

# Afraid to Be Myself, Even at Home: A Transgender Cause of Action Under the Fair Housing Act

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*Discrimination against transgender individuals in housing is pervasive. Nonetheless, American jurisprudence has not explicitly addressed whether there are legal protections available to transgender individuals who are the targets of housing discrimination. This Note argues that courts should utilize a broad and literal understanding of the Fair Housing Act's prohibition against discrimination on the basis of "sex," thereby recognizing that animus towards an individual's sex and his or her expression thereof, is, by its very terms, discrimination on account of "sex." In so doing, courts will find that transgender housing discrimination constitutes actionable "sex" discrimination within the meaning of the Fair Housing Act.*

## I. INTRODUCTION

Societal preconceptions of a rigid binary system in which gender matches anatomical sex are deeply engrained. Transgender individuals, who blur these sharp lines of gender and sex, face discrimination in virtually every aspect of their lives.<sup>1</sup> This discrimination is relentless and widespread, manifesting itself in

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1. Leslie A. Farber, *Transgender Legal Issues and Practice*, 239 N.J. LAW. 39, 39 (2006) (“Due to their differences, transgender individuals may face discrimination with respect to employment, housing, places of public accommodation, bias-related crimes, and other areas.”).

social interactions, employment, housing, and even acts of overt violence.<sup>2</sup>

The right to return each day to a home that feels safe and warm, to a haven that shelters you from the harsh realities of life, is a right that should be afforded to all members of our society. Unfortunately, for many of this nation's transgendered individuals, this right remains both unprotected and unavailable. As "crissyinmaine," a recent Craigslist<sup>3</sup> poster on the transgender forum, described:

The Madness of it All . . . Discrimination that is . . . Looking on C/L for a room to rent, find a suitable one, go to visit, everything seems fine . . . nice person, we chat . . . I leave to look for some others also . . . several days later [I] call back and am told on the phone that the place is not avail[a]ble . . . ok . . . me thinks . . . but the waves of discontent and suspicion are stirred to life in my mind . . . [I] quickly compose an email from a non/gender specific account and am told[,] "[Y]es the apt is still available, let me know when you want to see it" . . . that prom[p]ted (before the tears of sadness and the sobbing of non acceptance flowed) a[] reply saying thanks and then revealing that I was the person they earlier told that the apt wasn[']t available . . . with some sprinkling of shame on them [I] hope . . . also the details of this to the Maine Human Rights Commission . . .

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2. According to the National Center for Transgender Equality, "[t]ransgender people are frequent victims of hate violence. On average, more than one transgender person per month is murdered in the United States. The current federal hate crimes law does not cover anti-transgender hate crimes." DANA BEYER ET AL., NATIONAL CENTER FOR TRANSGENDER EQUALITY, MAKING YOUR VOICE HEARD: A TRANSGENDER GUIDE TO EDUCATING CONGRESS 20, <http://nctequality.org/Resources/VoiceHeard.pdf>; see also Emilia L. Lombardi et al., *Gender Violence: Transgender Experiences with Violence and Discrimination*, 42 J. HOMOSEXUALITY 89, 91 (2001), available at [http://www.haworthpress.com/store/E-Text/View\\_EText.asp?a=3&fn=J082v42n01\\_05&i=1&s=J082&v=42](http://www.haworthpress.com/store/E-Text/View_EText.asp?a=3&fn=J082v42n01_05&i=1&s=J082&v=42) (noting that in a 1995 study the "National Coalition of Anti-Violence Programs (NCAVP) began to collect data concerning attacks upon trans-people in 1995" and despite the small sample size "they believe that violence against trans-people is pervasive and grossly underreported").

3. Craig's List "is a centralized network of online communities, featuring free online classified advertisements — with jobs, internships, housing, personals, erotic services, for sale/barter/wanted, services, community, gigs, résumés, and pets categories — and forums on various topics." Wikipedia, Craigslist, [http://en.wikipedia.org/wiki/Craigs\\_list](http://en.wikipedia.org/wiki/Craigs_list) (last visited Apr. 13, 2009).

I just know that during my 20 years in the Coast Guard, [I] didn[']t care what the person that we were trying to save from the sea was all about, [i]t didn[']t matter to me the color of the skin of the person needing a helicopter to lift them off a sinking ship[ ]nor did the thought that a (in my case) transgendered person wasn[']t worthy of human respect and ackno[w]ledgment as a person as equal to them . . . .<sup>4</sup>

The denial of access to housing is not the only form of housing discrimination that transgender individuals face. Housing discrimination also plagues transgender individuals in the homes in which they already live.<sup>5</sup> Lorena Borjas, a transgender woman, fell victim to housing discrimination in her own home after a new realty company took over her building and brought in a new superintendent, Mr. Fernando Batista.

Mr. Batista has called me a faggot on a nearly daily basis. He has asked me when I will move out because faggots are not allowed in the building, instructed painters not to paint my apartment, cut my cable wires and turned off my electricity, asked me “Why don’t you die?”, and told me that in his country they kill people like me. Though I live as a woman, Mr. Batista has consistently referred to me as a man, and has said to other people, “Why would you call her a woman? She’s a man.” When my friends have come to visit me, Mr. Batista has told them that I was dead and told them to get out because they don’t allow faggots in the building. Mr. Batista has also talked about me to other tenants, and other tenants have started to call me and my friends faggots. Mr. Batista has also come into my apartment and demanded, “Where are the faggots?”<sup>6</sup>

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4. Posting of Crissyinmaine to <http://newyork.craigslist.org/forums/?ID=50478211> (Oct. 7, 2006, 06:08:12 EST).

5. National Center for Transgender Equality, Homelessness and the Trans Community, <http://nctequality.org/Issues/Homelessness.html> (last visited Apr. 13, 2009) (describing study finding that among transgender individuals who have housing, “[o]nly one in four respondents reported being satisfied with his or her housing situation” and “13% of respondents reported not feeling safe in their current housing”).

6. Complaint at 4, *Berges v. Far Realty LLC*, No. 1:2008cv01389 (E.D.N.Y. Apr. 4, 2008).

Without legal protections for transgender individuals, this type of discrimination will persist unchecked.<sup>7</sup> Transgender men and women will continue to face harassment and discrimination that prevents them from feeling safe in their own homes, and which often prevents them from finding homes at all.

Transgender individuals “are those who identify, in whole or in part, with the sex opposite the one they were assigned at birth, or who express their gender in ways that are not typically associated with their assigned sex.”<sup>8</sup> Within the medical field “transsexualism is defined as ‘the desire to change one’s anatomic sexual characteristics to conform physically with one’s perception of self as a member of the opposite sex.’”<sup>9</sup> Within the mental health community transsexualism<sup>10</sup> is “classified as a specific form of a broader psychiatric disorder termed gender identity disorder, also known as gender dysphoria,”<sup>11</sup> which “is defined by strong, persistent feelings of identification with the opposite gender and dis-

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7. There are some state and local laws that offer protection for transgender discrimination claims. For example, the following states have enacted laws that explicitly ban discrimination on the basis of gender identity: Colorado, Iowa, Oregon, Washington, Hawaii, Illinois, Maine, California, New Mexico, Rhode Island and Minnesota. See Transgender Law and Policy Institute, U.S. Jurisdictions that Include Transgender People in Human Rights Law, <http://www.transgenderlaw.org/ndlaws/index.htm#maps> (last visited Apr. 13, 2009). The Transgender Law and Policy Institute website provides detailed mapping of state and local legislation prohibiting discrimination on the basis of gender identity. *Id.* The existence of state and local statutes preventing discrimination on the basis of gender identity and sexual orientation, however, is insufficient. Absent federal legislation concerning these issues, transgender plaintiffs are denied a federal forum. This is problematic because as “[s]cholars have often argued . . . federal courts offer a preferred forum for rights claims. . . . [S]tate courts [are] institutionally less competent or less favorable to claims seeking the vindication of individual rights. . . . [And m]ost practitioners seem to concur.” Frank B. Cross, *Gay Politics and Precedents*, 103 MICH. L. REV. 1186, 1212 (2005). Moreover, the absence of federal legislation significantly narrows the geographic areas in which individuals who are transgender can choose to live and work without fearing that the law will not protect them.

8. Farber, *supra* note 1, at 39.

9. See *id.* (citing STEDMAN’S MEDICAL DICTIONARY 1841 (26th ed. 1995)).

10. Transsexualism is defined as “a condition in which a person *identifies* with a physical sex different from the one with which they were born,” and as such the terms transsexual, transsexualism and transgender are sometimes used interchangeably. Reference.com, Transsexualism Encyclopedia Topics, <http://www.reference.com/search?q=Trans-sexualism> (last visited Apr. 13, 2009).

11. See Farber, *supra* note 1, at 39 n.2 (citing the AM. PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (4th ed. 1994) [hereinafter DSM] and noting that “there is some controversy within the mental health community regarding whether gender identity disorder should be listed in the DSM as a mental disorder, with some experts saying there is little or no evidence of pathology”).

comfort with one's own assigned sex."<sup>12</sup> This Note uses the term "transgender" to refer to individuals who, regardless of their anatomical sex, identify with the sex opposite that which they were assigned at birth.

This Note explores discrimination and harassment of transgender individuals in housing and the legal protections that may be available to them in this area.<sup>13</sup> Specifically, it explores whether there is a cause of action under the Fair Housing Act ("FHA") available to transgender individuals who experience housing discrimination. As yet, there are no reported decisions involving transgender claims under the FHA.<sup>14</sup> Thus, in analyzing whether a cause of action may be available under the FHA, this Note considers the state of transgender protections under Title VII. Courts have consistently looked to and adopted Title VII sex discrimination jurisprudence when analyzing similar FHA claims, since there is a lack of case law in the FHA sex dis-

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12. PSYCHOLOGY TODAY, GENDER IDENTITY DISORDER, <http://psychologytoday.com/conditions/genderid.html> (last visited Apr. 13, 2009).

13. Harassment in housing can be understood as a variation or a subset of general discrimination. In the housing context "discrimination" typically refers to conduct such as failure to rent or failure to provide ordinary services, on account of things like the individual's race or gender; "harassment" refers more specifically to conduct that interferes with an individual's ability to peacefully and comfortably make use of their home. ROBERT G. SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION §§ 11C:2, 14:3 (2008).

