

TRANSGENDER TEACHERS AS ROLE MODELS FOR A TOLERANT SOCIETY: THE
IMPACT OF SOCIETAL VIEWS AND THEIR INFLUENCE ON EMPLOYMENT
ANTI-DISCRIMINATION LAWS

“Society as a whole benefits immeasurably from a climate in which all persons, regardless of race or gender, may have the opportunity to earn respect, responsibility, advancement and remuneration based on ability.”¹

“People seldom improve when they have no other model but themselves to copy after.”²

Abstract

This paper discusses the judicial and statutory constructs of the Chambers v. Omaha Girls Club Role Model Rule,³ which protects the rights of employers to take adverse employment actions against unsuitable role models in certain circumstances, in relation to transgender teachers. It includes an introduction to Gender Identity, a brief discussion of how Title VII's prohibition on sex discrimination should be interpreted to prohibit discrimination on the basis of gender identity, and a survey of parental and societal responses to the recent coming out of transgender teachers across America. It argues that adverse action taken against transgender teachers on the basis that they are poor role models for youth violates Title VII, as well as various state and local anti-discrimination laws.

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¹ Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, edited by Craig Joyce, Random House Trade Paperbacks, New York, copyright 2003 by Arizona community foundation, page 167-168.

² Oliver Goldsmith, unknown source, *cited on* DublinToursit.com, http://www.dublinitourist.com/literary_dublin/oliver_goldsmith.shtml (last visited Jan. 15, 2009).

³ 834 F.2d 697 (8th Cir. 1987).

Introduction

In 1975, teacher aides Lestine Rogers and Katie Mae Andrews were told that they could not work in Mississippi's Drew Municipal School District based on a specific trait.⁴ The superintendent said that he was "disturbed"⁵ by their trait, stating that it was an "irredeemable moral disease."⁶ Thirty years later, teachers Leslie Webster and Lily McBeth faced the same type of criticism—only it came from the parents of their students, and not the school board. Both teachers were criticized for making their trait known, and Mr. Webster was even accused of robbing his students of their childhoods, and of "stabbing" the children's psyches.⁷

The moral character of teachers is a serious concern among parents and society in general. Teachers are in the unique position of spending several hours a day with children, "exerting a subtle but important influence over their perceptions and values."⁸ It is thus understandable that parents and school boards alike would be loath to employ people with questionable morals. In 1975, the "moral disease" that Ms. Rogers and Ms. Andrews were accused of was that they were single mothers. In 2005, the "immoral" characteristic of Leslie Webster and Lily McBeth was that they were, and are, both transgender.

In recent years, stories of transgender teachers have become more frequent and more publicized.⁹ Consequently, these stories have spurred heated debates about the competency,¹⁰

⁴ *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611, 613 (5th Cir. 1975).

⁵ *Id.* at 613.

⁶ *Id.* at 613.

⁷ John Curran, *District OKs transgender teacher's return*, gay.com, Feb. 28, 2006, <http://www.gay.com/news/article.html?2006/02/28/3>; posting of Robert Giles to Let's Tell The Kids About Sex Change, <http://www.thepiratescove.us/2007/08/30/lets-tell-the-kids-about-sex-change/> (January 24, 2008, 13:55).

⁸ *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

⁹ See e.g., Gerrick Brenner, *Private School Keeps Transgender Teacher On Staff*, ABC11 News, Aug. 30, 2007, <http://abclocal.go.com/wtvd/story?section=triangle&id=5620082>; Sarah Netter, *Parents, Students Surprised at Change in Teacher's Gender Identity*, ABC News, Oct. 16, 2008, <http://abcnews.go.com/US/story?id=6050076&page=1>.

¹⁰ "This is part of the reason our society is in such a horrible (sic) decline. Give the schools back to the GOOD teachers." Posting of Michael Warren, *Batavia Transgender Teacher*, Topix.com, <http://www.topix.com/forum/news/transgendered/T1BHTGF6A789RRTBE> (Sept. 6, 2006).

mental stability,¹¹ trustworthiness,¹² and morality¹³ of transgender teachers. This debate is depicted, to an extent,¹⁴ in the postings and commentaries in the blogosphere,¹⁵ and demonstrates the conflicting ways that transgender teachers can be understood as role models; depending on one's perspective, they can be either a positive or negative role model.

