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**THE ROAD LESS TRAVELED: GENDER IDENTITY  
DISCRIMINATION IN THE US AND UK**

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*Two roads diverged in a wood, and I—  
I took the one less traveled by,  
And that has made all the difference.<sup>1</sup>*

**I. INTRODUCTION**

Trans individuals in both the United States and in the United Kingdom have had to take the road *less traveled by*, in their private lives and in their employment relationships and it has *made all the difference*. Horrific consequences have resulted for many of those whose gender identity differs from their birth-assigned gender with hate crimes, violence and murder being the most grim consequences. “Transgender and gender non-conforming people face rampant discrimination in every area of life: education, employment, family life, public accommodations, housing, health,

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<sup>1</sup> ROBERT FROST, *The Road Not Taken*, MOUNTAIN INTERVAL (1920).

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police and jails, and ID documents.”<sup>2</sup> While we acknowledge that all these issues are urgently in need of attention and awareness raising, the focus of this paper is on the protection of trans individuals in the employment sphere in two jurisdictions which vary significantly in their approach. We argue that the protection available under the Equality Act 2010 provides some hope for trans individuals in the UK but that much depends on judicial interpretation. Concepts such as gender stereotyping which could be ‘borrowed’ from the US context could help interpret and develop the law so as to promote equality and protections from discrimination. We further argue that the US has further to travel along the road to equality and that it can learn from the explicit protection afforded to trans individuals in statute. We begin with a brief consideration of the context in which we are writing and an explanation of the vocabulary used before considering each jurisdiction in turn. Toward the end of the paper we seek to highlight what the jurisdictions can learn from each other.

### A. *Legal Recognition of Gender Identity*

Since April 4, 2005 it has been possible in the UK to apply for a Gender Recognition Certificate<sup>3</sup> that is available for those who have suffered from gender dysphoria, have lived as their acquired gender for at least two years and intend to do so permanently.<sup>4</sup> Statistics on the number of Gender Recognition

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<sup>2</sup> National Gay and Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, (Feb. 3, 2011), [http://www.thetaskforce.org/reports\\_and\\_research/ntds](http://www.thetaskforce.org/reports_and_research/ntds).

<sup>3</sup> Gender Recognition Act, 2004, c.17 (U.K.)

<sup>4</sup> Gender Recognition Act, 2004, c.17 (U.K.) (§ 1. A Gender Recognition Certificate allows the holder to live legally as their acquired gender. In other

Certificates issued gives us a glimpse into the community with which this paper is concerned. Statistics are readily available showing the number of certificates applied for since inception. A total of 4111 Gender Recognition Certificates have been applied for between April 2005 and the end of March 2014.<sup>5</sup> Reports have been published quarterly since 2009 and show a fairly steady stream of around 75 applications a quarter.<sup>6</sup> These figures of course give us only the briefest of insights as they refer only to people who have taken the step to formally change their gender; they do not take account of the many transgendered people who have chosen not to apply for a certificate for whatever reason or of those whose gender identity is far more fluid such as those identifying as any other part of the trans community. Here estimates vary greatly between 65000 people<sup>7</sup> to 300000 people<sup>8</sup> identifying as trans in the UK.

In the US transgender persons struggling to have their self-identified gender legally recognized find that amending their birth certificates is fundamentally necessary in order to ensure legal

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words once the Certificate has been obtained, the holder is legally (as well as in their own life generally) considered to be the acquired gender, not the sex assigned at birth).

<sup>5</sup> MINISTRY OF JUSTICE *Quarterly Official Statistics on Gender Recognition Certificates applied for and granted by Her Majesty's Courts and Tribunals Service's Gender Recognition Panel*, available at <https://www.gov.uk/government/collections/gender-recognition-certificate-statistics> (last visited on May 27, 2014).

<sup>6</sup> *Id.*

<sup>7</sup> OFFICE FOR NATIONAL STATISTICS *Trans Data Position Paper*. (OPSI 2009).

<sup>8</sup> GIRES *Gender Dysphoria, Transsexualism and Transgenderism: Incidence, Prevalence and Growth in the UK and the Implications for the Commissioners and Providers of Healthcare*, available at <http://www.gires.org.uk/assets/GIRES-Prevalence-Abstract-2.pdf> (last visited on May 27, 2014).

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congruity with their gender identity. Since there are no federal laws their difficulties vary from state to state. In many instances birth certificates will only be changed upon production of proof of sex reassignment surgery (SRO). However, most transgender persons do not undergo SRO. Questions still remain as to whether trans people are required to have surgery for their sexual identities to be recognized for various legal transactions, such as marriage. For instance, transgender people in Montana face the situation where they could be legally recognized as one sex for some purposes and another sex for others. Montana permits transgender persons to legally change drivers' license sex designations even if surgery has not been performed; on the other hand, Montana only permits postoperative transgender persons to legally change birth-assigned sex on birth certificates.<sup>9</sup>

### *B. Employment Discrimination*

In the United Kingdom it is clear is that discrimination in employment is of significant concern. A relatively recent government survey found that most trans employees were concerned about employment issues; very few felt their gender identity was safe from disclosure and at least half had been the victim of discrimination in the workplace.<sup>10</sup>

In the United States few people will be surprised to learn that “in this day and age [transgender] individuals still face intense,

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<sup>9</sup> Wesley Parks, *Removal of the Impediment: The State of Transgender Marriage in Montana*, 74 MONT. L. REV. 309, 310 (2013).

<sup>10</sup> GOVERNMENT EQUALITIES OFFICE *Headline Findings from our transgender online surveys*, available at <https://www.gov.uk/government/publications/headline-findings-from-our-transgender-online-survey> (last visited May 27, 2014).

pervasive discrimination in the employment context, the statistics are still nothing short of astounding.”<sup>11</sup>

A recent national survey of almost 6,500 transgender individuals found that nearly half of respondents had experienced an adverse employment action--denial of a job, denial of a promotion, or termination of employment--as a result of their transgender status and/or gender nonconformity. Fifty percent reported harassment by someone at work, forty-five percent stated that co-workers had referred to them using incorrect gender pronouns “repeatedly and on purpose,” and fifty-seven percent confessed that they delayed their gender transition in order to avoid discriminatory actions and workplace abuse. It is little wonder that many in the transgender community feel that they have no choice but to suffer through this type of hostility, as transgender employees who lose their job due to workplace bias are six times as likely as the general United States population to be living on a household income under \$10,000 per year, and four times as likely to have experienced homelessness as transgender individuals who did not lose a job due to workplace bias.<sup>12</sup> (*Citations omitted.*)

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<sup>11</sup> Jason Lee, Comment, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J. L. & GENDER 423, 424 (2012).

<sup>12</sup> *Id.* at 424-425, (citing Jaime M. Grant, et al, *Nat'l Ctr. for Transgender Equal. and Nat'l Gay and Lesbian Task Force, Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 2* (2011), available at [http://www.thetaskforce.org/reports\\_and\\_research/ntds](http://www.thetaskforce.org/reports_and_research/ntds)).

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These findings suggest that a better understanding of transgender discrimination in employment is vital if we are to move forward towards equality. To help us do that, this paper considers both the US condition and the situation in the UK in order to see what, if anything, we can learn from each other.