14. The absence of reported decisions involving transgender claims under the federal Fair Housing Act should not be taken to mean that there are not widespread instances of housing discrimination against transgender individuals, or even that there are not a fair number of complaints filed alleging housing discrimination against transgender individuals. Rather, housing discrimination exists, as evidenced by the experiences of crissyinmaine and others, but remains under-reported. For example, a woman named Je'amour Matthews who "transitioned from male to female more than 30 years ago" explained: "[t]he discrimination is certainly real . . . I've been denied housing, lost jobs." Marty Levine, *LGBT Issues: Transgender Pennsylvanians Say 2009 Crucial for Equal Rights*, PITTSBURGH CITY PAPER, Nov. 20, 2008, at 10. Moreover, as in the case of Lorena Borjas, there appears to be a number of lawsuits that transgender individuals have filed alleging housing discrimination. For example, "Samantha J. Cornell, a transgender woman, and Andrea V. Boisseau, her spouse, recently filed a housing discrimination complaint with the Massachusetts Commission Against Discrimination after a rental agent informed them that an apartment they sought had been rented to a 'straight, single male.'" *Transgender Pair Files Bias Complaint*, MASS. LAW. WKLY., Nov. 10, 2008. The absence of reported decisions concerning transgender discrimination under the FHA likely stems from a variety of causes. In some cases, like Ms. Borjas's and Ms. Cornell's, the case has not yet reached a final disposition and thus no record is yet available. In other situations, the absence of such decisions may be due to a combination of the claim's uncertainty of success, the likelihood that a case may settle or be dismissed before a final judgment is ordered, and the difficulty many potential litigants may face in both retaining counsel and presenting evidence of the (often un-witnessed) acts of discrimination.

crimination arena.<sup>15</sup> This Note concludes that transgender housing discrimination constitutes actionable “sex” discrimination within the meaning of the FHA, based on a literal reading of the FHA’s prohibition against sex discrimination, together with an appreciation of the contemporary medical realities governing sex and gender.

Part II of this Note discusses the history of sex discrimination and sexual harassment cases under Title VII, and the importation of Title VII jurisprudence into the FHA. Part II further explores deviations from application of Title VII sexual harassment analysis in FHA claims in order to predict whether they might depart in addressing FHA gender identity claims. Part III discusses the content of transgender housing discrimination. It further analyzes the state of transgender protections under Title VII and the ramifications that these protections may have on whether gender identity claims will be recognized under the FHA. Part IV suggests that the FHA, in its current state, can and should be interpreted as providing a cause of action for transgender discrimination. Specifically, it offers a framework for assessing transgender housing discrimination claims which includes: analyzing such claims as part of a spectrum, applying a literal understanding of the prohibition against “sex” discrimination in the FHA, and utilizing medical definitions to understand “sex.”

## II. HISTORY OF SEX DISCRIMINATION AND SEXUAL HARASSMENT UNDER TITLE VII, AND ITS IMPORTATION INTO THE FAIR HOUSING ACT

This Part begins by discussing the history of “sex” discrimination’s incorporation into Title VII and the Fair Housing Act, and is then broken into three sections. The first section discusses the history of sex discrimination and sexual harassment within Title VII jurisprudence. It illustrates Title VII’s evolution from a legal scheme that protected only narrow forms of discrimination, such as precluding job access on account of sex, to one that protects individuals from sexual harassment on the job as well. The second section explores the importation of Title VII sexual harassment jurisprudence into the Fair Housing Act and discusses

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15. SCHWEMM, *supra* note 13, § 11C:2.

the effect this importation has had on FHA jurisprudence. Finally, the third section analyzes courts' rigid adherence to a Title VII framework in evaluating sexual harassment claims under the FHA and determines that courts may be resistant to modifying this approach.

In their earliest forms, neither Title VII,<sup>16</sup> dealing with employment discrimination, nor the FHA, dealing with housing discrimination, included "sex" as a protected category.<sup>17</sup> In fact, in February of 1964, "while the bill was being debated on the House floor, Rep. Howard W. Smith . . . [a] staunch opponent of all civil rights legislation, rose up and offered a one word amendment to Title VII . . . 'sex' . . . 'to prevent discrimination against another minority group, the women . . .'"<sup>18</sup> This sarcastic remark "stimulated several hours of humorous debate . . . before the amendment was passed . . ."<sup>19</sup> The FHA took even longer to incorporate protection on the basis of "sex," only recognizing "sex" as a protected category when the Fair Housing Act was amended in 1974.<sup>20</sup>

Moreover, both Title VII and the FHA were primarily intended to prevent racial and ethnic discrimination, and nothing in their legislative histories indicates that the amendments' drafters envisioned this new category as offering protection against sexual harassment.<sup>21</sup> It was only later litigation efforts to include

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16. Marybeth Herald, *Deceptive Appearances: Judges, Cognitive Bias, and Dress Codes*, 41 U.S.F. L. REV. 299, 310 (2007) (noting that "legislative intent related to sex discrimination is lacking because the amendment adding "sex" to Title VII was done on one day's notice, with little floor discussion") (internal citation omitted); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989) (describing the "bizarre path by which 'sex' came to be included as a forbidden criterion for employment — it was included in an attempt to defeat the bill").

17. The 1968 version of the Fair Housing Act prohibited discrimination exclusively on the basis of "race, color, religion or national origin." Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 73 (codified as amended at 18 U.S.C. § 245(b)(4)(a) (2006)). The Fair Housing Act of 1968 was amended in 1974 to prohibit discrimination on the basis of sex. *See* Florence Wagman Roisman, *National Ingratitude: The Egregious Deficiencies of the United States' Housing Programs for Veterans and the "Public Scandal" of Veterans' Homelessness*, 38 INDIANA L. REV. 103, 148 n.249 (2005).

18. Jo Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991) (quoting 110 Cong. Rec. 2577 (1964)).

19. *Id.* at 163.

20. Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 729 (codified as amended at 42 U.S.C. § 3604 (2006)).

21. 110 Cong. Rec. 6552 (1964) (remarks of Sen. Humphrey) ("The goals of this bill are simple ones: To extend to Negro citizens the same rights and the same opportunities

sexual harassment as a protected aspect of “sex discrimination” that ultimately effected this change.<sup>22</sup> When courts began to hear sexual harassment claims in the employment context they were uncertain about how to analyze these new types of claims. This uncertainty was even more striking in the context of sexual harassment claims in housing, which did not begin to arise until almost a decade later.<sup>23</sup>

### A. SEX DISCRIMINATION UNDER TITLE VII

Given the lack of jurisprudence with sexual harassment claims in the housing arena, most courts turned to Title VII standards for guidance.<sup>24</sup> In deciphering the scope of the FHA’s prohibition against sex discrimination it seemed logical to look to Title VII, as both Title VII and the FHA prohibit discrimination on the basis of sex. Specifically, § 3604 of the Fair Housing Act provides that it is “unlawful— (a) [t]o refuse to sell or rent . . . [or] (b) [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of . . . sex . . . .”<sup>25</sup> Title VII likewise provides that it is “an unlawful em-

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that white Americans take for granted.”); SCHWEMM, *supra* note 13, § 5:2 (explaining “that even though fair housing legislation had been before Congress for a number of years, Title VIII resulted from a relatively short and intense period of congressional consideration that took place against the background of dramatic national events,” most notably the Kerner Commission Report which discussed growing problems of racial residential segregation and the resulting social disorder, the assassination of Dr. Martin Luther King, Jr., and a series of urban riots).

22. See, e.g., *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (recognizing, for the first time, that sexual harassment is a form of sex discrimination under Title VII).

23. The first reported decision involving sexual harassment in housing was *Shellhammer v. Lewallen*, No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985).

24. See, e.g., *id.* at \*1 (affirming magistrate judge who analogized to Title VII).

25. 42 U.S.C. § 3604 (2006). Section 3617 of the Fair Housing Act further provides that it is illegal to “coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of . . . any right granted or protected by section . . . 3604 . . . of this title.” 42 U.S.C. § 3617 (2006). This language makes clear that discrimination on the basis of sex is prohibited under the Fair Housing Act. The conduct that violates this prohibition, however, has not always been clear. See SCHWEMM, *supra* note 13, § 11C:2. Professor Schwemm notes that,

[b]ecause sexual harassment in housing still has produced only a few authoritative decisions and because the Fair Housing Act includes a number of possibly applicable provisions that go beyond Title VII’s prohibitions . . . many . . . key questions [remain] in this field . . . includ[ing]: (1) how many and what types of incidents may establish a hostile environment claim; (2) from whose perspective



ployment 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 . . . sex . . . .”<sup>26</sup>

In practice, courts derived “most of the legal principles in th[e] area [of sex discrimination in housing] . . . from employment discrimination cases.”<sup>27</sup> The first time a court recognized sexual harassment as a form of sex discrimination under Title VII was in *Williams v. Saxbe*, where the District Court held that “the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination” under Title VII.<sup>28</sup>

Initially, as in *Williams v. Saxbe*, courts recognized sexual harassment as violating Title VII only when it took the form of quid pro quo harassment, in which “an exchange of sex for economic benefit is proposed” and there is often “job retaliation for refusal . . . .”<sup>29</sup> In 1986, however, in *Meritor Savings Bank v. Vinson*, the Supreme Court expanded the scope of sex discrimination to include a sexually hostile work environment.<sup>30</sup> The Court explained that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>31</sup>

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should such a claim should be judged; (3) what evidence is appropriate to prove or disprove a charge of sexual harassment; (4) who are proper plaintiffs in such cases, in addition to the direct target of the harassment; and (5) what circumstances would make an employer liable for its employee’s harassment.

*Id.*

26. 42 U.S.C. § 2000e-2(a) (2000).

27. SCHWEMM, *supra* note 13, § 11C:2.

28. 413 F. Supp. 654, 655 (D.D.C. 1976).

29. Catharine A. MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 823 (2002).

30. 477 U.S. 57, 67 (1986).

