismissing as insufficiently pled a sex stereotyping claim in which the plaintiff failed to show that he acted effeminately, hence showing that harassment was based on sex stereotypes and not his homosexuality); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 285-88 (E.D. Pa. 1993) (holding that the plaintiff failed to prove that the discrimination was because a male-to-female

Though the court in *Schroer* dismisses the distinction as irrelevant, it only does so in the process of holding that the library violated Title VII under both theories.<sup>176</sup> If *Schroer*'s interpretation of literal discrimination "because . . . of sex"<sup>177</sup> is not accepted, transsexual individuals who claim discrimination based on sex stereotyping are left vulnerable to judicial hair-splitting and inconsistency. For example, one district court assumes for the purpose of argument that the plaintiff, a male-to-female transsexual, is a female.<sup>178</sup> The court maintains that the plaintiff would still have to prove that the discrimination was because she did not conform to female sex stereotypes, and not because she had undergone a sex change.<sup>179</sup> This type of analysis limits the utility of the sex stereotyping claim if transsexual individuals cannot also claim a literal violation of Title VII. Hence, both theories are important to remedying discrimination against transsexual individuals.

#### V. CONCLUSION

Complex legal issues have arisen with developments in the field of gender studies and the increasing acceptance of individuals who do not fit squarely in the male/female chromosomal and social dichotomy. The evolution of social, judicial, and legislative attitudes regarding these issues may bring about new legislation or interpretations. For the time being, the judicial system must work within the current statutory language. Given its validation of both the sex stereotyping claim and a claim based literally on the statutory language, a clarified acceptance of *Schroer* could provide relatively comprehensive Title VII protection for transsexual individuals.

The court listed three components justifying its holding that Diane Schroer was literally discriminated against because of sex: intent to change legally, physically, and culturally. This ruling leaves unaddressed important questions regarding when protection because of "sex" applies to transsexual individuals, and how much "change" an individual must undergo.

Regarding the *Schroer* court's analysis of the literal violation, each enumerated component contains problems, but legal and physical changes are more complex and problematic than cultural alteration. The legal status and the physical sex characteristics of an individual lack a logical connection to discrimination by a third party. Discrimination analysis should be based on the perceptions of the discriminator, rather than formalities in the victim's legal or medical status. The cultural component may be vague, but it most accurately reflects the external nature of discrimination. This article has argued for a broad, clarified interpretation of *Schroer*. I emphasize the cultural change

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transsexual was not conforming to female sex stereotypes rather than because she was transsexual).

176. *Schroer*, 577 F. Supp. 2d at 305.

177. *Id.* at 306; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).

178. *Dobre*, 850 F. Supp. at 285, 287.

179. *Id.* at 287-88.

analysis, and argue that discrimination based on changing one's sex should be accepted as a literal violation of Title VII, though sex stereotyping should be retained as an alternative theory.

Even if this interpretation of *Schroer*'s cultural component is accepted and utilized, the sex stereotyping claim remains an important gap-filler. A sex change is a very personal and drawn out undertaking. Transsexual individuals may face discrimination before announcing the intent to "change," or may never intend to change to the extent required by a court. Although sex stereotyping remains an important alternate theory for proving discrimination, it alone cannot sufficiently address discrimination against transsexual individuals. Without the recognition that the statute literally protects against discrimination because of a change of sex, courts must determine whether discrimination is based on transsexuality—which is unprotected—or if it is based on non-conformance with sex stereotypes. Both theories validated in *Schroer* have important roles in ensuring transsexual individuals may seek judicial remedy for discrimination.

*Schroer v. Billington* introduced the idea that discrimination because of a sex change is discrimination based on sex under Title VII. Given the development of the sex stereotyping theory and in light of the court's analogy to religious conversion, this is a logical step in Title VII jurisprudence. However, the elements necessary to advance a successful Title VII claim based on a literal interpretation of the statutory language must be clarified. This article has proposed an interpretation of *Schroer* that fits with the nature of a discrimination claim by emphasizing the cultural aspects of sex change, while maintaining that sex stereotyping remains an important theory for transsexual individuals seeking Title VII protection.