## II. THE VOCABULARY OF GENDER IDENTITY

*Biology loves variation. Biology loves differences.  
Society hates it.*<sup>13</sup>

In order to understand the law surrounding gender identity, it is important to understand the meaning of *transgender* (or *trans*). Traditionally it has been a comprehensive term “encompassing anyone who is at odds with traditional concepts of gender, whether transsexual, transvestite, intersexed, or otherwise.”<sup>14</sup> More recently, outside the courtroom, it is sometimes being replaced by the term *genderqueer*. “Genderqueer (GQ; alternatively non-binary) is a catch-all category for gender identities other than man and woman, thus outside of the gender binary and cisnormativity.”<sup>15</sup> Genderqueer people may identify as one or more of the following:

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<sup>13</sup> Dr. Milton Diamond, quoted at [http://www.huffingtonpost.com/2013/08/27/trans-murder-rates\\_n\\_3824273.html#slide=875171](http://www.huffingtonpost.com/2013/08/27/trans-murder-rates_n_3824273.html#slide=875171).

<sup>14</sup> Neil Dishman, *The Expanding Rights of Transsexuals in the Workplace*, 21 LAB. LAW 121, 123-24 (Fall 2005) (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 576 (4th ed., text revision 2000)).

<sup>15</sup> USHER, RAVEN, ED. NORTH AMERICAN LEXICON OF TRANSGENDER TERMS (2006).

- having an overlap of, or indefinite lines between, gender identity and sexual and romantic orientation.<sup>16</sup>
- two or more genders (bigender, trigender, pangender);
- without a gender (nongendered, genderless, agender; neutrois);
- moving between genders or with a fluctuating gender identity (genderfluid);<sup>17</sup>
- third gender or other-gendered; includes those who do not place a name to their gender;<sup>18</sup>

Transsexuals are individuals who have been diagnosed with a recognized medical condition called *gender identity disorder or gender dysphoria*.<sup>19</sup> According to the American Psychiatric Association, transsexualism is characterized as a disjunction between an individual's sexual organs and sexual identity.<sup>20</sup> Individuals who change their birth-assigned gender may be male to female (MTF) or female to male (FTM).

Gender identity disorder is marked by two characteristics:

- (1) a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex; and

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<sup>16</sup> BRILL, STEPHANIE A. & RACHEL PEPPER, *THE TRANSGENDER CHILD: A HANDBOOK FOR FAMILIES AND PROFESSIONALS* (2008).

<sup>17</sup> WINTER, CLAIRE RUTH *UNDERSTANDING TRANSGENDER DIVERSITY: A SENSIBLE EXPLANATION OF SEXUAL AND GENDER IDENTITIES* (2010).

<sup>18</sup> BEEMYN, BRETT GENNY, *AN ENCYCLOPEDIA OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND QUEER CULTURE* (2008).

<sup>19</sup> *Id.*

<sup>20</sup> American Psychiatric Association. *American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 576-582* (4th ed.2000).



(2) persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex.’<sup>21</sup>

Last, a transvestite is more commonly thought of as a cross-dresser (a heterosexual person who dresses as the opposite sex); an intersexed person is someone who has ambiguous genitalia and/or chromosomes (a physical, not psychological, condition).<sup>22</sup>

### III. The Current Situation in the US

Regarding legislative protection of trans individual from employment discrimination, the current situation in the US can best be described as complex and uncertain. In thirty-three states there is no state law protecting transgender people from being fired *for being who they are*.<sup>23</sup> Only seventeen states and the District of Columbia currently prohibit discrimination based on gender identity;<sup>24</sup> this current patchwork of state-level protections for trans people is insufficient.

Forty years ago, "Battling Bella" Abzug, a member of Congress from New York and a trailblazer for women, introduced a bill to protect gay people from discrimination for *the first time in*

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<sup>21</sup> Dishman, *supra*, note 14 at 123.

<sup>22</sup> Erika Birch & Rachel Otto, *Is Legislation Necessary to Protect the Rights of Transgendered Employees?* 51 ADVOC 24 (2008).

<sup>23</sup> Transgender Law Center, *LGBT Policy Tally Snapshot*, <http://transgenderlawcenter.org/equalitymap> (last visited July 30, 2115).

<sup>24</sup> *Id.* (CA, CO, CT, DE, HI, IL, IA, MA, ME, MN, NJ, NM, NV, OR, RI, VT and WA have protective legislation).

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*American history.*<sup>25</sup> The Equality Act of 1974 would have banned discrimination against lesbians, gay men, unmarried persons, and women in employment, housing, and public accommodations. It didn't specifically mention trans individuals, nor did it become law. Four decades later, the only good news is that this year there were over 200 co-sponsors on the current bill, Employment Non-Discrimination Act (ENDA).<sup>26</sup> Because the Act has never been passed trans people can be denied employment or fired because of their gender identity in thirty-three states. Although an overwhelming majority of the American public support legislative action to ban discrimination based on sexual orientation and gender identity, Congress has not acted.<sup>27</sup>

In addition, Congress and most of the federal courts have repeatedly failed to include sexual orientation and gender identity as explicitly protected categories under Title VII of the 1964 Civil Rights Act.<sup>28</sup> In deference to Congress, even the most progressive

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<sup>25</sup> Ian S. Thompson, *The 40<sup>th</sup> Anniversary of an LGBT Milestone in Congress*, ACLU, available at <https://www.aclu.org/blog/washington-markup> (last visited May 30, 2014.)

<sup>26</sup> *Id.* See also Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM BUS. L.J. 835 (2013) (For an in-depth discussion of ENDA).

<sup>27</sup> *Id.* (A 2011 poll found that 73 percent of likely voters support protecting LGBT people from discrimination in employment).

<sup>28</sup> 42 U.S.C. 2000e-2(a) (2000). (This subsection, which applies to employers who have at least fifteen employees and are involved in interstate commerce, provides:

It shall be an unlawful employment practice for an employer-

- (1) 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; or
- (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

of courts have therefore only granted relief to bi/homosexual plaintiffs who focus on their nonsexual gender-nonconformity--such as their manner of speech or dress--rather than on their bi/homosexuality itself.

However, twenty years ago, the United States Supreme Court, in *Price Waterhouse v. Hopkins*,<sup>29</sup> determined that under Title VII

[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>30</sup>

The Court created a “diverging road” when it held that employment discrimination based on gender stereotyping was illegal discrimination because of sex; however, this diverging road is the “one less traveled by, [a]nd that has made all the difference.”<sup>31</sup> In discrimination suits based on transgendered status, gender stereotyping has seldom been raised as an issue. When plaintiffs have attempted to prove they were discriminated against because

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individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

The Act was not originally intended to include any provision regarding gender protection; “sex” was added to the list of protected classes in a last-minute attempt to sabotage the bill, but despite the fear that its passage would result in equal employment rights for women, the bill passed.

<sup>29</sup> 490 U.S. 228 (1989).

<sup>30</sup> 490 U.S. 228 at 251 ((citing *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702, 707, n. 13 (1978)) (citing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

<sup>31</sup> FROST, *supra* note 1.

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of their gender nonconforming appearance, behavior, and personal habits, very few have been successful in their reliance on the theory of gender stereotyping. The federal judiciary generally has been unwilling to go down the less traveled road and it has made all the difference.

To analyze this judicial reluctance to allow plaintiffs' recovery based on gender stereotyping, this section of the paper first explores the issues of gender stereotyping as presented by the *Price Waterhouse* Court,<sup>32</sup> and then examines the relevant Title VII jurisprudence.

### A. *Price Waterhouse v. Hopkins*

For many years Congress and the judiciary have recognized “the problem of subconscious stereotypes and prejudices,”<sup>33</sup> but it wasn't until 1989 that the Supreme Court specifically clarified the illegality of gender stereotyping.<sup>34</sup> Although the partners at Price Waterhouse recognized Ann Hopkins as an “outstanding professional” with a “strong character, independence and integrity,”<sup>35</sup> they denied her a partnership because she was not feminine enough. Clearly engaging in gender stereotyping, they criticized her as being “brusque” and “harsh,”<sup>36</sup> “a lady using foul language.”<sup>37</sup> Reacting negatively to her personality, partners comment that she was “macho,” “overcompensated for being a woman,” needed to take “a course at charm school,” and should “walk more femininely, talk more femininely, dress more

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<sup>32</sup> *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>33</sup> *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

<sup>34</sup> *Price Waterhouse*, 490 U.S. at 237.