31. *Id.* (internal citations omitted). It is important to note that it is the “terms and conditions” provision of Title VII, which prohibits discrimination in the “terms, conditions, or privileges of employment,” that the Court determined to be the basis for the plaintiff’s claim in *Meritor*. *Id.* at 64; *see also* SCHWEMM, *supra* note 13, § 11C:2, at 2. As Professor Schwemm explains:

The basic principles established by the Supreme Court for Title VII harassment claims [are]: (1) that sexual harassment is a form of sex discrimination that may violate Title VII’s “terms and conditions” provision; (2) that a single incidence of quid pro quo harassment is sufficient to violate the statute and render an employer vicariously liable; (3) that even harassment that does not result in tangi-

In decisions following *Meritor*, the Supreme Court fleshed out fundamental principles of sexual harassment under Title VII. For example, in 1998, the Court heard two cases, *Burlington Industries v. Ellerth*<sup>32</sup> and *Faragher v. City of Boca Raton*<sup>33</sup> that dealt with the unresolved issue of the “circumstances under which an employer would be held vicariously liable for its agent’s harassment . . . .”<sup>34</sup> These cases held that in instances of quid pro quo discrimination where there is tangible employment repercussion, an employer would automatically be held vicariously liable.<sup>35</sup> By contrast, where there is no tangible employment repercussion, but instead the employer’s agent creates a sexually hostile environment, it is less likely that the employer will be found liable for his agent’s actions. In sexually hostile environment cases, the harassed employee has an obligation to notify certain individuals of the harassment, thereby taking advantage of any anti-harassment policy the employer offers.<sup>36</sup> Only if the employee fulfills this obligation, and the employer does not adequately respond, can the employer be held vicariously liable.<sup>37</sup>

## B. IMPORTATION OF TITLE VII ANALYSIS INTO THE FHA

Around the time *Meritor* was decided, courts began to borrow the two-tiered sexual harassment jurisprudence from Title VII and apply it to analogous Fair House Act claims; this jurisprudence recognizes both quid pro quo harassment and sexually hostile environment harassment as forms of sexual harassment.<sup>38</sup>

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ble employment actions may be unlawful; but (4) that such hostile environment claims, which do not automatically result in vicarious liability, are actionable only if the harasser’s conduct is so ‘severe or pervasive’ that it alters the victim’s conditions of employment . . . . Courts have generally followed these principles in dealing with sexual harassment claims under the Fair Housing Act.

*Id.*

32. 524 U.S. 742 (1998).

33. *Id.* at 775 (1998).

34. SCHWEMM, *supra* note 13, § 11C:2, at 2.

35. *Id.* § 11C:2, at 2.

36. *Id.* (noting that when no “tangible employment action is involved (i.e., only a ‘hostile environment’ claim is made), the defending employer may escape liability by proving as an affirmative defense that it had a reasonable anti-harassment policy which the plaintiff unreasonably failed to take advantage of”).

37. *Id.*

38. *Id.* (explaining the “basic principles established by the Supreme Court for Title VII harassment claims” and noting that “[c]ourts have generally followed these principles

The first reported decision involving sexual harassment in housing was *Shellhammer v. Lewallen*, in which the Sixth Circuit held that a sexual harassment claim was viable under the FHA.<sup>39</sup> Analogizing to Title VII, the court found that sexual harassment claims in the form of both quid pro quo and hostile environment are cognizable under the FHA.<sup>40</sup>

Following *Shellhammer*, courts around the country applied Title VII's sexual harassment framework to FHA claims.<sup>41</sup> For example, in *Honce v. Vigil*, the Tenth Circuit addressed the FHA sexual harassment claim of Elizabeth Honce, a female tenant

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in dealing with sexual harassment claims under the Fair Housing Act"); *see also supra* note 31.

39. *Shellhammer v. Lewallen*, No. 84-3573, 1985 WL 13505, at \*1 (6th Cir. July 31, 1985).

40. *Id.* at \*1–2 (affirming magistrate court finding that plaintiffs' theory "that Lewallens' sexual harassment created an offensive environment for their tenancy . . . stated [a] viable legal claim[] under the Fair Housing Act," but nonetheless concluding that "plaintiffs had failed to carry their burden of proof").

41. *See, e.g.*, *Krueger v. Cuomo*, 115 F.3d 487, 491–92 (7th Cir. 1997) (affirming HUD decision that landlord's sexual harassment of tenant violated FHA); *DiCenso v. Cisneros*, 96 F.3d 1004, 1008 (7th Cir. 1996) ("Like the Tenth Circuit, we recognize a hostile housing environment cause of action . . ."); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993) (holding that the sex-based discrimination prohibited in the Fair Housing Act includes sexual harassment); *Cavaliere-Conway v. L. Butterman & Assocs.*, 992 F. Supp. 995, 1007–08 (N.D. Ill. 1998) (stating that "[a]s with sexual discrimination claims, courts rely on a Title VII analysis in reviewing 'hostile environment' claims of sexual harassment under the FHA" but nevertheless determining that this plaintiff's "claim of sexual harassment is without merit"); *Reeves v. Carrollsburg Condo. Unit Owners Ass'n*, No. Civ. A. 96-2495RMU, 1997 WL 1877201, at \*5 (D.D.C. Dec. 18, 1997) (noting that "[w]hile this Circuit has not addressed the issue [of sexual harassment under the FHA] to date, at least seven federal courts have accepted the hostile housing environment theory"); *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490 (D. Md. 1996) (holding that sexual harassment suffered by tenant was sufficient to support a hostile housing environment sexual harassment claim under FHA); *Beliveau v. Caras*, 873 F. Supp. 1393, 1397 (C.D. Cal. 1995) (holding that "the purposes underlying Titles VII and VIII are sufficiently similar so as to support discrimination claims based on sexual harassment regardless of context" and that "the basic principles thus apply as strongly in the housing situation as in the workplace. At this point, then, it is appropriate to turn to this circuit[']s analysis of sexual harassment in employment cases] for guidance on the applicable standards in sexual harassment cases [under the FHA]"); *Woods v. Foster*, 884 F. Supp. 1169, 1173 (N.D. Ill. 1995) (holding that allegations of female residents of a homeless shelter that they were sexually harassed by male employees of the facility states a cognizable claim under the Fair Housing Act); *Doe v. Maywood Hous. Auth.*, No. 93-C2865, 1993 WL 243384, at \*1 (N.D. Ill. July 1, 1993) (recognizing that sexual harassment is actionable under the FHA); *New York ex rel. Abrams v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988) (holding that sexual harassment is a permissible cause of action under Fair Housing Act even where no loss of housing is claimed); *Grieger v. Sheets*, 689 F. Supp. 835, 840–41 (N.D. Ill. 1988) (holding that sexual harassment is actionable under the Fair Housing Act).

who rented a mobile home lot in a trailer park from Mr. Vigil.<sup>42</sup> Prior to moving in, Vigil invited Honce “to accompany him socially on three occasions,” each of which she refused.<sup>43</sup> After Honce moved onto the lot, she had a series of arguments with Vigil over the property.<sup>44</sup> As a result of these disputes, Honce moved her home, alleging that Vigil’s actions “amount[ed] to sexual discrimination and harassment, which forced her to leave the trailer park.”<sup>45</sup>

The Tenth Circuit was explicit in *Honce* that the “Fair Housing Act prohibits gender-based discrimination . . . [which] may occur either by treating one gender less favorably (disparate treatment) or by sexual harassment.”<sup>46</sup> The Tenth Circuit further noted that since it had “not yet addressed the issue of sexual discrimination in the context of fair housing under [the FHA],” it would “look to employment discrimination cases for guidance.”<sup>47</sup> Finally, the court explained that a FHA sexually hostile environment claim is only viable if the conduct is “‘sufficiently severe or pervasive’ to alter the conditions of the housing arrangement.”<sup>48</sup> The Tenth Circuit understood this to mean that “[h]ostile environment claims usually involve a long-lasting pattern of highly offensive behavior” and it therefore determined that the *Honce* defendant’s “offensive behavior [which] did not include sexual remarks or requests, physical touching, or threats of violence” did not meet the “severe or pervasive” standard.<sup>49</sup>

In *DiCenso v. Cisneros*, the Seventh Circuit addressed a case involving a FHA hostile environment claim by a female tenant concerning her landlord’s behavior.<sup>50</sup> In that case, the landlord came to the tenant’s apartment, “stood at the tenant’s door, . . . asked about the rent . . . began caressing her arm and back” and said, in effect, “that if she could not pay the rent, she could take

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42. *Honce v. Vigil*, 1 F.3d 1085, 1087 (10th Cir. 1993).

43. *Id.*

44. *Id.*

45. *Id.* at 1088.

46. *Id.* (emphasis added).

47. *Id.*; see also 100 A.L.R. Fed. 97, § 1[a] (“[T]he Fair Housing Act of 1968 (42 U.S.C.A. §§ 3601–3631), [is] also known as Title VIII of the Civil Rights Act of 1968 . . .”).

48. *Honce*, 1 F.3d at 1090.

49. *Id.*

50. *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996).

care of it in other ways.”<sup>51</sup> The tenant “slammed the door in his face . . . [and he] stood outside calling her names — a ‘bitch’ and ‘whore’ and then left.”<sup>52</sup> As in *Honce*, the *DiCenso* court found the defendant’s behavior was not “sufficiently severe or pervasive to alter the conditions of the victim’s . . . environment.” The court rationalized that although the landlord may have harassed the tenant, “he did so only once . . . [and the] conduct, while clearly unwelcome, was much less offensive than other incidents which have not violated Title VII.”<sup>53</sup>

Interestingly, in both *Honce* and *DiCenso* the courts addressed housing discrimination claims under the framework of Title VII sexual harassment claims, and — despite overtly discriminatory conduct — determined that the Fair Housing Act had not been violated. What neither court addressed, however, is the unique context of housing discrimination. In particular, neither court recognized the uniquely disconcerting sense that one is not safe in her own home, nor that one cannot access a home in which she would be safe.

Recently, in *U.S. v. Veal*, a Missouri District Court affirmed a judgment holding that “[d]efendants had engaged in . . . housing discrimination based on sex.”<sup>54</sup> The court found that “Bobby Veal made unwanted physical and verbal sexual advances towards the women” renting from him, beginning “with lewd comments and stares” and escalating to “unauthorized visits and unwanted touching (and, for one woman, rape) — all under the watchful but blind eye of Mrs. Veal.”<sup>55</sup> As a result, the court held that Mrs. Veal, the harasser’s wife who co-owned the property, could also be held liable under the FHA because she “had personal knowledge of her husband’s harassing conduct” but “did nothing to prevent” it.<sup>56</sup> The court further explained: “even if Mrs. Veal did not have direct knowledge” of the harassment, she could not “shield herself from liability” because the harassment “occurred at rental properties owned jointly by her and her husband and managed for

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51. *Id.* at 1006.