For example, when Ms. McBeth reapplied to her former school district after transitioning,¹⁶ she faced opposition from several parents.¹⁷ However, there were also other parents, and many students,¹⁸ who supported her return to their district.¹⁹ In the case of Mr. Webster, when he informed his school that he would be returning to the school year as a man, the Headmaster voiced his support of Mr. Webster's transition. He drafted an open letter to the parents of children at the school,²⁰ and encouraged them to speak with their children openly and honestly about the change. Again, there were parents who opposed both Mr. Webster's transition

¹¹ "Transgender (sic) have serious mental issues. They should not be allowed to teach nor be around young children." Posting of tclguy to Netter, *supra* note 9 (October 16, 2008).

¹² "A teacher who falsely claims to have changed their gender and acts in a manner deviate from 90+% of society is not fit to teach my children." Posting of RBruce to Military.com, <http://forums.military.com/eve/forums/a/tpc/f/409192893/m/3720000302001> (Oct. 16, 2008. 10:25 PM).

¹³ "I should not have to subject my child to things that I find morally wrong just because Jane's mom didn't teach her better." Posting of Valorie Delp, Teresa McEntire, *Homosexual Agenda Being Promoted In Schools*, Families.com, Aug. 31, 2006, <http://parenting.families.com/blog/homosexual-agenda-being-promoted-in-schools> (Sept. 1, 2006, 06:58AM).

¹⁴ The comments posted on blogs may not be truly representative of society's perspective on this issue. The people who bother to write may hold extreme views that they may state more baldly than they would in other contexts.

¹⁵ "[A]ll of the blogs on the Internet as a collective whole." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/blogosphere> (last visited Dec. 3, 2008). A blog is "a Web site that contains an online personal journal with reflections, comments, and often hyperlinks provided by the writer." Merriam-Webster, <http://www.merriam-webster.com/dictionary/blog> (last visited Jan. 15, 2009).

¹⁶ *See infra* pt. I(A).

¹⁷ "I, as a parent, am appalled to have this issue brought into my child's psychology," Steve Bond said." John Curran, *District OKs transgender teacher's return*, gay.com, Feb. 28, 2006, <http://www.gay.com/news/article.html?2006/02/28/3>.

¹⁸ "I don't see how this is an issue, honestly, because he's a totally competent teacher and I don't see how that could have changed," said student Leandra Bourdot, 17." *Community Divided Over Transgender Teacher*, ABC News, Mar. 3, 2006, <http://abcnews.go.com/GMA/story?id=1682922&page=1>.

¹⁹ When Ms. McBeth was hired in a new school district, "[t]here was no public outcry over the decision to add Lily McBeth to the payroll." *NJ Town Hires Transsexual Teacher*, WCBS News Radio 880, Sept. 29, 2006, <http://www.wcbs880.com/pages/94109.php?contentType=4&contentId=214397>.

²⁰ Read the full text at *Letter to Duke School Parents About Transgender Teacher*, WRAL.com, Aug. 28, 2007, <http://www.wral.com/news/local/page/1757482/>.

and the school's embrace of him,²¹ but for the most part, the parents and students were accepting of Mr. Webster.²² These situations show that, while some parents were opposed to the employment of these teachers, the schools recognized the positive impact that these two teachers could have in the lives of the students.

[I]nstead of the parents removing their children from the classrooms, this is a perfect opportunity for the parents to teach the children about DIVERSITY. The world is full of people and beliefs that not all of us agree on. You can't just teach your kids if they don't like it to leave. You need to teach them that they do not have to agree with another person's belief, but they must respect the other person's belief. That is what makes living in this country so wonderful.²³

Such teachers could serve as role models for understanding diversity and acceptance.

However, the variety of reactions to teachers who have transitioned, and the growing comfort of transgender individuals to “come out,”²⁴ indicates that this issue is one that is likely to grow over time. Unfortunately, transgender individuals are vulnerable to discrimination due to a lack of statutory and judicial protections.

As is true of discrimination against other minority groups, prejudice²⁵ towards transgender people is based on pervasive misunderstandings and false generalizations²⁶ of what and who transgender people are.²⁷ However, unlike other minority groups, such as race and

²¹ “I believe the teacher needs to resign from the position at Duke School and go about her way. If she wants to be a him, that's fine. Get it away from the children. Go find another job in the workplace and get away from the children,” [parent Jim] Gossett said.” Gerrick Brenner, *Private School Keeps Transgender Teacher On Staff*, ABC11 News, Aug. 30, 2007, <http://abclocal.go.com/wtvd/story?section=triangle&id=5620082>.

²² “It's the person that matters in the classroom. Not the gender of the teacher,” [parent Erwin] Chemerinsky said.” Brenner, *supra* note 9.