<sup>35</sup> *Id.* at 233-34.

<sup>36</sup> *Id.* at 234-35.

<sup>37</sup> *Id.* at 235.

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femininely, wear make-up, have her hair styled, and wear jewelry."<sup>38</sup> The masculine characteristics that had made her a successful manager were the same characteristics that kept her from being selected for partnership.

The Court clearly recognized gender stereotyping as sex discrimination under Title VII. A plurality concluded that Title VII prohibits discrimination, not just because one is a woman, but also because one fails to act like a woman.<sup>39</sup> Because the Court emphasized that “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group,”<sup>40</sup> many have unsuccessfully tried to apply the theory of gender stereotyping to transgendered persons.

### *B. The Road Less Traveled*

In the late seventies and early eighties, trans individuals were consistently unsuccessful in their Title VII claims for sex discrimination. Based on the idea that sex refers to anatomy and not to how individuals psychologically perceive themselves, federal courts decided that trans people do not fall under the protection of Title VII.<sup>41</sup> In 1989 *Price Waterhouse*<sup>42</sup> gave trans persons new hope of Title VII protection when the Court expanded

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<sup>38</sup> *Id.*

<sup>39</sup> *Price Waterhouse*, 490 U.S. at 250 (Brennan, J. speaking for Justices Marshall, Stevens, and Blackmun); 258-61 (White, J. concurring); 272-73 (O'Connor, J. concurring) (accepting plurality's sex-stereotyping analysis).

<sup>40</sup> *Id.* at 251.

<sup>41</sup> *See*, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661 (9th Cir. 1977); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 749-50 (8th Cir. 1982); and *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).

<sup>42</sup> 490 U.S. 228 (1989).

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the definition of “sex” under Title VII, holding that sex stereotyping provides a cause of action under the statute.<sup>43</sup>

Since the *Price Waterhouse* Court and many other federal appellate courts had used the terms “sex” and “gender” interchangeably their practice had clouded the issues in many of the gender stereotyping cases.<sup>44</sup> So the federal courts sought to clarify the issue by defining “sex” as a noun to distinguish men from women, regarding their biological and physiological features. As Judge Posner has pointed out, the term “gender” is one “borrowed from grammar to designate the sexes as viewed as social rather than biological classes.”<sup>45</sup> Gender will be used in this paper to describe cultural attitudes and behaviors such as appearance, vocal range, and gestures.

A second practice that has clouded the issue has been many courts’ tendency to equate effeminacy with homosexuality. Too often it is assumed that masculine men and feminine women are heterosexual while feminine men and masculine women are homosexual. These assumptions, sometimes true, sometimes not true, are the direct result of gender stereotyping. When MTF trans and effeminate men, most frequently the victims of employment discrimination, have complained that they were harassed or denied employment benefits because of their gender nonconformity, the courts have dismissed the claims saying that homosexuality and transsexuality are not protected under Title VII.

The courts basically used three reasons to deny recovery based on the gender stereotyping theory. First, many courts rejected an effeminacy discrimination claim without even

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<sup>43</sup> *Id.* at 250-251.

<sup>44</sup> Jon D. Bible & Patricia Pattison, *Similar Cases, Different Results: The Perplexing Question of What Constitutes Title VII “Effeminacy Discrimination,”* 11 ALSB J.E.L.L. 22 (2009).

<sup>45</sup> RICHARD A. POSNER, *SEX AND REASON*, 24-25 (1992).

mentioning *Price Waterhouse*.<sup>46</sup> Their decisions were premised on the belief that there is a difference between biological sex and gender; gender-based discrimination, which encompasses traits such as masculinity, is not proscribed by Title VII.<sup>47</sup> Second, some courts declined to address the stereotyping claims because they had not been asserted at the trial, even though the courts expressly recognized a Title VII cause of action for discrimination based on an employee's failure to conform to stereotypical gender norms.<sup>48</sup> Third, some courts denied recovery finding that the plaintiffs were only using the theory of gender stereotyping to make an "end run" around Title VII requirement or to "bootstrap" protection for sexual orientation.<sup>49</sup>

However, similar to the cases of sexual harassment of effeminate men, the theory of sexual stereotyping remained on the road less traveled. For example, in 2007 the Tenth Circuit affirmed the lower's court dismissal of a case brought by a MTF transsexual, a Utah bus driver who was fired because the company feared reprisal from the employee's use of women's restrooms.<sup>50</sup>

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<sup>46</sup> See, *Dandan v. Radisson Hotel Lisle*, 2000 U.S. Dist. LEXIS 5876 (N.D. Ill. Mar. 28, 2000); and *Klein v. McGowan*, 36 F.Supp.2d 885, 887 (D. Minn. 1999), *aff'd*, 198 F.3d 705 (8<sup>th</sup> Cir. 1999).

<sup>47</sup> *Klein* at 889,890.

<sup>48</sup> *Bibby v. Phil. Coca Cola Bottling Co.*, 260 F.3d 257, 259-60 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); and *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999).

<sup>49</sup> See *Simonton v. Runyon*, 232 F.3d 33, 37-39 (2<sup>nd</sup> Cir. 2000); *DiCintio v. Westchester Cnty. Med. Center*, 807 F.2d 304 (2<sup>nd</sup> Cir. 1986); *Dawson v. Bumble & Bumble*, 231 F.Supp.2d 301, 306 (S.D.N.Y. 2003); *Smith v. Liberty Mutual Ins. Co.*, 569 F.2d 325 (5<sup>th</sup> Cir. 1978); *Willingham v. Macon Teleg. Pub. Co.*, 507 F.2d 1084 (5<sup>th</sup> Cir. 1975); *Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6<sup>th</sup> Cir. 2006); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1066 (7<sup>th</sup> Cir. 2003); and *Klein v. McGowan*, 36 F.Supp.2d 885, 887 (D. Minn. 1999), *aff'd*, 198 F.3d 705 (8<sup>th</sup> Cir. 1999).

<sup>50</sup> *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10<sup>th</sup> Cir. 2007).

The driver presented two legal theories to support to her claim that, in violation of Title VII, she was discriminated against because of sex.<sup>51</sup> First, she argued that transsexualism is sex discrimination, protected under Title VII. Alternatively, she argued that she was dismissed because of gender stereotyping, her failure to conform to the male sex stereotype. In response, the court first reiterated that transsexuals are not a protected class under Title VII based on the traditional definition that it is “unlawful to discriminate against women because they are women and men because they are men.”<sup>52</sup> The court recognized only “the two starkly defined categories of male and female.”<sup>53</sup> Second, the court also rejected her claim of gender stereotyping, that she was fired because, as a biological male, she failed to conform to stereotypical gender norms. The court acknowledged that the plaintiff established a prima facie case of gender stereotyping, but found that in defense the employer had articulated a legitimate, nondiscriminatory reason for the termination.<sup>54</sup> The decision to discharge “was based solely on her intent to use women’s public restrooms while wearing a UTA [Utah Transit Authority] uniform, despite the fact she still had male genitalia.”<sup>55</sup> “However far *Price Waterhouse* reaches, this court cannot conclude it requires employers to allow biological males to use women's restrooms.”<sup>56</sup> (Neither the court, nor the employer, discussed how the public would know what genitalia was under the uniform.)

The Sixth Circuit was the first appellate court to rely on *Price Waterhouse* to uphold a transsexual's claim for protection

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<sup>51</sup> *Id.* at 1221.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 1222.