52. *Id.*

53. *Id.* at 1008–09.

54. *U.S. v. Veal*, 365 F. Supp. 2d 1034, 1037 (W.D. Mo. 2004).

55. *Id.* at 1036, 1039.

56. *Id.* at 1041.

their joint benefit.”<sup>57</sup> In grappling with vicarious liability the *Veal* court invoked Title VII’s approach to vicarious liability in sexual harassment cases,<sup>58</sup> and found that since the co-owner had knowledge of the discrimination but did nothing to stop it, she was vicariously liable.

These cases demonstrate that sexual harassment under the FHA has, thus far, paralleled the development of Title VII sexual harassment law. The fact that courts have consistently utilized a Title VII framework for understanding sex discrimination under the FHA, however, does not mean that the Title VII framework is appropriate in this context. Residential sexual harassment is unique and would be more appropriately served by a statutory scheme that is uniquely tailored to its needs.

In particular, the “expectation of both safety and privacy in one’s home is justifiably greater than that in the workplace” because in “virtually all of American jurisprudence” the home has been held to deserve special protection: “[u]nder criminal law, one can shoot an intruder to defend it. Under tort law, one has a reasonable expectation of privacy within it. Under constitutional law, one has a right to be free from unreasonable searches and seizures within it.”<sup>59</sup> Moreover, the “[g]eographic and socioeconomic placement of one’s home predetermines access to a greater opportunity structure, including fundamental resources such as employment and education” and “the home is an embodiment of myriad intangible traits that are personally and culturally revered: identity, family, refuge from the pressures of public life.”<sup>60</sup> Consequently, “an injury inflicted in this cherished place twice offends: once in the act itself against the injured party, and once again as a breach of our intimate veneration for the home itself.”<sup>61</sup> The home plays a fundamental role in American culture and

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57. *Id.* (holding that under the Fair Housing Act, an owner of apartment building may be held vicariously liable for discriminatory acts committed by co-owner).

58. *Dinkins v. Charoen Pokphand USA, Inc.*, 133 F. Supp. 2d 1254, 1263 (M.D. Ala. 2001) (noting that “[u]nder well-established law, Plaintiffs may hold [defendant] liable for harassment if . . . a non-supervisor took no tangible employment action, but [defendant] knew or should have known of the harassment and failed to take remedial action”) (citations omitted).

59. Nicole A. Forkenbrock Lindemyer, *Sexual Harassment on the Second Shift: The Misfit Application of Title VII Employment Standards to Title VIII Housing Cases*, 18 *LAW & INEQ.* 351, 368–69 (2000).

60. *Id.* at 371.

61. *Id.* at 370–71.

psyche. Thus, the infliction of pain in relation to, or in the context of, the home is particularly devastating.

Regardless of whether the importation of Title VII analysis into Fair Housing Act sex discrimination is appropriate, courts often utilize a Title VII sex discrimination framework in determining the validity of sex discrimination claims under the FHA.<sup>62</sup> Therefore, to determine how courts might receive transgender claims under the FHA, it is essential to determine whether courts ever deviate from rigid applications of Title VII's sex discrimination framework in addressing FHA sex discrimination claims.

### C. COURTS' DEPARTURE (OR LACK THEREOF) FROM TITLE VII IN FHA SEXUAL HARASSMENT CASES

Given courts' general reliance on Title VII precedent in deciding sexual harassment claims under the FHA, the state of transgender law under Title VII is an important predictor of how courts may react to transgender sex discrimination claims under the FHA. To determine how accurately Title VII transgender law foreshadows possible treatment of transgender FHA claims, this section examines whether courts have ever declined to apply Title VII sex discrimination analysis to FHA sex discrimination claims. If there have been past instances in which courts declined to invoke Title VII analysis for a FHA sexual harassment claim, that may indicate that future courts analyzing transgender claims might decline to apply Title VII analysis. On the other hand, if courts have never declined to invoke Title VII analysis for a FHA sexual harassment claim, then there is little reason to assume they will depart in the future.

According to Professor Robert Schwemm, author of one of the leading treatises on the Fair Housing Act, since "*Shellhammer*, subsequent decisions dealing with sexual harassment in housing have generally found it appropriate to rely on Title VII precedents."<sup>63</sup> The case law seems to support Schwemm's assertion.<sup>64</sup>

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62. See, e.g., *DiCenso v. Cisneros*, 96 F.3d 1004 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088 (10th Cir. 1993); *Shellhammer v. Lewallen*, No. 84-3573, 1985 WL 13505 (6th Cir. July 31, 1985); *U.S. v. Veal*, 365 F. Supp. 2d 1034, 1037 (W.D. Mo. 2004).

63. SCHWEMM, *supra* note 13, § 11C:2.

64. SCHWEMM, *supra* note 13, § 11C:2, n.32 (citing, as proof of his assertion, *Hall v. Meadowood Ltd. P'ship*, 7 Appx. 687, 2001 WL 311320 (9th Cir. 2001); *DiCenso v. Cisne-*

Unfortunately, this framework does not always adequately address the unique nature of residential sexual harassment because “the legal doctrine of sexual harassment in housing was designed and has evolved to accommodate the issues that arise from sexual harassment in the workplace.”<sup>65</sup>

Most courts ignore aspects of residential sexual harassment that distinguish it from sexual harassment in employment, and therefore apply strict Title VII analysis to FHA claims. As Maggie Reed notes, however, “[a] few courts have acknowledged the unique context of the home in their analysis of residential sexual harassment cases.”<sup>66</sup> For example, in *Beliveau v. Caras*, “the first and . . . one of the few cases in which the context of the home was specifically articulated and referenced,” the court was willing to break from its ordinarily rigid application of Title VII analysis to accommodate the unique needs of residential sexual harassment.<sup>67</sup> The *Beliveau* court held that the alleged touching of the plaintiff in her bathroom, “would support a sexual harassment claim under the Fair Housing Act,” particularly in light of the fact that the alleged touching, “was committed (1) *in* plaintiff’s own home, where she should feel (and be) less vulnerable, and (2) by one whose very role was to provide that safe environment.”<sup>68</sup> Reed argues that the *Beliveau* court understood the unique nature of residential sexual harassment, and took into account the psychological associations with the location of the harassment. In an analogous Title VII claim, the court would have likely refused to give weight to these factors.

Ultimately, though, even Reed acknowledges that while “at least two other courts have cited *Beliveau* and incorporated the context of the home into their analysis of residential sexual harassment claims . . . most courts continue to apply Title VII standards to [FHA] cases without appreciating the unique circumstances,” such as the uniquely disconcerting sense that one cannot

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ros, 96 F.3d 1004, 1007–08 (7th Cir. 1996); *Honce v. Vigil*, 1 F.3d 1085, 1088–90 (10th Cir. 1993); *U.S. v. Koch*, 352 F. Supp. 2d 970, 981 (D. Neb. 2004); *Williams v. Poretzky Mgmt. Inc.*, 955 F. Supp. 490, 494–97 (D. Md. 1996); *Beliveau v. Caras*, 873 F. Supp. 1393, 1397–98 (C.D. Cal. 1995); *New York v. Merlino*, 694 F. Supp. 1101, 1104 (S.D.N.Y. 1988)).

65. Forkenbrock Lindemyer, *supra* note 59, at 352–53.

66. Maggie E. Reed, *There’s No Place Like Home: Sexual Harassment of Low Income Women in Housing*, 11 PSYCHOL., PUB. POL’Y & L. 439, 443 (2005).

67. *Id.* at 443.

68. *Beliveau*, 873 F. Supp. at 1398.



be safe in her own home, that are “inherent in residential claims.”<sup>69</sup> Given courts’ generally rigid adherence to Title VII analysis in dealing with sexual harassment under the FHA, it appears unlikely that courts would — without serious prompting — decline to apply Title VII analysis to transgender sex discrimination claims under the Fair Housing Act. Nonetheless, the unique context of housing discrimination is a substantial and significant reason that courts should, in fact, decline to apply a Title VII analysis to transgender sex discrimination claims under the FHA.<sup>70</sup>

### III. THE CURRENT STATE OF TRANSGENDER PROTECTIONS UNDER TITLE VII AND THE FHA

This Part is broken into three sections. The first section begins by looking at the content of transgender housing discrimination. It first explains the general nature of transgender housing discrimination by addressing the intent of the discriminator as well as when, chronologically, it occurs. Next, this section looks at ways in which transgender discrimination in housing is different from transgender discrimination in the workplace. The second section looks at the current state of transgender protections under Title VII, assessing the history of transgender claims under Title VII, and addressing recent legislative action that could influence transgender protections under Title VII. Finally, the third section looks at the ramifications of the state of Title VII transgender protections on the viability of similar claims under the FHA.

#### A. WHAT IS TRANSGENDER HOUSING DISCRIMINATION?

##### 1. *What animates transgender discrimination?*

Discrimination against transgender individuals in housing is pervasive. It occurs at all stages of housing: “[s]ome landlords refuse to rent apartments to transgender tenants. Real estate

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69. Reed, *supra* note 66, at 443 (discussing *Reeves v. Carrollsbury Condominium Unit Owners Ass’n*, No. Civ. A. 96-2495RMU, 1997 WL 1877201 (D.D.C. Dec. 18, 1997), and *Williams v. Poretsky Mgmt., Inc.*, 955 F. Supp. 490 (D. Md. 1996)).

70. See *infra* Part III.A.

brokers will steer transgender people away from certain properties. Transgender people already living in an apartment may face . . . eviction,”<sup>71</sup> and may “be discriminated against in the terms or conditions available to other tenants. They can be harassed by a landlord, the landlord’s employees and/or fellow tenants.”<sup>72</sup> For example, one San Francisco resident

found himself having to regularly call the police due to continual harassment from other tenants. When it became known that he was transgender, some of his downstairs neighbors began to verbally harass him. At times they would go so far as to stand outside his door, pound on it, and threaten to come in and beat him up. After four months of complaints to the property manager, he was offered a different apartment in a different building. As far as he knows, no action was ever taken against the people attacking him.<sup>73</sup>

Other transgender individuals experience intense difficulty simply gaining access to housing.