²³ Posting of Vegas girl to *Batavia Transgender Teacher*, Topix.com, <http://www.topix.com/forum/news/transgendered/T1BHTGF6A789RRTBE> (Sept. 11, 2006).

²⁴ “Publicly identifying one's sexual orientation may or may not be part of coming out.” Gay & Lesbian Alliance Against Defamation (GLAAD), *Lesbian/Gay/Bisexual Glossary of Terms*, <http://www.glaad.org/media/guide/glossary.php> (last visited Jan. 15, 2009).

²⁵ See posting of telguy to Netter, *supra* note 9.

²⁶ “The schools protect actual, known peodophiles, (sic) why wouldn't they protect self body-mutilators?” Posting of subterfuge to FreeRepublic.com, <http://www.freerepublic.com/focus/f-news/2107088/posts> (October 16, 2008, 11:16:41am).

²⁷ See *infra* pt. I(B).

religion,²⁸ discrimination on the basis of gender identity is not explicitly prohibited by federal law, and only a handful of states include gender identity in their anti-discrimination laws.²⁹

Without explicit laws, transgender employees are exposed to, and defenseless against, adverse actions on the basis that schools do not find transgender people suitable to teach children.

Another hurdle that transgender teachers face is the judicially created Role Model Rule,³⁰ an exception from explicitly protected characteristics. It allows employers to take adverse actions against employees whom the employer deems a negative role model.³¹ Furthermore, the Rule has the potential to greatly impact transgender teachers because it has relevance both in states that have explicit gender identity provisions, as well as those that do not.³²

Similarly, state statutes have statutory provisions that include “immorality” as a reason to revoke a teacher’s certification.³³ Immorality, though, is a nebulous term, partly due to the evolution³⁴ of the standard of morality over time; what was considered immoral thirty-five years ago is now considered commonplace.³⁵ This paper will look at both the judicial and statutory conceptions of the Role Model Rule, in conjunction with parental and community opinions obtained from a survey of various news websites and blogs, to determine whether either of these theories protect transgender teachers, or whether they instead provide an excuse for discriminating school boards.

Part I of this paper provides a quick explanation of what it means to be transgender, as well as addresses misconceptions associated with transgender people. Part II begins with a brief

²⁸ 42 U.S.C. § 2000e-2(a)(1).

²⁹ *See infra* pt. I(C).

³⁰ *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

³¹ *See infra* pt. III(B)(1).

³² The Rule would also have relevance if the Employment Non-Discrimination Act, *see infra* pt. I(C).

³³ *See, e.g.* 14 Ariz. Rev. Stat. Ann. § 15-539(B) (2003); 14 Del.C. § 1411 (2008); Mo. Ann. Stat. § 168.114(1)(2) (2000); N.Y. Educ. Law § 3018 (2001); Ohio Rev. Code § 3319.16 (1994).

³⁴ *Burton v. Cascade Sch. Dist. Union High Sch. No. 5*, 353 F.Supp. 254, 255 (D.C.Or., 1973).

³⁵ “‘It used to be that schools made teachers leave the classroom when their pregnancy began to show. ... We look back at those things and it seems to anachronistic.’ ... Chemerinsky said.” Brenner, *supra* note 9.

explanation of the at-will and just-cause standards of employment. Part II will also discuss the inclusion of Gender Identity within the meaning of Title VII's prohibition on sex discrimination. Part III will introduce both the judicial and the statutory constructs of the Role Model Rule. The section will then present a survey of parental and community attitudes regarding transgender teachers. Part III will then critically analyze the applicability of the Role Model Rule in light of societal views. This paper will conclude in Part IV.

Part I: Introduction to Gender Identity

A. Definitions and General Introduction to Gender Identity

As is evident from a survey of any bookstore, human beings place great importance on the self, and the need to improve one's self, both internal and external, to achieve happiness.³⁶ The import that people put on their outward appearance is evident by the fact that reality TV shows based on losing weight³⁷ and getting makeovers³⁸ to become more attractive, and thus happier, have become popular sources of entertainment. These attempts at changing one's physical appearance to achieve happiness is accepted and welcomed into our homes on a weekly basis. However, those people who feel that their outer appearance does not match their personal sense of self, based not on weight or attraction but rather physical manifestations of gender, have a much harder time being accepted by society.

Gender identity is “[o]ne’s internal, personal sense of being a man or a woman.”³⁹ While for the great majority of people it appears that their gender identity and their biological sense are

³⁶ Search of “self-help” produced 179,455 results. Amazon.com (last visited Dec. 4, 2008). Similarly, a search for “self-improvement” returned 33,678 results. Barnes&Noble.com (last visited Dec. 4, 2008).