<sup>54</sup> *Id.* at 1224.

<sup>55</sup> *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

<sup>56</sup> *Id.*

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under Title VII.<sup>57</sup> Smith, a biological male, served as a lieutenant in the Fire Department for seven years without any negative incidents.<sup>58</sup> After being diagnosed, in accordance with international medical protocols for treating GID [Gender Identity Dysphoria], Smith began “expressing a more feminine appearance on a full-time basis”.<sup>59</sup> Smith notified his immediate supervisor about his GID diagnosis and treatment, also informing him of the likelihood that his treatment would eventually include complete physical transformation from male to female. After learning of the GID diagnosis the fire chief, along with the mayor and the city law director, determined to use Smith's transsexualism and its manifestations as a basis for terminating his employment. When Smith learned of the city officials' intention, he retained counsel and filed a complaint with the EEOC. Immediately after receiving the EEOC's right to sue letter, the city fired him in retaliation.

Implying that his claim was disingenuous, the district court stated that Smith merely “invokes the term-of-art created by *Price Waterhouse*, that is, ‘sex-stereotyping,’ as an end run around his ‘real claim.’”<sup>60</sup> The real claim, the court observed, was “based upon his transsexuality”<sup>61</sup> and “Title VII does not prohibit discrimination based on an individual's transsexualism.”<sup>62</sup> However, on appeal the sixth circuit court reversed and remanded, holding that if transsexuals are fired for not conforming to gender stereotypes, they have a claim under Title VII; the fact that they are transsexuals does not somehow strip them of *Price Waterhouse's*

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<sup>57</sup> *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

<sup>58</sup> *Id.* at 570.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 571.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

protection.<sup>63</sup> The circuit court explained that just as an employer who discriminates against women for not wearing dresses or makeup is engaging in sex discrimination under the rationale of *Price Waterhouse*, “employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex.”<sup>64</sup>

Two district courts have followed the lead of the Sixth Circuit. In 2007, the District of Columbia district court held that “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>65</sup> Dave Schroer applied for a position as a terrorism research analyst with the Congressional Research Service (CRS), presenting himself as a man. He was offered and accepted the position. When he met with a representative of the CRS to discuss the details, he explained that he was under a doctor’s care for gender dysphoria and, consistent with the recommended treatment, was going to change his name to Diane, begin dressing in traditionally feminine attire, and start presenting full-time as a woman.<sup>66</sup> He showed the representative pictures of himself dressed in professional female clothing. In a phone call the next day the CRS representative told Schroer that he “would not be a good fit given the circumstance that they spoke of yesterday.”<sup>67</sup> In denying the CRA’s motion to dismiss the district court stressed:

The point here, however, is that Schroer does not claim that disclosure of her gender dysphoria was

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Schroer v. Billington*, 525 F. Supp.2d 58, 63 (D.C. 2007).

<sup>66</sup> *Id.* at 61.

<sup>67</sup> *Id.*

the singular cause of her non-selection. Instead, informed by the discovery she has taken, Schroer now asserts that she was discriminated against because, when presenting herself as a woman, she did not conform to Preece's sex stereotypical notions about women's appearance and behavior.<sup>68</sup>

In a more recent case, the United States District Court for the Southern District of Texas determined that Lopez's transsexuality did not bar her sex stereotyping claim.<sup>69</sup> The defendant medical clinic offered a position to the plaintiff, Izza Lopez, a/k/a/ Raul Lopez, but the job offer was subsequently rescinded when the clinic's management determined that Lopez had "misrepresented" herself as a woman during the interview process.<sup>70</sup> Lopez asserted that River Oaks impermissibly rescinded its job offer to her because she failed to conform with traditional gender stereotypes.<sup>71</sup> The court concluded that "applying Title VII as written and interpreted by the United States Supreme Court .... Lopez has stated a legally viable claim of discrimination as a male who failed to conform with traditional male stereotypes."<sup>72</sup>

Based on reasoning identical to that used with Title VII the Eleventh Circuit decided a section 1983 case in favor of a MTF trans who was fired when her supervisor learned that she would begin presenting as a woman.<sup>73</sup> She was hired as an editor in the Georgia General Assembly's Office of Legislative Counsel when

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<sup>68</sup> *Id.*

<sup>69</sup> Lopez v. River Oaks Imaging & Diagnostic Group, Inc., 542 R.Supp.2d 653 (S.D. Texas 2008).

<sup>70</sup> *Id.* at 657.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 667-668.

<sup>73</sup> Glenn v. Brumby, 663 F.3d1312 (11<sup>th</sup> Cir. 2011).

presenting as a man. Glenn claimed sex discrimination in violation of the Equal Protection Clause. The district court granted Glenn's motion for summary judgment, and the Eleventh Circuit affirmed on appeal.<sup>74</sup> The Eleventh Circuit noted that "a person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."<sup>75</sup>

In 2012 the EEOC clearly recognized that a MTF plaintiff had stated a Title VII claim of action.<sup>76</sup> The EEOC said that Title VII has always protected transgender persons from discrimination because of sex.<sup>77</sup> Similar to the fact situations in several other cases, Macy, a MTF trans, applied for a position in a crime laboratory that was part of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) at a time when she was still publicly presenting as a man. During phone calls with the Director, he told her twice that she would have the position as long as her background check did not uncover any problems. Then Macy informed the staffing firm that she was "in the process of transitioning from male to female."<sup>78</sup> Shortly after that she was notified that the position had been eliminated due to federal budget restrictions. When she investigated further she learned that it was not true; the AFT had hired another person.<sup>79</sup> Macy thereafter filed an EEO complaint alleging that she had been discriminated against "on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity."<sup>80</sup> Noting

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<sup>74</sup> *Id.* at 1315.

<sup>75</sup> *Id.* at 1315.

<sup>76</sup> *Macy v. Holder*, EEOC No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012).

<sup>77</sup> *Id.* at \*11.

<sup>78</sup> *Id.* at \*1.

<sup>79</sup> *Id.* at \*1-2.

<sup>80</sup> *Id.* at \*3.

that “evidence of gender stereotyping is simply one means of proving sex discrimination” the EEOC also indicated:

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition [in *Price Waterhouse*] that “an employer may not take gender into account in making an employment decision.”<sup>81</sup>

#### *D. A Summary of the US Situation*

In the previous sections it has been documented that in the US, as a legal theory of recovery, gender stereotyping can be characterized as the “road less traveled.” In a variety of cases where the theory could have been implemented to allow Title VII recovery, it was not. Either it was not argued, or not allowed, based on a number of rationales. In the remainder of the paper the authors will consider a number of perspectives in an attempt to

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<sup>81</sup> *Id.* at \*7.

identify the reasoning that has caused gender stereotyping to be widely ignored. Following *Price Waterhouse* why does gender stereotyping in employment remain an acceptable alternative? Is the answer to be found in the nature of the US federal judiciary, our historical, philosophical, and religious culture, or in our social-psychological attitudes?

#### **IV. THE CURRENT SITUATION IN THE UK**

The UK situation in relation to transgender discrimination is, in one sense far less complex than the US situation.<sup>82</sup> Protection from discrimination is included in the Equality Act 2010 which prohibits direct and indirect discrimination, harassment and victimization because of a number of protected characteristics including sex, sexual orientation and gender reassignment. However, as the Act covers only the protected characteristic of gender reassignment, there are likely to be many in the trans community who are not able to bring themselves within the narrow statutory definition and as such must look for protections elsewhere. For this reason and because the Act is relatively recent, it is worth exploring the history of protection in this area in order to see what protections is available and how it compares with the US experience.