Jill Weiss, a transgendered woman who moved to Boston three years ago to get her Ph.D. at Northeastern University, was given a list of phone numbers by the university of people looking for roommates. When she went to see the apartments in person, she found that most people expressed discomfort with her being transgendered. “Even though I generally pass pretty well, . . . they’d call me back and say, ‘We don’t want some guy living in our apartment,’” said Weiss. She found that the situation only worsened when she explained to potential roommates that she was transgendered. “I generally felt that saying something up front was a mistake,” said Weiss. “Nobody actually said to me,

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71. Transgender Legal Defense & Education Fund, Housing & Shelter, [http://www.transgenderlegal.org/work\\_show.php?id=5](http://www.transgenderlegal.org/work_show.php?id=5) (last visited Apr. 13, 2009).

72. SHANNON MINTER & CHRISTOPHER DALEY, NATIONAL CENTER FOR LESBIAN RIGHTS & TRANSGENDER LAW CENTER., TRANS REALITIES: A LEGAL NEEDS ASSESSMENT OF SAN FRANCISCO’S TRANSGENDER COMMUNITIES 18 (2003), available at <http://www.transgenderlawcenter.org/tranny/pdfs/Trans%20Realities%20Final%20Final.pdf>.

73. *Id.*

‘Do you have a penis?’ but I could see that the question was there in their eyes.”<sup>74</sup>

In instances such as these, transgender individuals find themselves precluded from accessing housing and forced to endure painful feelings of ostracism. In addition, they often find themselves tormented and harassed in the housing they are able to secure.

A study of transgender individuals conducted between September 1998 and May 2000 found that among transgender individuals who had been able to access housing, “[o]nly one in four respondents reported being satisfied with his or her housing situation” and “13% of respondents reported not feeling safe in their current housing.”<sup>75</sup> Equally disturbing is another report’s conclusion that, “[t]ransgender people face increased risk of homelessness due to the transphobia that is prevalent in our society,” and that many transgender individuals encounter serious difficulty “in finding safe, adequate, secure housing.”<sup>76</sup>

Although the existence of transgender housing discrimination is indisputable, it is often difficult to identify the source of the discrimination. Many of the following questions remain unanswered — and possibly unanswerable. Is a male to female transgender woman<sup>77</sup> discriminated against and denied housing because she is a woman who does not fit society’s expectations of what a woman should look like? Or, is she a target of discrimination because her discriminators perceive her to be a man who is not acting or who does not look the way society expects a man to look and behave? Is the discrimination rooted in animus towards the transgender woman’s sexual orientation? In other words, does the discriminator who *falsely* believes the transgender woman — whose sexual preference is for men — is a man, and thus

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74. Ethan Jacobs, *New Territory in Fair Housing: Housing Discrimination Laws Unclear for Trans People*, BAY WINDOWS, Oct. 2, 2003, available at <http://www.aegis.org/news/bayw/2003/BY031004.html>.

75. National Center for Transgender Equality, Homelessness and the Trans Community, <http://nctequality.org/Issues/Homelessness.html> (last visited Apr. 13, 2009).

76. *Id.*

77. A male to female transsexual woman refers to an individual who was “born with the physical characteristics of [a male], but who has undergone, or is preparing to undergo, sex-change surgery.” BLACK’S LAW DICTIONARY 1537 (8th ed. 2004) (defining “transsexual”).

discriminate on the basis of this misimpression that she is a man whose sexual preference is for men?<sup>78</sup> Is the discrimination reflective of the discriminator's fear of 'association' with transgender individuals? Or, is she discriminated against because her very existence confuses and blurs the sharp binary classifications of sex and gender to which society has clung thus far?<sup>79</sup>

It is unlikely that any of these questions alone reflects the rationale for transgender discrimination. Instead, the realities of transgender discrimination are likely encompassed by a combination of factors. As a Trans Accessibility Project pamphlet notes in its articulation of the nature of discrimination that transgender people often encounter:

Transphobia [the term used to describe the prejudice and discrimination directed at people who stray from the rigid

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78. I am not suggesting here that discrimination based on sexual orientation and discrimination based on gender identity are synonymous. Instead, I am suggesting that, perhaps, there are instances in which transgender individuals are discriminated against not because of their actual sexual orientation, but rather because of misperceptions about their "gender" which lead to animus on the basis of false perceptions of sexual orientation. To further clarify:

Discrimination on the basis of sexual orientation is about mistreating a person based on irrational fears and false beliefs about lesbian, gay, and bisexual people. For example, a teacher who comes out as lesbian, gay, or bisexual may be fired because school officials wrongly believe that a gay teacher will cause students to "become gay." In contrast, discrimination on the basis of gender identity involves mistreatment because a person has undergone sex-reassignment or in some other way does not conform to gender stereotypes. For example, a prejudiced employer may fire an employee who discloses that he or she is transsexual and intends to undergo sex-reassignment based on irrational fears and stereotypes about transsexual people . . . . Sexual orientation and gender identity are related but distinct aspects of human identity. Being transgender is entirely a matter of one's internal gender identity or outward gender expression (that is, who you are), whereas being lesbian, gay, or bisexual is about whether a person is attracted to men, women, or both (that is, who you love). Everyone has both a sexual orientation and a gender identity—so a transgender person may be heterosexual, lesbian, gay or bisexual.

University of Minnesota Press, *Transgender Rights — Q and A* with Paisley Currah, Richard M. Juang, and Shannon Price Minter, [http://www.upress.umn.edu/excerpts/currah\\_qanda.html](http://www.upress.umn.edu/excerpts/currah_qanda.html) (last visited Apr. 13, 2009).

79. See, e.g., Caroline White & Joshua Goldberg, *Expanding Our Understanding of Gendered Violence: Violence Against Trans People and Their Loved Ones*, 25 CANADIAN WOMAN STUDIES 124, 125 (2006) (noting that there are "multiple reasons for violence [against trans people], including the ways that identities and experiences of trans survivors are racialized, classed, and otherwise constructed" and explaining that in assessing hate crimes "where race, class and/or sexual identity are considered, it is unclear whether crimes were motivated by gender, 'race' or sexual identity, challenging theories of violence that privilege gender over all other identities").

gender expectations of our society] is often confused with . . . homophobia. . . . For example, much homophobic name-calling is related to gender roles. Calling a man a “pansy” or a “fairy” is to call him effeminate; in other words, he is not doing his part in upholding the masculine gender standard . . . . It is the appearance of gender-bending, rather than knowledge of sexual behaviours or affections, that precipitates a great deal of homophobic behaviour. . . . Transgendered individuals are frequently subjected to homophobic reactions even if they identify as heterosexual. A transgendered woman may be attracted only to men, yet her relationships may be considered . . . gay. Many assaults on transgendered people are homophobic in nature, as the assailant assumes that the person is gay or lesbian.<sup>80</sup>

2. *How does transgender discrimination in housing differ from transgender discrimination in the workplace?*

In deciding sexual harassment cases brought under the FHA, courts consistently ignore distinctions between housing- and employment-based discrimination, instead applying an undifferentiated Title VII analysis to housing cases.<sup>81</sup> There are, however, many critical differences between these two areas of discrimination. The courts’ refusals to recognize these distinctions have spawned a series of articles specifically criticizing the rigid application of Title VII analysis to FHA sexual harassment claims.<sup>82</sup> The differences between traditional sexual harassment in the home and the workplace are largely comparable to the differences

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80. Queens University Human Rights Office, Trans Accessibility Project: Transphobia and Discrimination, <http://www.queensu.ca/humanrights/tap/3discrimination.htm> (last visited Apr. 13, 2009).

81. See *supra* Part I.C.

82. See, e.g., Michelle Adams, *Knowing Your Place: Theorizing Sexual Harassment at Home*, 40 ARIZ. L. REV. 17, 17 (1998) (arguing that “application of established legal principles to sexual-harassment-at-home cases is fatally flawed”); Forkenbrock Lindemyer, *supra* note 59, at 352 (asserting “that the current doctrinal analysis of residential sexual harassment, imported from employment sexual harassment, fails to address core issues particular to the context of the home”); Theresa Keeley, *An Implied Warranty of Freedom From Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 U. MICH. J.L. REFORM 397, 398 (2005) (exploring “how applying Title VII to housing claims exacerbates problems like class bias that are already plaguing sexual harassment jurisprudence”).

between sexual harassment of transgender people in the home and in the workplace.

In criticizing the courts' rigid application of Title VII jurisprudence to FHA claims, these articles argue that the disparity between the nature of sexual harassment in the home and the workplace is simply too vast for identical legal principles to adequately govern both.<sup>83</sup> Moreover, one commentator argues, “[d]espite overall similarities” between sexual harassment in housing and in the workplace, there are “a number of distinctive characteristics of residential harassment” including, for example, “the phenomen[on] of home invasion [which has] no apparent workplace parallel.”<sup>84</sup>

Professor Michelle Adams argues that in addition to the fact that there are features of housing discrimination that have no workplace parallels, the home is simply *sui generis*. “The word ‘home’ signifies a fundamental presumption in American culture: that an individual can preserve this one place — and no other — as private, secure, and inviolable. Sexual harassment in the home represents an invasion of this quintessentially private space.”<sup>85</sup> Sexual harassment in the home “raises different issues from sexual harassment at work . . . because the concept of ‘home’ is unique in the American cultural imagination.”<sup>86</sup> No less than victims of “traditional” sexual harassment, transgender individuals who are victimized in their homes lose their ability to preserve this single sphere of quintessentially private space.

Professor Adams further explores the connection between poverty and vulnerability to sexual harassment in the home, explaining that there is a “relationship between gender and poverty,” that “women as a ‘gender class’ are especially vulnerable to poverty,” and that consequently women “are also particularly

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83. See *supra* note 82; Reed, *supra* note 66, at 445–46.

Despite obvious similarities, it is likely that important material differences exist between the housing and employment contexts. First, sexually predatory behavior in the home may be inherently more threatening than similar experiences in the workplace. . . . Another difference . . . has to do with perpetrator access to family and significant others, access generally unavailable in the employment context. . . . Finally, sexual coercion may be even more daunting in housing than in employment, especially for the poor and those receiving public assistance.