³⁷ *E.g.*, *The Biggest Loser*, NBC, www.nbc.com/The_Biggest_Loser (last visited Dec. 4, 2008); *Celebrity Fit Club*, VH1, www.vh1.com/shows/dyn/celebrity_fit_club_boot_camp/series.jhtml (last visited Dec. 4, 2008).

³⁸ *E.g.*, *What Not to Wear*, TLC, tlc.discovery.com/fansites/whatnottowear/whatnottowear.html (last visited Dec. 4, 2008).

³⁹ GLAAD, *supra* note 24. *See also* Transgender Terminology, American Civil Liberties Union (ACLU), <http://www.aclu.org/getequal/transsterms.pdf> (last visited Oct. 16, 2008).

in accord, there is a population⁴⁰ whose gender identity does not match their biological sex—these people are transgender. The term “transgender”⁴¹ is an umbrella term that includes transsexuals, cross-dressers, drag kings and queens, and other gender-variant people.⁴² However, it should be noted that “transgender” is not synonymous with sexual orientation.⁴³

It is also important to clarify the difference between sex and gender for purposes of the following discussion. “Sex” is used to refer to the biological and chemical classifications of “male” and “female.”⁴⁴ Sex is assigned at birth, and is based on chromosomes, hormones, internal reproductive organs, and genitals.⁴⁵ “Gender” is used to refer to the behavioral traits traditionally associated with one sex or the other and in fact is often used as a synonym for sex.⁴⁶

The process of altering one’s birth sex to comply with one’s gender identity is called transitioning.⁴⁷ Transitioning includes⁴⁸ cultural, legal, and medical changes such as, but not

⁴⁰ At the present time, there is very little statistical data available on transgender people in America, and what is available is inconclusive. HUMAN RIGHTS CAMPAIGN FOUNDATION (HRC), *TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING*, (2008), <http://www.hrc.org/documents/hrcTGguide.pdf>. “Studies like this one tend to dramatically undercount the population of transgender people because they only include transsexuals who have completed or are in the process of completing sex reassignment surgery.” *Id.* at 9. The APA has stated that while the prevalence of transgender people is unknown, it is estimated that about 1 in 10,000 biological males are transsexual, and about 1 in 30,000 biological females are transsexual. American Psychological Association, *Answers to Your Questions About Transgender Individuals and Gender Identity*, <http://www.apa.org/topics/transgender.html> (last visited Dec. 4, 2008).

⁴¹ Most of the courts cited in this paper use the term “transsexual.” *See e.g., Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1981). Regardless, I will be using the term “transgender” as an umbrella term. Thus when a quote from a court opinion uses the word “transsexual,” it should be read as synonymous with “transgender.”

⁴² The term “queer” is being embraced among LGBTQ youth as a catch-all term. “For many people who use the term to describe themselves, ‘queer’ is intended to be a term inclusive enough to overcome the thorny theoretical problems surrounding the labels of lesbian, gay, bisexual, and transgender.” Barbara Fedders, *Coming Out for Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 Nev. L.J. 774, 779-80 (2006).

⁴³ Sexual orientation is the “physical, romantic, emotional and/or spiritual attraction to another person,” and as such, “[t]ransgender people may be heterosexual, lesbian, gay, or bisexual.” ACLU, *supra* note 39.

⁴⁴ Merriam-Webster, <http://www.merriam-webster.com/dictionary/sex> (last visited Oct. 16, 2008).

⁴⁵ *See*, GLAAD *Transgender Glossary of Terms*, *supra* note 43; *Smith v. City of Salem, Ohio*, 378 F.3d 566, 573 (6th Cir. 2004) (“sex” refers “to an individual’s anatomical and biological characteristics”).

⁴⁶ Merriam-Webster, <http://www.merriam-webster.com/dictionary/gender> (last visited Oct. 16, 2008); *see also* APA, *supra* note 40 (“Gender is a term that is often used to refer to ways that people act, interact, or feel about themselves, which are associated with boys/men and girls/women.”).

⁴⁷ ACLU, *supra* note 39; GLAAD, *supra* note 24.