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<sup>82</sup> We refer throughout this paper to the UK situation for ease although this is not always strictly accurate. Readers will be aware that the UK refers to the United Kingdom of England, Wales Scotland and Northern Ireland but that Scotland and Northern Ireland operate their own jurisdictions in terms of law and that given relatively recent changes in governance there is also an increasing number of laws applying only in Wales. It is therefore vital to note the geographic extent of the legislation under scrutiny. Most of the relevant legislation referred to in this paper applies to Great Britain; that is England, Wales and Scotland.

A. *The historic context: finding a road to travel*

Prior to the late 1990s there was no protection to speak of for trans people living in the UK. In fact the existing legislation was often used to justify unfair treatment.<sup>83</sup> The Sex Discrimination Act (SDA) 1975<sup>84</sup> required the equal treatment between men and women but was held not to include trans people because, according to the legislation, the appropriate comparator for a woman suffering unequal treatment was a man and vice versa meaning that an employer could simply claim that a male to female transsexual would be treated in the same (appalling) way as a female to male transsexual and there was therefore equal (equally unfair, but equal) treatment between the sexes. This view was challenged in 1996 with the ruling of the European Court of Justice<sup>85</sup> in the case of *P v S and Cornwall County Council (P v S)*.<sup>86</sup> The road toward at least some protections therefore turned out to be, and has to a large extent continued to be, a European one. In

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<sup>83</sup> Stephen Whittle, '*Employment Discrimination and Transsexual People*', (The Gender Identity Research and Education Society, 2000), available at <http://www.gires.org.uk/assets/employment-dis-full-paper.pdf> (last visited May 27 2014); and Stephen Whittle, Lewis Turner, and Maryam Al-Alami, *Engendered Penalties: Transgender and Transsexual People's Experiences of Inequality and Discrimination*. (Press for Change, 2007), available at <http://www.pfc.org.uk/pdf/EngenderedPenalties.pdf> (last visited May 27, 2014).

<sup>84</sup> Sex Discrimination Act, 1975, c.65 (G. Brit.)

<sup>85</sup> For those readers not familiar with the relationship between European Union (EU) Law and that of the European Union Member States, it is worth noting that EU law takes precedent over National Law and that where questions of EU Law arise in any of the national courts (at whatever level) those questions can be referred to the European Court of Justice (ECJ) for interpretation. The ECJ is therefore not an appeal court in the traditional sense but rather a court of interpretation which is to ensure the uniform interpretation of law across the EU.

<sup>86</sup> *P v S and Cornwall County Council*, ECJ [1996] Industrial Relations Law Reports 347.

*P v S*, the claimant was a male to female transsexual working for an education establishment. When she informed her employer of her intention to undergo gender reassignment she was dismissed. The employer argued that the termination was actually due to redundancy but it was held that the real reason was the employer's objection to *P* undergoing gender reassignment. The case was referred to the European Court of Justice in Luxembourg because, although English Law provided no protection for *P*, it was thought that the European Union Law in this area might. The Court referred to Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions<sup>87</sup> and concluded that 'Article 5(1) of the Directive precludes dismissal of a transsexual for a reason related to a gender reassignment'.<sup>88</sup> The Court also took a different, and ultimately much fairer approach to the question of comparators and instead of asking whether *P* would have been dismissed had she been a female to male transsexual (where the answer would have been yes), the court instead asked whether *P* would have been dismissed had she remained a man (where the answer would have been no) and therefore saw no reason why discrimination on the grounds of sex had not been established. The importance of this decision should not be underestimated. It was the first decision in the world offering protection to trans people and because it was decided in the European Court of Justice its reach went beyond the jurisdiction in which it arose (the UK) and

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<sup>87</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions *OJ L 39, 14/02/1976, p. 40–42*

<sup>88</sup> *P v S* and Cornwall County Council, ECJ [1996] Industrial Relations Law Reports 347.



made it unlawful to discriminate in the workplace against those intending to undergo, undergoing or having undergone gender reassignment in all of the European Union Member States. The new interpretation of the SDA was confirmed in *Chessington World of Adventures Ltd v Reed*,<sup>89</sup> where the English Employment Appeals Tribunal held that there was no need for a comparator of the opposite sex in order to hold that there was discrimination on the grounds of sex. The changes were formalised with the introduction of the Sex Discrimination (Gender Reassignment) Regulations 1999<sup>90</sup> which amended the SDA to include specific provision prohibiting discrimination on the grounds of gender reassignment.<sup>91</sup>

Since then there has been little progress in domestic courts with research showing that discrimination remains wide spread.<sup>92</sup> *Croft v Consignia*<sup>93</sup> serves as a useful example of the UK courts' unwillingness to fully embrace trans equality. The case concerned a male to female transsexual Ms. Crofts who wanted to use the female toilets at her workplace and was refused by the employer. The Employment Appeal Tribunal (EAT) held that until Ms. Crofts was legally a woman, in other words, until she had completed the transition and was legally entitled to have her new gender recognized in law, the employer was not obliged to allow her to use the female facilities. The EAT held that the Health and Safety

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<sup>89</sup> *Chessington World of Adventures Ltd v Reed*, EAT [1997] Industrial Relations Law Reports 556.

<sup>90</sup> Sex Discrimination (Gender Reassignment) Regulations 1999 SI 1999/1102.

<sup>91</sup> Sex Discrimination Act, 1975, c.65 (G. Brit.) §2A.

<sup>92</sup> Whittle, *supra* note 83.

<sup>93</sup> *Croft v Consignia*, EAT, [2002] IRLR 851 and *Croft v Royal Mail* [2003] IRLR 592 EWCA Civ 1045 (The change of name is due to the employer Consignia changing its name back to Royal Mail, the parties remain the same in fact).

legislation which obliges employers to provide separate toilet facilities for men and women took precedent in this case and that Ms. Croft was assigned to a particular set of facilities in the same way as her non transsexual colleagues. The Court of Appeal, while more sympathetic to Ms. Croft and trans people generally also failed to uphold her claim. The Court of Appeal considered section 82 of the SDA which set out the definition of gender reassignment and acknowledged that this included those undergoing gender reassignment. It agreed that the long term refusal to allow the use of toilet facilities for the ‘new’ gender would be discriminatory but that there was no automatic entitlement to use the toilet facilities of the new sex immediately from the employee informing the employer of their intention. Instead the employer should allow the use of the facilities based on a case by case consideration of the workplace context including having regard to other employees and the transsexual employee’s circumstances including the stage in the medical proceedings and the employee’s own assessment and presentation. In Ms. Croft’s case, so the Court, the time had not yet come for her to be entitled to use the female toilet facilities.

The decision in *Croft* was disappointing but there were others which showed more promise. In *A v Chief Constable of the West Yorkshire Police*<sup>94</sup> the Court of Appeal held that a post-operative transsexual had the right to be treated as female in all aspects and the Police could not invoke a ‘genuine occupational requirement’ defense<sup>95</sup> to less favorable treatment when refusing A’s application to become a Constable on the grounds that she would not be able to conduct intimate searches of women. In *Richards v Secretary of State for Work and Pensions*, ECJ<sup>96</sup> and

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<sup>94</sup> *A v Chief Constable of the West Yorkshire Police*, CA [2003] IRLR 32.

<sup>95</sup> Sex Discrimination Act, 1975, c.65 (G. Brit.) §7A.

<sup>96</sup> *Richards v Secretary of State for Work and Pensions* (Case C-423/04) ECJ 2006 I-03585.