*Id.*

84. Reed, *supra* note 66, at 439.

85. Adams, *supra* note 82, at 17.

86. *Id.*

vulnerable to sexual harassment at home.”<sup>87</sup> Sadly, women are not the only group that is particularly vulnerable to poverty, and by extension, to sexual harassment at home. Like women, “[a]s a group, transgender and gender non-conforming people are disproportionately poor [and] homeless,”<sup>88</sup> and “[d]iscrimination against transgender people in housing, employment, healthcare, education, public benefits, and social services is pervasive, pushing transgender people to the margins of the formal economy.”<sup>89</sup>

Transgender individuals, like women, are especially vulnerable to sexual harassment in the home. They are also susceptible to the uniquely devastating aspects of harassment in the home. Among the most striking differences between residential and workplace discrimination is the individual’s relative ability to escape. Harassment that takes place at work can be escaped in a way that housing harassment cannot. For instance, the time period during which the individual is exposed to the threat of harassment is limited to the hours and days in which he or she is at work. By contrast, in the housing context, the opportunity for invasion is ever present. Particularly in cases of landlord or superintendent harassment, since the landlord and superintendent likely possess keys to the apartment, the harassment is inescapable. Moreover, the nature of the harassment — particularly the sense of invasion — is different because of cultural attachments to the notion of “home” as a place of safety and refuge.<sup>90</sup>

All of these variables serve to increase the power differential between landlord and tenant, and this power differential is yet another hallmark of sexual harassment that is unique to housing.<sup>91</sup> The disparity that often arises in the landlord/tenant rela-

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87. *Id.* at 38.

88. D. MORGAN BASSICHIS, SYLVIA RIVERA LAW PROJECT, “IT’S WAR IN HERE”: A REPORT ON THE TREATMENT OF TRANSGENDER AND INTERSEX PEOPLE IN NEW YORK STATE MEN’S PRISONS, 12 (2007), available at <http://www.srlp.org/files/warinhere.pdf>.

89. *Id.* at 11; see also *id.* at 12–13 (explaining that many transgender people “remain persistently homeless, marginally housed, unemployed, and without healthcare” and that research “reveals high rates of discrimination [and] low income levels” among transgender adults).

90. See Adams, *supra* note 82, at 17.

91. Although in the workplace there is also often a power differential between the harasser and the person being harassed, the degree to which a landlord/superintendent can wreak havoc on a tenant’s life and psyche tends to be inordinate.

For example, a common element of housing harassment is home invasion, facilitated by the access that perpetrators generally possess to the victim’s apartment. Women report that landlords use their keys to enter apartments late at

tionship is linked to a series of factors including “a tightening housing market that produces low vacancy rates and higher rents, high levels of dependency by tenants upon landlords who rent to lower income tenants because such tenants can be easily replaced, and the potential for the landlord to detrimentally affect the tenant’s life by delaying repairs.”<sup>92</sup>

There is also a general lack of awareness of residential sexual harassment. Unlike workplace harassment, where the “Supreme Court confirmation hearings of Clarence Thomas . . . [and] Paula Jones’s lawsuit against President Bill Clinton” called attention to the issue, there has been “no large-scale publicity surrounding” residential sexual harassment.<sup>93</sup> The general unawareness of sexual harassment in housing contributes to judicial inability to appreciate its unique context. Furthermore, the “disproportionate effect” of sexual harassment on individuals “of lower economic means perpetuate[s] its invisibility.”<sup>94</sup>

Finally, in addition to the various factual and contextual elements of housing harassment and discrimination that make it unique to the home, there are statutory distinctions between the provisions surrounding workplace and housing discrimination. Most notably, the language in the FHA and the language in Title VII are not identical. Instead, the FHA contains a provision in § 3617, “which makes it unlawful to ‘coerce, intimidate, threaten, or interfere’ with any person in the exercise or enjoyment of her fair housing rights [and t]his provision . . . [is] much broader than its counterpart in Title VII.”<sup>95</sup> Specifically,

Title VII’s comparable provision prohibits only retaliation in response to an individual’s having “opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or

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night, often without warning, and refuse to leave when requested to do so, experiences that are extremely frightening.

Reed, *supra* note 66, at 445 (citations omitted).

92. Adams, *supra* note 82, at 32 n.60.

93. Keeley, *supra* note 82, at 397–98.

94. *Id.* at 398; see also BASSICHIS, *supra* note 88, at 11 (noting that “[i]t is in this already neglectful, abusive, and discriminatory environment that the experiences of transgender . . . people . . . must be understood”).

95. SCHWEMM, *supra* note 13, § 11C:2.



hearing under [Title VII]” (42 USCA § 2000e-3(a)), [while] § 3617’s ban extends to all forms of coercion, intimidation, threats, and interference prompted by one’s exercise of her fair housing rights.<sup>96</sup>

The language of the FHA, then, provides a more robust protection scheme for individuals who endeavor to exercise their right to non-discriminatory treatment in the housing context than Title VII does for individuals seeking to vindicate their rights to non-discriminatory treatment in an employment setting.

Despite these various differences between sexual harassment in housing and employment, and despite even the statutory differences that inhere, courts seem to cling to Title VII jurisprudence as a basis for adjudicating Fair Housing Act claims.<sup>97</sup> Perhaps one reason it is so difficult for courts to develop a jurisprudence that uniquely addresses housing discrimination is because law is typically divided into two spheres. The first sphere is public, traditionally including employment, public accommodation, and the like; the second sphere is private, traditionally including marriage, family, and the like. Housing does not fit cleanly or exclusively within either the public or the private framework. It straddles both. Consequently it is difficult to create an appropriate legal framework to address housing issues.<sup>98</sup> Adding to the difficulty of legislating in housing is the decentralized, fragmented nature of housing markets.<sup>99</sup> Without centralized control, it is difficult to affect even those regulations that already exist.<sup>100</sup>

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96. *Id.* § 11C:2, n.43 & accompanying text.

97. *See supra* Part II.C.

98. Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 395 (2001) (explaining that there are “two arenas in which discrimination based on sex, gender, and sexual orientation severely impact a person’s day-to-day life: transactions generally considered public, such as discrimination in the workplace or other public accommodations, and the law’s regulation of the private realm of marriage and family”).

99. U.S. Congress, Office of Technology Assessment, *Technology, Trade, and the U.S. Residential Construction Industry-Special Report, OTA-TET-315*, 3 (Sept. 1986), available at [http://govinfo.library.unt.edu/ota/Ota\\_3/DATA/1986/8634.PDF](http://govinfo.library.unt.edu/ota/Ota_3/DATA/1986/8634.PDF) (noting that “housing policy in the United States is fragmented and lacks central coordination”).

100. *Id.* at 3 (explaining that because U.S. housing policy is fragmented and decentralized, “[i]t does not respond to . . . changing needs”).

## B. TRANSGENDER PROTECTIONS UNDER TITLE VII

### 1. *History of Transgender Claims Under Title VII*

The courts applying Title VII have long denied recognition of transgender claims. The “first cases brought by transgender plaintiffs claiming sex discrimination protection under Title VII uniformly held that federal law offered no such protection.”<sup>101</sup> In 1977, the Ninth Circuit, in *Holloway v. Arthur Anderson*,<sup>102</sup> was the first federal appellate court to address whether Title VII included a prohibition against transgender discrimination.<sup>103</sup> *Holloway* asked “whether an employee [could] be discharged, consistent with Title VII, for initiating the process of sex transformation.”<sup>104</sup> In answering, the Ninth Circuit explained, “transsexuals are [not] a suspect class” and “transsexuality is [not] an ‘immutable characteristic determined solely by the accident of birth’ like race or national origin.”<sup>105</sup> Therefore, the court determined, Title VII does not prohibit firing an employee for initiating a sex transformation and *Holloway*, a transgender woman whom the court determined had “not claimed to have [been] treated discriminatorily because she [wa]s male or female, but rather because she [wa]s a transsexual who chose to change her sex” did not put forth an “actionable [claim] under Title VII.”<sup>106</sup>

Seven years after *Holloway*, the Seventh Circuit, in *Ulane v. Eastern Airlines, Inc.*, made a similar determination regarding transgender claims under Title VII.<sup>107</sup> The Seventh Circuit held that despite the fact that *Ulane*, a male to female transgender

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101. Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CAL. L. REV. 561, 567 (2007).

102. 566 F.2d 659, 662 (9th Cir. 1977).

103. In 1975, the Northern District Court of California, in *Voyles v. Ralph K. Davies Medical Center*, 403 F. Supp. 456 (N.D. Cal. 1975), was the first federal district court to address whether Title VII's prohibition on sex discrimination included protection of transgender claims. In *Voyles*, the plaintiff employee informed her supervisor that she would be undergoing “sex conversion surgery” and in response she was fired. *Id.* at 456. The district court focused primarily on legislative intent in its decision and explained that since “in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism” it held that the plaintiff did not have a viable Title VII claim. *Id.* at 457.

104. *Holloway*, 566 F.2d at 661.

105. *Id.* at 663 (citations omitted).

106. *Id.* at 664.

107. 742 F.2d 1081 (7th Cir. 1984).

pilot, had been discharged from Eastern Airlines “because she was a transsexual” the “words of Title VII do not outlaw discrimination against a person who has a sexual identity disorder.”<sup>108</sup> It further explained that while the Seventh Circuit did “not condone discrimination in any form, [it was] constrained to hold that Title VII does not protect transsexuals.”<sup>109</sup>

In *Sex Stereotyping Per Se: Transgender Employees and Title VII*, Ilona Turner analyzes these early Title VII transgender cases<sup>110</sup> and highlights a number of themes that emerge:

First, the courts uniformly apply a “plain meaning” analysis to the interpretation of the word ‘sex’ in Title VII. Second they attach great weight to the several failed attempts to enact federal legislation extending antidiscrimination protection to gays and lesbians. Third, the cases emphasize the lack of legislative history behind Title VII’s sex discrimination provision.<sup>111</sup>

In other words, in these early cases courts consistently refused to expand the scope of Title VII’s prohibition of sex discrimination beyond conduct that discriminated against women because they were women or against men because they were men. These early courts also frequently asserted that legislative failures to explicitly include discrimination on account of sexual orientation within the ambit of Title VII’s protection counseled against recognizing discrimination on account of gender non-conformity as a violation of Title VII.