⁴⁸ After transitioning often one hopes to pass in society—that is, to be viewed by society as the gender they identify with. HupPages, *Passing While Cross Dressed and Transgendered*, <http://hubpages.com/hub/Passing-while-Cross->

limited to, coming out to friends and family, engaging in gender expression (e.g., altering clothing, haircut, and mannerisms), legally changing one's name, taking hormones, and/or surgical alteration including Sex Reassignment Surgery (SRS).⁴⁹

The American Psychological Association (“APA”) first included the term “transsexual” in its Diagnostic and Statistical Manual of Mental Disorders (“DSM”) in its third edition, and again in DSM-III-R.⁵⁰ In DSM-IV, the APA replaced “Transsexualism” with “Gender Identity Disorder” (“GID”).⁵¹ GID remains in the current version, DSM-IV-TR,⁵² and provides diagnostic criteria.⁵³

In the middle of the twentieth century, Dr. Harry Benjamin and Alfred Kinsey worked with transgender individuals.⁵⁴ Dr. Benjamin eventually began the Harry Benjamin International Gender Dysphoria Association, Inc.⁵⁵ where he developed the Harry Benjamin Standards of Care for transgender individuals transitioning from their birth gender to the gender they actually

[dressed-and-Transgendered](#) (last visited Dec. 4, 2008) (“I want to be able to order my Big Mac without anyone paying me any attention, regardless of how I am dressed.”). Although many other transgender people feel as though “passing is just the wrong thing to do because it keeps the [transgender] issue in the closet and out of the public eye where it might yet gain some degree of acceptance.” HupPages. *See also* Questioning Transphobia, Evolving a Trans Vocabulary, <http://questioningtransphobia.wordpress.com/2008/10/17/evolving-a-trans-vocabulary-passing/> (last visited Dec. 4, 2008) (personal blog discussing both sides of the “passing” vernacular).

⁴⁹ ACLU, *supra* note 39.

⁵⁰ Wikipedia, <http://en.wikipedia.org/wiki/Transsexual> (last visited Dec. 1, 2008).

⁵¹ Transsexual Road Map, DSM-IV-TR on gender identity ‘disorder,’ <http://www.tsroadmap.com/info/gender-identity-disorder.html> (last visited Dec. 4, 2008).

⁵² *Id.*

⁵³ A. A strong persistent cross-gender identification (not merely a desire for any perceived cultural advantages of being the other sex) ... [including] ... symptoms such as a stated desire to be the other sex, frequent passing as the other sex, desire to live or be treated as the other sex, or the conviction that he or she has the typical feelings and reactions of the other sex ... B. Persistent discomfort with his or her sex or sense of inappropriateness in the gender role of that sex ... C. The disturbance is not concurrent with physical intersex condition ... D. The disturbance causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Mental Health Today, Gender Identity Disorder Today: DSM IV Gender Identity Disorder, <http://www.mental-health-today.com/gender/dsm.htm> (last visited Dec. 4, 2008).

⁵⁴ Archive for Sexology: Harry Benjamin, <http://www2.hu-berlin.de/sexology/GESUND/ARCHIV/COLLBEN.HTM> (last visited Dec. 4, 2008); Wikipedia, http://en.wikipedia.org/wiki/Harry_Benjamin#Work_with_transsexual_people (last visited Nov. 28, 2008).

⁵⁵ The Harry Benjamin International Gender Dysphoria Association, Inc. was renamed The World Professional Association for Transgender Health (WPATH). http://www.wpath.org/about_wpath.cfm (last visited Nov. 28, 2008).

identify with.⁵⁶ The Standards of Care are a three-part approach to transitioning:⁵⁷ 1) real-life experience, which is “[t]he act of fully adopting a new or evolving gender role or gender presentation in everyday life;”⁵⁸ 2) hormone treatment;⁵⁹ and 3) surgery,⁶⁰ including mastectomy or breast implants,⁶¹ genital surgery,⁶² and other surgeries.⁶³ Often, this triadic therapy begins with psychotherapy, although it is not a requirement.⁶⁴

However, not all transgender people follow these Standards of Care. Sometimes people choose to begin presenting as their gender identity with their friends or family before they begin presenting full-time. Furthermore, many transgender people cannot afford SRS,⁶⁵ and so, for example, female-to-male (“FTM”)⁶⁶ transgender men may bind their breasts,⁶⁷ and male-to-female (“MTF”)⁶⁸ transgender women may use waist cinchers or corsets to alter their body.⁶⁸

While GID is generally accepted in the medical community, there are many opponents, as well. The GID Reform Advocates are proponents of the “reform of the psychiatric classification of gender diversity as mental disorder,”⁶⁹ because by its very terminology labels people as

⁵⁶ *Id.*; Wikipedia, http://en.wikipedia.org/wiki/Harry_Benjamin#Work_with_transsexual_people (last visited Nov. 28, 2008).