*Grant v The United Kingdom* ECtHR<sup>97</sup> Europe once again led the way forcing the UK to take another step towards trans equality. In *Richards* the ECJ concluded that Ms. Richards who had been living as woman permanently was entitled to a state pension payable to women at 60 rather than having to wait until reaching the age of 65 at which men became entitled to a state pension. This was irrespective of whether Ms. Richards had a Gender Recognition Certificate or not, the deciding factor was simply whether or not she had been permanently living as a woman. In *Grant* the European Court of Human Rights in Strasbourg<sup>98</sup> came to exactly the same conclusion stating that not allowing Ms. Grant to take her pension at age 60 was a breach of Article 8 of the European Convention on Human Rights.

Some progress has therefore been made and a path to be taken shaped by European Union Law and European Human Rights Instruments. It is now up to the UK to travel that path, widen it and make it more inclusive.

### *B. The Statutory Framework: Providing a roadmap*

The Equality Act 2010 came into force in October 2010 and aims to consolidate all the previously existing anti-discrimination legislation in Great Britain. It covers a series of

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<sup>97</sup> *Grant v The United Kingdom* (Application No. 32570/03) ECtHR [2006] All ER (D) 337.

<sup>98</sup> The European Court of Human Rights (ECtHR) is an institution separate from the European Union and should not be confused with the European Court of Justice. The ECtHR hears cases arising from infringements of the European Convention on Human Rights to which the UK is a signatory. In order to bring a case to the ECtHR, all national avenues for seeking redress must have been exhausted. The ECtHR therefore functions more like an appeal court in the traditional sense

‘protected characteristics’ which, for the purposes of this paper importantly, includes gender reassignment. Section 7 confirms that a person has the protected characteristic of gender reassignment when that person “is proposing to undergo, is undergoing or has undergone a process (or part of a process) for the purpose of reassigning the person's sex by changing physiological or other attributes of sex.”<sup>99</sup> The Act prohibits four distinct forms of behavior by employers. The first is direct discrimination defined as treating someone less favorably because of a protected characteristic; the second is indirect discrimination which is the application of a provision, criterion or practice which has a disproportionate negative impact on someone because of a protected characteristic, thirdly, harassment which is the engaging in behavior which has the purpose or effect of creating a hostile or degrading environment and finally victimization which is the less favorable treatment of someone because they assert their rights under the provisions laid down in the Equality Act.

Although the Equality Act 2010 contains provisions which reach beyond the employment sphere, the discussion in this paper is limited to employment. Nonetheless it is worth noting that protection from discrimination begins at the hiring process and applies to hiring, the offering of terms and conditions, the actual terms and conditions and access to promotions, benefits and other perks as well as to disciplinary actions and dismissal. The Act covers those in regular employment relationships as well as those classed as contractors or temporary workers and makes special provisions for partnerships as well as personal and public office holders (where these are not elected).

The statutory framework therefore appears, at first glance at least, comprehensive and should ensure that those who have or

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<sup>99</sup> Equality Act, 2010 c15 (Gr. Brit.) s7 (1).

who are planning to undergo gender reassignment will be protected from discrimination in the work place. The Equality Act has also removed the requirement of medical supervision which was included in the SDA. This change is to be welcomed as it is likely to increase the number of people able to access protection as there is no longer a requirement to intend to or be undergoing medical treatment – the focus is now on the gender as which the person intends to or is living permanently and the Explanatory Notes of the Act make it quite clear that gender reassignment is to be understood as a process and not as a medical procedure.

However there are also some worrying provisions in the Equality Act 2010. These relate mostly to the exceptions to the provisions providing for non-discrimination in the provision of services contained in Schedule 3. However, there are also exceptions relating to work. These exceptions are set out in Schedule 9 and provide that where there is an occupational requirement to have a particular protected characteristic, such as gender, there is no discrimination if someone of a different gender is treated less favorably. The occupational requirement must, however, be proportionate. Schedule 9, Part 1 Section 1 (3)(a) states that the references in sub-paragraph (1) to a requirement to have a protected characteristic are to be read— (a)in the case of gender reassignment, as references to a requirement not to be a transsexual person (and section 7(3) is accordingly to be ignored);<sup>100</sup> This provision is hugely problematic and the explanatory notes fail to fully encapsulate the issues arising. The explanatory notes give the following example:

A counsellor working with victims of rape might have to be a woman and not a transsexual person,

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<sup>100</sup> Equality Act, 2010, c. 15 (Gr. Brit.) Schedule 9.

even if she has a Gender Recognition Certificate, in order to avoid causing them further distress.<sup>101</sup>

There are several issues here. The first is that it seems to endorse a distinction between woman and transsexual person with or without a Gender Recognition Certificate whereas the point of the GRC was to allow a person to legally and completely become their 'new' gender. The provision appears to make a GRC rather pointless if discrimination is allowed even where one has been granted. The second problem is that the employer of the counsellor would have no way of knowing whether the person applying for the job is transsexual. If the employee presents herself as a woman and the employer has no reason to think she is a transsexual, the fact that she was not in fact born a woman is surely irrelevant and there is no reason to think she could not be an effective counsellor or that a victim of rape would feel uncomfortable with her. The example given, which may shape how employers implement the provisions, seems to be based on a stereotyped assumption of what a woman and a rape counsellor should be and what they should look like. It seems there is significant scope here for employers to (deliberately or not) discriminate against a large proportion of the LGBT community based on appearance. A third issue is that the example makes presumptions about what the victims of rape might feel or think about counsellors and those presumptions are based on a very narrow view. It ignores sexual violence against men and importantly for the purposes of this paper, against trans victims. It ignores the

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<sup>101</sup> Equality Act, 2010, c. 15 (Gr. Brit.) Explanatory Notes.

fact that the Act would not require those offering counselling to the trans community to themselves be trans and it presumes that female rape victims would not want a male counsellor. It's a badly conceived example but one that has the potential for significant impact as employers look to the explanatory notes to help them shape their own policy and guidance.

While the Equality Act has broadened the path to be taken to include a more nuanced and less medical understanding of gender reassignment it has not taken us further down the path to equality and has in some important respects opened up the possibility of backward steps when it should have been leading us forward.

### *C. Reading the Roadmap - Interpreting Statute: Recent Case Law*

The question now is the extent to which the courts will interpret the provisions in the Equality Act 2010 in a way which advances equality. There is of course the possibility of expansive interpretation of the provision prohibiting discrimination and very narrow and strict interpretation of the exceptions. There is also however the potential for the opposite to happen. There have been few cases since the Act came into force in October 2010 and results are mixed.

In early 2014, Ms. Chapman, a police Constable and male to female post-operative transsexual complained to an Employment Tribunal that she had been discriminated against because she was a transsexual because she had effectively been forced to out herself as such over the police radio.<sup>102</sup> The control

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<sup>102</sup> Chapman v Essex Police, ET, 2014 unreported, *available at* <http://www.independent.co.uk/news/uk/home-news/transsexual-pcs->

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room did not believe who she was and claimed she had ‘a male voice’. Ms. Chapman reported the incident but the police force refused to carry out a full investigation or deal with the matter. Two further incidents followed leaving Ms. Chapman extremely distressed. Her claim was however rejected and her reaction to being challenged over her identity when using the radio was described as extreme. The police force on the other hand was praised for having introduced trans awareness training 6 months prior to the hearing. A more positive approach was taken in a case relating to service provision and the use of toilet facilities by customers.<sup>103</sup> Ms. Brooks, a male to female transsexual sued a pub after being refused entry to the ladies toilets and then being barred when she complained. Her complaint was upheld and she was awarded compensation.

#### *D. Summary of the UK position*

The UK position looks in good shape. We have a clear roadmap in the form of statutory provisions which prohibit the discrimination because of gender reassignment. However, we have not yet learned to take the direct path shown to us by the map. The map seems to have flaws, roads not fully marked out and some falsely labelled as heading towards equality when in fact they take us a step backwards. What we now need is a brave judiciary willing to take the most direct path towards equality, a judiciary which will interpret concepts broadly and inclusively and

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discrimination-case-against-essex-police-rejected-9009093.html (last visited May 27 2014).