After the Supreme Court decided *Price Waterhouse v. Hopkins* in 1989, the tide began to turn for transgender claims.<sup>112</sup> Although its implications for transgender protections under Title VII were substantial, *Price Waterhouse* did not involve a transgender plaintiff. The case involved a female plaintiff named Ann

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108. *Id.* at 1084–85.

109. *Id.* at 1084.

110. In addition to the cases (and circuits) mentioned above, the Eighth Circuit also addressed whether Title VII offered protection for transgender claims in *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982), ultimately holding that since the “legislative history” of Title VII “doesn’t show any intention to include transsexualism in Title VII,” a transgender claim is not viable.

111. Turner, *supra* note 101, at 569–70.

112. 490 U.S. 228 (1989).

Hopkins, whose candidacy for partnership in the Price Waterhouse accounting firm was initially held for reconsideration, but ultimately was not re-proposed.<sup>113</sup> The individual who “bore responsibility for explaining to Hopkins the reasons for the Policy Board’s decision to place her candidacy on hold” told her that in order “to improve her chances for partnership” she “should ‘walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.’”<sup>114</sup>

Hopkins brought a suit alleging she had been denied partnership in violation of Title VII on the basis of sex stereotyping. The Supreme Court agreed and held that the decision not to reconsider Hopkins’ candidacy resulted from sex stereotyping:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[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>115</sup>

The *Price Waterhouse* holding explicitly recognized that Title VII’s prohibition of sex discrimination is not limited to narrowly defined discrimination on account of sex, but instead includes the entire spectrum of discrimination stemming from sex stereotyping.

*Price Waterhouse*’s introduction of “‘sex stereotyping’ as the basis for framing a sex discrimination claim under Title VII” and its holding that “Title VII is not limited to discrimination on the basis of one’s biological status as a man or a woman but instead prohibits that ‘entire spectrum’ of discrimination on the basis of sex, including discrimination on the basis of sex stereotypes”

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113. *Id.* at 231–32.

114. *Id.* at 235.

115. *Id.* at 251 (citations omitted). In describing the overt nature of the sex stereotyping in *Price Waterhouse*, the Court noted that “[i]t takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school’” and it does not “require expertise in psychology to know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.” *Id.* at 256.

created a perfect opportunity for transgender claims to be brought under Title VII.<sup>116</sup> Accordingly, the Ninth Circuit expressed the significance of *Price Waterhouse* for the availability of Title VII transgender claims in *Schwenk v. Hartford*, explaining that “the justifications advanced in the older cases for excluding transgender employees from Title VII’s protections have ‘been overruled by the logic and language of *Price Waterhouse*.’”<sup>117</sup>

The Sixth Circuit, in *Smith v. City of Salem*, was the first federal appeals court to recognize explicitly that transgender individuals have a valid cause of action under Title VII. *Smith* addressed the claims of a firefighter, who “[a]fter being diagnosed with [Gender Identity Disorder], began ‘expressing a more feminine appearance on a full-time basis’” and was subsequently harassed by coworkers who questioned him about his appearance and commented that he was not “masculine enough.”<sup>118</sup> In determining that Smith had a valid Title VII sex discrimination claim, the court explained that

[a]fter *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex. It follows that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.<sup>119</sup>

The court also explicitly stated that *Price Waterhouse* did not “exclude Title VII coverage for ‘non-sex stereotypical behavior’ simply because the person is a transsexual.”<sup>120</sup> Instead, sex stereotyping on account of gender non-conformity violates Title VII regard-

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116. John P. Furfaro & Risa M. Salins, *Transgender Discrimination*, N.Y.L.J., Apr. 6, 2007, at 3, available at [http://skadden.com/content/Publications/Publications1240\\_0.pdf](http://skadden.com/content/Publications/Publications1240_0.pdf).

117. Turner, *supra* note 101, at 562 (quoting *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) (holding that the Gender Motivated Violence Act (“GMVA”) applies with equal force to men and women, and extends to transsexuals)).

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

119. *Id.* at 574.

120. Furfaro & Salins, *supra* note 116.

less of the source of the gender non-conformity or the labels, “such as ‘transsexual,’” that we assign to it.<sup>121</sup>

The Sixth Circuit reinforced its *Salem* decision the following year in *Barnes v. Cincinnati*, where it upheld a determination that the plaintiff, Barnes, had sufficiently stated a Title VII claim for relief.<sup>122</sup> Barnes, a police officer who was a preoperative male-to-female transgender woman, filed suit against the city alleging that her demotion resulted from her failure to conform to sex stereotypes, in violation of Title VII. The Sixth Circuit agreed, reiterating the *Smith* holding that “sex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination” which is prohibited by Title VII.<sup>123</sup>

Recently, in *Etsitty v. Utah Transit Authority*, the Tenth Circuit deviated from the Sixth Circuit’s explicit determination that transgender individuals could state a valid Title VII claim on the basis of sex discrimination.<sup>124</sup> Krystal Etsitty, a former employee of the Utah Transit Authority (“UTA”), sued the UTA alleging that she was fired because she was a transsexual who did not conform to UTA expectations about stereotypical male behavior in violation of Title VII.<sup>125</sup> The UTA purported to have discharged Etsitty, who had commenced her gender transition from male to female but had not yet undergone surgery to remove her male genitals, due to apprehension over her restroom use. Specifically, because UTA drivers often “use public restrooms along their routes,” the UTA asserted concern that “use of women’s public

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121. *Smith*, 378 F.3d at 575.

122. *Barnes v. Cincinnati*, 401 F.3d 729 (6th Cir. 2005).

123. *Id.* at 737. In contrast to the Sixth Circuit’s *Salem* and *Barnes* decisions, the Ninth Circuit’s 2004 decision *Jespersion v. Harrah’s Operating Co.* found the plaintiff’s Title VII sex discrimination claim meritless. 392 F.3d 1076 (9th Cir. 2004) (decision on rehearing *en banc* pending). *Jespersion*, a non-transgender female bartender at Harrah’s Casino, “brought [a] Title VII action alleging that her employer’s policy requiring that certain female employees wear makeup discriminates against her on the basis of sex.” *Id.* at 1077. The Circuit court rejected *Jespersion*’s claim and affirmed the district court holding that Harrah’s policy “did not run afoul of Title VII because (1) it did not discriminate against *Jespersion* on the basis of ‘immutable characteristics’ associated with her sex, and (2) it imposed equal burdens on both sexes.” *Id.* at 1079. Essentially, the Ninth Circuit upheld the district court’s ruling in *Jespersion* by distinguishing it, factually, from *Price Waterhouse* and by declining to follow the logic and direction that the Sixth Circuit had taken in *Smith* and *Barnes*.

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

125. *Id.* at 1218.

restrooms by a biological male could result in liability” for them.<sup>126</sup>

The district court determined that “transsexuals are not a protected class for purposes of Title VII and the prohibition against sex stereotyping recognized by some courts should not be applied to transsexuals.”<sup>127</sup> It further determined that “even if a transsexual could state a Title VII claim under a sex stereotyping theory, there was no evidence in this case that Etsitty was terminated for failing to conform to a particular gender stereotype.” The district court concluded that the UTA’s motivation in firing Etsitty — their concern over restroom liability — constituted a legitimate, nondiscriminatory reason for her termination.<sup>128</sup>

The Court of Appeals affirmed this decision.<sup>129</sup> Like the district court, the Tenth Circuit concluded that “transsexuals are not a protected class under Title VII.”<sup>130</sup> Additionally, the court explained that it did not need to “decide whether discrimination based on an employee’s failure to conform to sex stereotypes always constitutes discrimination ‘because of sex’” nor did it need to decide “whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.”<sup>131</sup> Even assuming that such a claim was available, they agreed with the district court that the UTA’s anxiety about restroom liability is a legitimate, nondiscriminatory reason for terminating Etsitty.<sup>132</sup>

Since the Supreme Court decision in *Price Waterhouse*, only a handful of circuit courts — including the Sixth and Tenth Circuits — have heard cases dealing explicitly with Title VII transgender claims. This makes it difficult to discern a clear national trend in this area. Moreover, among the circuits that have addressed Title VII transgender claims, there is disagreement about

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126. *Id.* at 1224. This intense concern about a “biological male’s” use of a female restroom seems not only exaggerated and baseless but also the product of an individual who has never seen the inside of a woman’s restroom. Unlike men’s restrooms, women’s restrooms do not contain urinals (which create the possibility of seeing someone else’s genitals). Instead, women’s restrooms are made up exclusively of stalls such that no restroom patron is exposed to another’s genitals.

127. *Id.* at 1218.

128. *Id.* at 1218, 1224.

129. *Id.* at 1218.

130. *Id.* at 1220.

131. *Id.* at 1224.

132. *Id.* at 1227.

the availability of a transgender cause of action. While some courts have applied *Price Waterhouse's* sex stereotyping theory to Title VII transgender sex discrimination claims, others “have relied upon *Ulane* and its progeny to reject discrimination claims of transsexual as if *Price Waterhouse* were irrelevant.”<sup>133</sup> On balance, it appears that “a larger number of district and appellate courts have treated discrimination against transsexuals as sex discrimination based on gender non-conforming behavior.”<sup>134</sup>

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133. *Schroer v. Billington*, 424 F. Supp. 2d 203, 209–10, & 209 n.1 (D.D.C. 2006) (collecting cases); see, e.g., *Creed v. Family Exp. Corp.*, No. 3:06-CV-465RM, 2009 WL 35237, at \*10 (N.D. Ind. Jan. 5, 2009) (granting summary judgment to defendant and holding that plaintiff “might argue that real-life experience as a member of the female gender is an inherent part of her non-conforming gender behavior, such that Family Express’s dress code and grooming policy discriminates on the basis of her transgender status, but rightly or wrongly, Title VII’s prohibition on sex discrimination doesn’t extend so far. . . . [Instead, plaintiff’s] Title VII claim must rest entirely on the theory of protection as a man who fails to conform to sex stereotypes”); *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at \*5 (E.D. La. 2002) (involving male cross dresser — and not a transgender person — who was fired because he dressed as a woman after work; the court explained that “this is not a situation where the plaintiff failed to conform to a gender stereotype. Plaintiff was not discharged because he did not act sufficiently masculine or because he exhibited traits normally valued in a female employee, but disparaged in a male . . . [he] was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wear’s women’s clothing . . . breast prostheses . . . pretends to be a woman, and publicly identifies himself as a woman.”); *Cox v. Denny’s Inc.*, No. 98-1085-CIV-J-16B, 1999 WL 1317785, at \*4 (M.D. Fla. Dec. 22, 1999) (holding that transsexual plaintiff did not establish a viable Title VII claim because the harassment fell short of the requisite “severe or pervasive conduct sufficient to alter the terms and conditions of [plaintiff’s] employment”); *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 286–87 (E.D. Pa. 1993) (noting that “[s]imply stated, Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their transsexualism”).