⁵⁷ THE WORLD PROFESSIONAL ASSOCIATION FOR TRANSGENDER HEALTH STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, 3 (6th ed. 2001), <http://wpath.org/Documents2/socv6.pdf>.

⁵⁸ *Id.* at 17.

⁵⁹ The beginning of hormone therapy rests on meeting three eligibility criteria: 1) at least eighteen years old; 2) a “[d]emonstrable knowledge of what hormones medically can and cannot do and their social benefits and risks;” and 3) either a documented real-life experience for at least three months or a period of psychotherapy. *Id.* at 13.

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 19.

⁶² *Id.* at 20.

⁶³ *Id.* at 20-21.

⁶⁴ *Id.* at 11.

⁶⁵ GLAAD, *supra* note 24.

⁶⁶ ACLU, *supra* note 39.

⁶⁷ University of Michigan Health System, Transgender Binding FAQ, <http://www.med.umich.edu/transgender/Binding%20FAQ.pdf> (last visited Dec. 4, 2008).

⁶⁸ eHow, How to Pass as Female as a Cross Dresser, http://www.ehow.com/how_2190834_pass-as-female-as-cross.html (last visited Dec. 4, 2008); MTF Passing Tips, http://www.masstpc.org/mediawiki/index.php?title=MTF_passing_tips (last visited Dec. 4, 2008).

⁶⁹ GID Reform Advocates, <http://www.gidreform.org/index.html> (last visited Dec. 4, 2008).

“disordered.”⁷⁰ The classification of transgender people as being mentally deficient “reinforce[s] false, negative stereotypes of gender variant people ... The result is that a widening segment of gender non-conforming youth and adults are potentially subject to diagnosis of psychosexual disorder, stigma and loss of civil liberty.”⁷¹

B. Misperceptions of Transgender People

It is common for people to underestimate the emotional suffering that transgender people endure prior to transitioning.⁷² People also discount the realness⁷³ of this suffering: the feelings of displacement and the experience of being shunned from society.⁷⁴ In extreme cases, people may equate being transgender with mental instability⁷⁵ or sexual deviancy.⁷⁶ These misperceptions⁷⁷ about transgender people are often based upon uncertainty and fear, and they ultimately lead to discriminatory conduct and attitudes.⁷⁸

Beyond personal opinions, misconceptions of transgender people are evident in colloquial terminology used in reference to transgender people. For example, it is common for

⁷⁰ *Id.*; see also GLAAD, *supra* note 24.

⁷¹ GID Reform Advocates, *supra* note 72.

⁷² “...how much harm would it have caused her to let them call her Ms?” Posting of fellenf to Netter, *supra* note 9 (October 16, 2008); “Leave your body the way it was created. This is just sick. I would have pulled my child as well. Should we go on teaching our child that it is perfectly ok to have a sex change because he/she feels a little out of place? Wouldn't it be better to teach our kids to cope with the problem rather than opt for surgery to fix it?” Posting of STLcardsPhan, *Transgender Teacher Catches Parents by Surprise*, KSDK.com, <http://www.ksdk.com/news/local/story.aspx?storyid=157570> (October 16, 2008, 9:58 AM CDT).

⁷³ “No, ‘he’ was not formerly a woman, but is STILL a woman who mutilated herself over an ego trip.” Posting of fwdude to This Is Mudvayne, <http://thisismudvayne.ning.com/forum/topic/show?id=1104133%3ATopic%3A57649&page=1&commentId=1104133%3AComment%3A57669&x=1#1104133Comment57669> (October 17, 2008, 1:45:26 AM).

⁷⁴ “Please don't try and pass transgenders off as ‘normal’. It is not in any way normal.” Posting of tclgyu to Netter, *supra* note 9 (October 16, 2008).

⁷⁵ “I would think most parents would have a problem with a whack job teaching their children.” Posting of jamesrage to DebatePolitics.com, <http://www.debatepolitics.com/education/37980-transgender-teacher-catches-parents-surprise.html> (October 16, 2008, 10:58 AM).

⁷⁶ “I would not want my children being taught by a sexual deviant.” Posting of Dominator Overlord to DebatePolitics.com, *supra* note 79 (October 16, 2008, 9:53am).

⁷⁷ Misconceptions of transgender people are also apparent in those accepting and trying to understand transgender people. “Although I don't condone them, I don't see what their sexual orientation has to do with their teaching abilities.” Posting of Shakarg to Netter, *supra* note 9 (October 16, 2008).