<sup>103</sup> *Kirklees Law Centre v New Inn, ET, 2014, unreported, available at* <http://www.lawcentres.org.uk/policy/news/news/kirklees-law-centre-wins-landmark-transgender-discrimination-case> (last visited May 27 2014).

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exceptions narrowly so as to afford the most protection to the most members of the trans community.

#### IV. ANALYSIS

##### *A. Review and Comparison*

America, the Land of the Free, does not appear to be ready to extend human rights protections to its trans citizens. This is in stark contrast to other developed countries in Europe. The United Kingdom has already legislated to provide trans individuals with a system to clearly identify themselves with their appropriate gender. For nearly fifteen years the UK has protected trans from discrimination in employment and in other aspects of their daily lives. Meanwhile, back in the US, only a handful of courts have recognized that trans people are protected under Title VII. It has only been in the last year that the EEOC recognized the coverage. For decades LGBT individuals have sought to be protected by ENDA, but Congress has continued to reject their appeals.

In past generations the United States has prided itself on being in the forefront of social and progressive change. Has it now stalled and failed to recognize any but the “typical” American, the rugged individual who tamed the West by brute force? Recent surveys have indicated that approximately 75 percent of Americans support workplace protection for LGBT, but they believe that the protection has already been provided under federal law.

Why do Americans, as compared to the British and Europeans, remain more attached to rigid gender stereotypes? Is it because as a younger country we are still adolescent in our thinking? As a society are we too fearful to honor and respect individual differences? Is the aversion to trans individuals based in religion? Do people in the US take religion more seriously than

those in the UK and Europe? Why are gays and lesbians becoming more accepted in the US, but trans persons are still reviled?

*B. Transgender Fear and Hate*

There is evidence that indicates that trans individuals are the objects of significant revulsion, particularly in the US. Previously in the paper, statistics were presented that shows that they are six times more likely to be murdered than gays and lesbians. Why are the majority of Americans now willing to give gays and lesbians full protection from discrimination, but continue to reject trans people? Over the years Congress has come close to passing ENDA when only LGB were included, but refused to even bring a bill to the floor when it included transgenders. This section of the paper is designed to contemplate and speculate on the reasons for the extreme revulsion.

In a posting on the Internet one man passionately answered the question, "Why do so many people hate transgender people?"

The reason people hate transgender is very simple. Every human being has something I call "basic identity features" these are things like: gender, ethnicity or also / and religion also a few more, depending on culture and society. Now because the gender is one of the most basic, basic identities everybody need [sic] to definitely identify themselves in these terms. Now, if you come along with your [sic] as you say: "transgender" - Identity everyone will of course want to be as far distanced from you in terms of features. All women who have similarities with you, will feel threatened. Because they want to be as feminine as possible. But when they spot features, which you and them have in

common, they feel automatically threatened because it seems as if they're [sic] basic identity is not so sure anymore, what follows is, that they start thinking about themselves and if they're enough feminine etc. etc. same in men. It's absolutely down to the psychic core of Darwinism. And I feel the same. I'm male and I drastically hate transgender people. Because sometimes I have the impression a [sic] have certain similarities with them, but I want to be as masculine as possible. This complete [sic] makes me hate all those people !<sup>104</sup>

It appears that his opinion is based on the fear that a WTM trans may appear to be more masculine than he is.

Fear is the most common emotion discussed in most of the postings. Another individual posted, "I think because of the two basic fears people tend to avoid addressing: fear of the unknown and fear of change. Transgender people encompass both."<sup>105</sup> One insightful person succinctly stated, "People tend to fear what they don't understand."<sup>106</sup> Several posts on the blog offered thoughtful and compassionate comments.

People hate transgender people because we live in a society that shuns differences. Difference has become almost shameful because of our cultural obsession with conformity and belonging. People

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<sup>104</sup> Experience Project, *Why do so many people hate transgender people?*, available at <http://www.experienceproject.com/question-answer/Why-Do-So-Many-People-Hate-Transgender-People-We-Dont-You-You-:c/1827020> (last visited May 28, 2014).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

are uncomfortable with others who do not share their same ideals.<sup>107</sup>

It is also due to lack of empathy. I cannot imagine how trapped and confused and isolated I would feel if I was not comfortable with being a woman. I think they are very strong people to be able to overcome the fear of being an outcast or not accepted to pursue the life they feel is meant for them.<sup>108</sup>

In response to the comment on empathy, another person observed, “You are right. If you are able to mentally dehumanize someone, you can do anything to them and maintain a clear conscience.”<sup>109</sup>

Where did the members of our society learn to fear, hate and dehumanize trans people? One author postulates that we learned it at the movies.<sup>110</sup> He cited movies such as *Ace Ventura: Pet Detective*, *Naked Gun 33 1/3*, and *The Hangover*. In all three movies MTF trans individuals tricked male characters into having a sexual experience with them. In *Ace Ventura: Pet Detective*, the male victim, played by Jim Carey, only “made out” (didn’t have intercourse) with the trans female. However, “the memory of kissing a transgender woman was forcing Carey to puke profusely, burn his clothes, and weep.”<sup>111</sup> How many millions of people learned a nasty, but unforgettable, lesson from that scene? The author summarizes:

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<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> Cord Jefferson, *How I Learned to Hate Transgender People*, GOOD MAGAZINE, (June 30, 2011) available at <http://magazine.good.is/articles/how-i-learned-to-hate-transgender-people> (last visited May 28, 2014).

<sup>111</sup> *Id.*

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Repugnance is a common theme in the trans-people-as-jokes canon. But more prevalent is the element of deceit. Time and again in both comedic and dramatic films, transgender people are cast as deviant tricksters out to fool innocent victims into sleeping with them. This narrative plays upon two of America's deepest fears: sexual vulnerability and humiliation. Not only is your sex partner "lying" about their gender, victims who "fall for it" are then forced to grapple with the embarrassment of being had, of being seen as gay. Men "tricked" into sleeping with another man are embarrassed by the threat to their masculinity. So much culture has taught us that transgender people aren't just sexual aliens, they're also predatory liars.<sup>112</sup>

But there is hope. At a web site called CafeMom, one of the participants confessed that "I secretly hate transgender people."<sup>113</sup> But she concluded her comments with, "I've decided in order to fully accept transgender people, I need to fully understand them and their life struggles. How I feel sickens me and I cannot believe I really feel this way."<sup>114</sup>

These remarks only reflect antidotal evidence, thoughts, values, and experiences of individuals who were interested enough in the topic to offer their comments. Of course, there is no way to prove the real reasons that so many people have an aversion to, and inclination to discriminate against trans individuals. However

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<sup>112</sup> *Id.*

<sup>113</sup> *I secretly hate transgender people*, CafeMom, available at [http://www.cafemom.com/group/115189/forums/read/16409668/I\\_secretly\\_hate\\_transgende](http://www.cafemom.com/group/115189/forums/read/16409668/I_secretly_hate_transgende) (last visited May 28, 2014).

<sup>114</sup> *Id.*

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some legal scholars have conducted research and contributed their expert opinions.

This concept of male preference was presented and discussed in depth in a 1995 Yale Law Journal article. Professor Mary Anne C. Case asserts that the societal devaluation and general disdain for women and feministic characteristics are the basis for discrimination against men who want to experience and value their feminine qualities.<sup>115</sup>

The man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege to do so. The masculine woman is today more readily accepted. Wanting to be masculine is understandable; it can be a step up for a woman, and the qualities associated with masculinity are also associated with success.<sup>116</sup>

In her article Professor Case was only considering discrimination against effeminate men. If they are “doubly despised” it is difficult to imagine the level of repugnance that may be experienced by MTF trans.