134. *Schroer*, 424 F. Supp. 2d at 209–10, 209 n.2 (collecting cases). See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874–76 (9th Cir. 2001) (noting that harassment “based upon the perception that [the plaintiff] is effeminate” is discrimination because of sex which violates Title VII); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) (“[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (“[T]he standards of liability under Title VII, as they have been refined and explicated over time, apply to same-sex plaintiffs just as they do to opposite-sex plaintiffs . . . just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity.”); *Doe v. City of Belleville*, 119 F.3d 563, 580 (7th Cir. 1997) (noting that a “man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of his sex’”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (holding that “for purposes of Title VII liability” it did not



However, this slight majority by no means ensures the availability of transgender protections under Title VII.<sup>135</sup>

## 2. *Recent Legislative Action and Its Effect on Transgender Rights Under Title VII*

Recent legislative action concerning employment has threatened to leave Title VII transgender law on even more uncertain footing. On November 7, 2007, the House of Representatives voted to approve the Employment Non-Discrimination Act (“ENDA”), a bill that grants “broad protections against discrimination in the workplace for gay men, lesbians and bisexuals.”<sup>136</sup> Specifically ENDA “would make it illegal for an employer ‘to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation.’”<sup>137</sup>

Prior to ENDA’s passage in the House, Representative Tammy Baldwin of Wisconsin “led efforts . . . to have gender identity add-

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matter whether, after learning that plaintiff was a transgendered woman, the defendant “withdrew its offer of employment because it perceived [her] to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual” thus concluding that plaintiff was “entitled to judgment based on a *Price Waterhouse*-type claim for sex stereotyping” but also concluding that “she [wa]s entitled to judgment based on the language of the statute itself”); *Mitchell v. Axcan Scandipharm, Inc.*, No. Civ.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006) (finding that the transsexual plaintiff sufficiently pled a Title VII sex discrimination claim based on failure to conform to sexual stereotypes); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at \*2 (D. Ariz. June 3, 2004) (noting that defendant violated “Title VII’s prohibition of sex discrimination when it required plaintiff, a biological female, to use the men’s restroom until such time as she provided proof that she did not have male genitalia, and subsequently terminated Plaintiff upon her refusal to comply with this directive”); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (noting that Title VII sex discrimination prohibits harassment because of belief that a person does “not conform with . . . ideas about what ‘real’ men should look or act like”); *Doe v. United Consumer Fin. Services*, No. 1:01 CV 1112, 2001 WL 34350174, \*5 (N.D. Ohio, Nov. 9, 2001) (explaining that “since [the plaintiff] may have been fired, at least in part, because her appearance and behavior did not fit into her company’s sex stereotypes, rather than solely because of her transgendered status, dismissal of [her] Title VII claims is not warranted”).

135. See generally *infra* note 142.

136. David M. Herszenhorn, *House Approves Broad Protections for Gay Workers*, N.Y. TIMES, Nov. 8, 2007, at A1.

137. *Id.*

ed to the legislation.”<sup>138</sup> Supported by over “300 LGBT groups,” she “sought [an] amendment . . . to provide protection for transgender people and . . . to strengthen the bill’s protections for gay people.”<sup>139</sup> After introducing the amendment, though, Baldwin withdrew it, explaining that “while she believed there was ‘strong support’ in the House for adding gender identity to the bill, she also expected it would ‘fall short of adoption.’”<sup>140</sup> Ultimately, the bill did not pass.<sup>141</sup> Nor was another bill that was introduced shortly thereafter, which banned employment discrimination on the basis of gender identity discrimination alone.<sup>142</sup>

There are some who would argue that the introduction and non-passage of these bills “shows that transsexuals are not currently covered by Title VII and also that Congress is content with the status quo.”<sup>143</sup> As the District Court for the District of Columbia noted in *Schroer v. Billington*, though,

another reasonable interpretation of that legislative non-history is that some Members of Congress believe that the *Ulane* court and others have interpreted “sex” in an unduly narrow manner, that Title VII means what it says, and that the statute requires, not amendment, but only correct interpretation. As the Supreme Court has explained, “[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.”<sup>144</sup>

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138. Lisa Keen, *Online Extra: ENDA passes House*, BAY AREA REPORTER, Nov. 8, 2007, <http://www.ebar.com/news/article.php?sec=news&article=2423>; H.R. 2015, 110th Cong. (2007).

139. *Id.*

140. *Id.*

141. H.R. 3685, 110th Cong. (2007).

142. H.R. 3686, 110th Cong. (2007).

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

144. *Id.* (citations omitted).

Moreover, the *Schroer* court explained,

[t]he decisions holding that Title VII only prohibits discrimination against men because they are men, and discrimination against women because they are women, represent an elevation of “judge-supposed legislative intent over clear statutory text.” In their holdings that discrimination based on changing one’s sex is not discrimination because of sex, *Ulane*, *Holloway*, and *Etsitty* essentially reason “that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers.” This is no longer a tenable approach to statutory construction. Supreme Court decisions subsequent to *Ulane* and *Holloway* have applied Title VII in ways Congress could not have contemplated. As Justice Scalia wrote for a unanimous court:

Male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.<sup>145</sup>

Thus, in *Schroer*, the court explained that for the plaintiff “to prevail on the facts of her case” it was “not necessary to draw sweeping conclusions about the reach of Title VII” because the defendant’s “refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was *literally* discrimination ‘because of . . . sex.’”<sup>146</sup>

Ultimately, as the *Schroer* court elucidates, despite recent legislative wavering about the inclusion of additional explicit protections under Title VII sex discrimination, there is a compelling argument that these legislative musings should not influence our

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145. *Id.* at 307 (internal citations omitted).

146. *Id.* at 307–08.

interpretation of the availability of transgender protections under Title VII.

### C. RAMIFICATIONS OF TITLE VII TRANSGENDER LAW ON GENDER IDENTITY CLAIMS UNDER THE FHA

Thus far, there have been no reported decisions involving transgender claims under the Fair Housing Act.<sup>147</sup> Consequently, it is unclear whether courts will interpret the FHA to provide protection to transgender individuals.

The viability of a transgender cause of action under the FHA could closely parallel the viability of transgender protections under Title VII.<sup>148</sup> Transgender individuals living in the Sixth Circuit, or any other circuit that recognizes *Price Waterhouse's* sex stereotyping theory as an opportunity to challenge gender identity discrimination under Title VII, could likely argue that they have a cause of action for gender identity discrimination under the FHA.<sup>149</sup> Individuals who try to bring gender identity claims under the FHA in the Ninth or Tenth Circuit, however, or in any other circuit that has declined to recognize gender identity as a form of sex discrimination under Title VII, may likely have their claims rejected.<sup>150</sup>

Alternatively, courts could — and this Note argues should — conceive of sex discrimination in housing as a distinct sphere of law that is not dependent upon Title VII precedents for its determinations. Proposed legislative changes to Title VII with regard to sexual orientation and gender identity counsel in favor of severing the FHA analysis from Title VII analysis. For, if Title VII is amended to explicitly prohibit employment discrimination on the basis of sexual orientation, gender identity, or both, courts

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147. The absence of filed claims does not appear to be a reflection of the absence of housing discrimination against transgender individuals. *See, e.g.,* Crissynmaine, *supra* note 4. For a confluence of reasons, including those that influence the relatively small filing of housing cases generally, these instances of discrimination have not made their way into the judicial arena.

148. *See supra* Part I.B.

149. *See, e.g.,* Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566, 568 (6th Cir. 2004); *supra* note 134.

150. *See, e.g.,* Etsitty v. Utah Transit Authority, 502 F.3d 1215 (10th Cir. 2007); Jesperson v. Harrah's Operating Co., 392 F.3d 1076 (9th Cir. 2004) (decision on re-hearing *en banc* pending); *supra* note 133.

would be left in limbo regarding transgender claims under the FHA. For over twenty years courts have relied almost exclusively on Title VII jurisprudence in deciding sex discrimination claims under the FHA. If the content of Title VII undergoes significant, substantive amendments, the facial similarity between Title VII and the FHA — which originally persuaded courts to use Title VII analysis in housing cases — would disappear. This would happen if, for instance, Title VII was amended to include an explicit ban on sexual orientation discrimination, gender identity discrimination, or both. At that point it would become illogical and improper for the courts to continue invoking Title VII's approach to gender identity claims in analyzing comparable claims under the FHA. The increasing uncertainty surrounding the scope of Title VII claims with regard to transgender claimants, then, presents a unique opportunity for courts, in the context of housing, to finally break from the traditional invocation of Title VII analysis for all things related to “sex” discrimination. Courts could reanalyze the realm of sex discrimination in housing and ultimately develop a body of case law and a mode of analysis that is specifically tailored to meet the unique context of housing discrimination. Moreover, in this unexplored terrain, courts dealing with transgender housing claims could — this Note argues should — properly perceive of housing discrimination against transgender individuals as the *Schroer* court did: as literally, “discrimination because of sex.”<sup>151</sup>

#### IV. A NEW FRAMEWORK FOR ASSESSING TRANSGENDER DISCRIMINATION

This Part offers a new framework for the legal assessment of sex discrimination claims by transgender individuals in the housing arena. This Part proceeds in three sections. The first section proposes viewing the various forms of transgender discrimination along a spectrum that is informed by the discriminator's intent. This spectrum illustrates the fundamental similarities between each of these forms of discrimination. The second section proposes that the similarities recognized in the first section counsel in favor of employing a literal understanding of “sex” discrimination

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