⁷⁸ Human Rights Campaign, *Discrimination Against Transgender Workers*, <http://www.hrc.org/issues/transgender/9606.htm> (last visited Jan. 12, 2009).

people to use a term such as “he/she” when they are unclear as to *which* term to use. However, while this may not be intended to be harmful, this term is viewed as a slur by many transgender people.⁷⁹ Another prevalent misperception about transgender people is that they are pretending to be something they are not.⁸⁰ But suggesting that one’s gender identity is a farce can prove damaging,⁸¹ “[g]ender identity is an integral part of a person’s identity.”⁸²

C. Statutory Protections for Gender Identity

Another common misunderstanding of gender identity is that it is a class that is protected by anti-discrimination laws,⁸³ when, in fact, there are only twelve states and the District of Columbia that have enacted such laws.⁸⁴ However, statutory protections for transgender people have rapidly grown over the past few years. For example, in 2003, only four states had prohibitions against discrimination on the basis of gender identity.⁸⁵ But in the past five years, eight states and the District of Columbia have enacted their own gender identity anti-discrimination laws.⁸⁶ In addition, another 108 cities and counties nationwide have their own local laws.⁸⁷ This trend suggests the possibility of the likelihood of the passage of a federal anti-discrimination law that prohibits discrimination on the basis of gender identity.

⁷⁹ GLAAD, *supra* note 24.

⁸⁰ “All the trannies (sic) I have seen are painfully obvious and look like a sad caricature of the sex they are trying to be, especially the men trying to be women. It's not funny or cute, but pathological.” Posting by fwdude to FreeRepublic.com, *supra* note 26 (October 17, 2008, 1:45:26am).

⁸¹ GLAAD, *supra* note 24.

⁸² ACLU, *supra* note 39.

⁸³ “[T]here are laws to protect them just as there are laws to protect us heteros.” Posting of ame s to Sandy Maple, *Transgender Teacher Has Parents Upset*, Parentdish.com, Oct. 17, 2008, <http://www.parentdish.com/2008/10/17/transgender-teacher-has-parents-upset/#comments> (October 17, 2008, 7:20 PM).

⁸⁴ Those states are as follows: California, Colorado, D.C., Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. National Gay and Lesbian Task Force, Transgender Fact Sheet, http://www.thetaskforce.org/downloads/reports/fact_sheets/all_jurisdictions_w_pop_8_08.pdf (last visited Oct. 26, 2008).

⁸⁵ National Gay and Lesbian Task Force, *Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws*, <http://www.transgenderlaw.org/ndlaws/nglftltpichart.pdf> (last visited Jan. 15, 2009).

⁸⁶ National Gay and Lesbian Task Force, Transgender Fact Sheet, *supra* note 84.

⁸⁷ National Gay and Lesbian Task Force, *supra* note 88.

The Employment Non-Discrimination Act, H.R. 2015, (“ENDA”) is a proposed federal law that would prohibit discrimination on the basis of sexual orientation and gender identity in the workplace. “It would reinforce the principle that employment decisions should be based upon a person’s qualifications and job performance.”⁸⁸ Currently, there are two versions of ENDA:⁸⁹ H.R. 2015 that includes protection both on the basis of gender identity and sexual orientation, and H.R. 3685 that only prohibits discrimination on the basis of sexual orientation.⁹⁰ On November 7, 2007, the House of Representatives passed H.R. 3685. Although further action has yet to be taken, this shows the great strides that those in the fight for equality are making.⁹¹

Other evidence of a trend towards transgender-inclusion can be found in the number of non-discrimination policies in Fortune 500 companies. “[A]s of November 2007, over thirty percent of Fortune 500 companies include transgender people in their policies. This is more than 10 times the number that had such policies in 2001...”⁹²

Part II: Employment Standards and Title VII

A. Employment Standards

All but one state⁹³ in the United States follow the doctrine of Employment At-Will.⁹⁴

This doctrine applies to non-contractual employee/employer relationships, and allows an

⁸⁸ Human Rights Campaign, Employment Non-Discrimination Act, http://www.hrc.org/laws_and_elections/enda.asp (last visited Dec. 4, 2008).

⁸⁹ In 1974, the first proposal for an anti-discrimination law was made, and it only included sexual orientation. It was not until 1994 that the current bill took the name of the Employment Non-Discrimination Act. Wikipedia, <http://en.wikipedia.org/wiki/ENDA> (last visited Oct. 26, 2008).