By focusing on the reasons why the societal margins, effeminate men and trans individuals, are disliked and feared, it is possible to recognize that the base fear may be of feminine influence.

In arguing that the treatment of the exceptional effeminate man teaches us much about that of both feminine and masculine women as well as

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<sup>115</sup> Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 2 (1995).

<sup>116</sup> *Id.* at 2.

masculine men, I hope to have shown how, once again, the margins can illuminate the center; and to have taken steps to make the world safe for us all, norms and exceptions, men and women, masculine and feminine, and every shade in between.<sup>117</sup>

## V. CONCLUSION

*When you know better, you do better.*<sup>118</sup>

Throughout this paper we have outlined the systematic discrimination faced by trans people in employment and in their lives generally in both the US and the UK and we have speculated on why discrimination is so wide-spread and why legislators and courts are reluctant to extend protection to the trans community in any meaningful way. It seems clear to us that law alone can achieve very little here. Even in the UK where legislation does exist, discrimination is still common. What is required is a change in culture and attitude. A better understanding of trans people in their lives and struggles, greater visibility and role models, and positive media portrayal would all help. In addition, as we have suggested above, as long as women are not fully seen as equal, it is unlikely that male to female transsexuals will be considered as equals as they will be assumed to have deliberately assumed the weaker sex. Both countries have a long way to go to change attitudes but arguably the UK, less constrained perhaps by the religious right, has walked a little further down the long road to equality. Having said that changes in attitude are needed, we do

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<sup>117</sup> *Id.* at 104.

<sup>118</sup> Maya Angelou, available at <http://www.eonline.com/news/546030/maya-angelou-s-15-best-quotes-regarding-love-forgiveness-humility-and-survival> (last visited May 29). 2014)

believe that law has a role to play to send clear signals about what is and is not acceptable within society. In concluding this paper we therefore want to outline what it is we think the US and UK can learn from each other.

*A. What the US can learn from the UK*

The UK has taken one very big step towards equality through legislation. The US has not and, as we have contended above, the law in the US is not clear and seems to be decided on a case by case basis. While legislation, or at least case law, that categorically brings trans people within the remit of existing legal provisions, might not immediately reduce levels of discrimination, doing nothing allows people to keep believing and perpetuating their stereotypes. Legislation which affords protection to trans people forces those who discriminate and those who hate to examine those prejudices. Some will do so before they discriminate, others may only get there after having been sued. Legislation will generate cases; cases will generate media coverage which will in turn generate discussion which will, it is hoped, lead to better understanding and less discrimination. The symbolic power of law is what is important rather than the exact provisions themselves.

An approach which is based on prohibiting direct discrimination and indirect discrimination captures the most obvious discrimination directed at trans individuals because they are trans but would also cover more subtle and sometimes unintentional discrimination. In fact a broad interpretation of indirect discrimination could cover situations of gender stereotyping on the basis that applying gender norms has a disproportionate negative impact on trans individuals. The opportunity for the US is to take an approach and to interpret it



more broadly and more inclusively than it so far has been in the UK. The US could also do well to consider the possibility of explicit protection from harassment and not just discrimination in order to try and reduce the amount of bullying and harassment faced by trans people in the workplace and further afield.

*B. What the UK can learn from the US*

It should be obvious from the discussions above that we believe that the US has further to travel on the road to equality than the UK does. For a start the UK has, in statute, recognized that those who intend to, are undergoing or have undergone gender reassignment are deserving of protection. However, that is not to say that the UK cannot learn anything from the US. There are many who identify as trans without intending to undergo gender reassignment and there is no real protection for them in the UK. It is here where the concept of gender stereotyping might be usefully employed to gain some protections. This of course would only work if the gender stereotyping provisions are interpreted so as to cover the trans community and this seems to be a rather big if. For example, the law on dress codes and grooming standards in the UK has held fast to a ‘difference is acceptable as long as standards are comparable in approach’<sup>119</sup> and cases such as *Schmidt*<sup>120</sup> and

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<sup>119</sup> *Schmidt v Austicks Bookshops Ltd* [1977] IRLR 360 EAT.

<sup>120</sup> *Id.* (In this case the question arose of whether particular dress codes were more restrictive for men than for women. The Employment Appeal Tribunal concluded that as long as general standards were laid down difference in detail of clothing permitted was not likely to be discriminatory. *Schmidt* has been doubted but not explicitly overruled).

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Smith<sup>121</sup> remain good law. Certain stereotyped assumptions therefore persist.

In relation to transvestites who may wish to dress in clothing usually associated with the opposite sex while at work, current case law holds out little hope. The case of *Kara v London Borough of Hackney*<sup>122</sup> shows that neither the UK, nor Europe are quite ready to step boldly toward equality. A male transvestite was, according to the UK Employment Appeals Tribunal not discriminated against when banned from wearing women's clothes and, according to the ECtHR, his Convention rights were also not breached. Although the ban on him wearing women's clothing was an interference with his private life, the ban was found to be in accordance with the law and 'necessary in a democratic society. In other words, the public image of the company and the concern about co-workers was more important than equality for Kara and other trans people.

There is another, subtly but importantly different, way of looking at these cases: If we say Kara was discriminated against because she is a transvestite, there is no protection in law. If we however frame the situations as Kara was discriminated against because she did not conform to the expectations of men in the workplace, we have discrimination because of gender. The problem is that the same arguments that can be made here were made in relation to transgender people before the SDA was amended: A female (the appropriate comparator in this case) who dresses in male clothing would also be banned from doing so. Both

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<sup>121</sup> Smith v Safeway plc [1996] IRLR 456 CA (in which a man was held not to have been treated less favorably because the uniform policy required men to have hair that was shorter than shoulder length whereas women's hair could be longer as long as it was pinned back at work).

<sup>122</sup> Kara v London Borough of Hackney (1996).

sexes are therefore treated equally (badly). It seems therefore this road may be blocked.

However, the law does show some promise for exploring the idea of stereotyping. There are examples where stereotyping has clearly been held to be unlawful such as in cases where presumptions were made about women's roles and the importance of their jobs vis-à-vis their husband's.<sup>123</sup> Even more promising is the law in relation to sexual orientation and, in fact gender reassignment which states that discrimination is also unlawful where someone believes a person to have a protected characteristic. A useful example of this is the case of *Thomas v Sanderson Blinds*<sup>124</sup> where the claimant was teased and bullied for being homosexual when in fact the perpetrators knew that he was not gay (and he knew that they knew). It was simply that he had gone to a boarding school in a town known to be gay friendly and that he displayed certain mannerisms considered to be stereotypically gay. If stereotypical assumptions or perceived possession of a protected characteristic might give rise to protection this can be used in some cases to protect some in the trans community and it may in time be developed to further so as to offer even greater protection. We should, surely be working towards a model of equality which allows all to express their

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123 See for example *Coleman v Skyrail Oceanic* ([1981] IRLR 398 in which the woman was dismissed when she married her husband who worked for a rival travel firm. The firms were concerned about confidential information being leaked and assumed that the man was the breadwinner and therefore the woman should be dismissed by her firm. Also see *Horsey v Dyfed County Council* [1982] IRLR 395 where it was assumed that the female employee would leave the company and follow her husband who had got a job in another city. On that basis she was refused training because she was unlikely to return to work for long after the training course.

<sup>124</sup> *English v Thomas Sanderson Blinds* (2009)

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identity in the way that they want without imposing our expectations of how men and women should dress, talk and behave.