⁹⁰ HRC ENDA, *supra* note 88.

⁹¹ This was “the first time a version of ENDA has passed either chamber of Congress. On June 26, 2008, for the first time, Congress held a hearing exclusively on the issue of workplace discrimination against transgender Americans.” HRC ENDA, *supra* note 88. Furthermore, the passage of H.R. 2015 is now more likely with the incoming Congress and President than it has been in the past.

⁹² HRC ENDA, *supra* note 88. These include American Airlines, Bank of America, Chevron, Coca-Cola, Coors Brewing Co., and General Mills. Human Rights Campaign, *Business Coalition for Workplace Fairness, Members*, Sept. 24, 2008, http://www.hrc.org/issues/workplace/equal_opportunity/6869.htm (last visited Dec. 4, 2008).

⁹³ Montana does not have a presumption of at-will employment. Mont. Code Ann. §§ 39-2-901 to-914.

⁹⁴ See Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. Pa. J. Lab. & Emp. L. 65 (2000).

employee to quit his or her job at any time and for any reason. Similarly, an employer is free to terminate an employee for any time and for any reason without warning and without “incurring any post-employment obligations.”⁹⁵

However, public school teachers often belong to a union which may provide the added protection of “just cause” termination. The Standard of Cause says that an employee’s “termination must be reasonable and neither arbitrary, excessive, nor discriminatory.”⁹⁶ Regardless of whether teachers are at-will employees or unionized, state statutes and federal laws, such as Title VII, provide further regulations for the hiring, firing, certification, and decertification of teachers.⁹⁷

B. Title VII

Title VII of the Civil Rights Act was enacted in 1964, and it prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin.⁹⁸ The primary purpose of Title VII was to eliminate race-based discrimination in employment, but at the last minute, the category of “sex” was added to the Civil Rights Bill.⁹⁹ Due to this last minute addition, the enactors of this legislation did not clearly delineate the exact parameters of “sex,” and there is a “total lack of legislative history” regarding sex.¹⁰⁰ Today, it is widely

⁹⁵ Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 *Indus. L.J.* 84, 84 (2007).

⁹⁶ Susan P. Stuart, *Citizen Teacher: Damned If You Do, Damned If You Don't*, 76 *U. Cin. L. Rev.* 1281, n.153 (2008).

⁹⁷ See e.g., *Ariz. Rev. Stat. Ann.* § 15-539(B) (2003); *Cal. Educ. Code* § 44339 (2006); 14 *Del.C.* § 1411 (2008); *Mo. Ann. Stat.* § 168.114(1)(2) (2000); *N.Y. Educ. Law* § 3018 (2001); *Ohio Rev. Code* § 3319.16 (1994).

⁹⁸ 42 U.S.C. § 2000e-2(a)(1).

⁹⁹ Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *Law & Ineq.J.* 163, 163 (1991), in BELTON ET AL., *EMPLOYMENT DISCRIMINATION LAW: CASES AND MATERIALS ON EQUALITY IN THE WORKPLACE* 308, 309 (The Labor Law Group ed., 2004) (1971). It has also been said that an opponent of the Civil Rights Act proposed this amendment in hopes that it would derail people from voting for the passage of the Act as a whole. See *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821 (N.D.Ill., 1983); Equal Employment Opportunity Commission website, <http://www.eeoc.gov/abouteeoc/40th/panel/expanding.html>, accessed 10/21/2008.

¹⁰⁰ *Ulane*, *supra* note 104, at 1085; *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

accepted that “sex” includes biological sex as well as gender, but does *not* include sexual orientation.¹⁰¹

1. Expansion of Title VII Protection to Transgender People

Gender Identity is not specifically included in Title VII’s protected classes.¹⁰² However, courts have begun to interpret “sex” more broadly, with several holding that it could reach discrimination on the basis of gender identity.¹⁰³ Two arguments have been made to support a broader reading of “sex”: the first is discrimination based on sex stereotyping, and the second is that discrimination based on gender identity is literally discrimination on the basis of sex.

a. Sex Stereotyping¹⁰⁴

In *Price Waterhouse v. Hopkins*,¹⁰⁵ Ann Hopkins asserted that she had been denied partnership because she did not conform to the partners’ preconceived notions of how a woman should look and behave.¹⁰⁶ The Supreme Court said that these stereotypes of how a woman should present herself were evidence of discrimination on the basis of gender non-conformity.¹⁰⁷ This direct evidence of gender stereotyping, said the Court, can support a claim of discrimination

¹⁰¹ However, while Title VII does not provide protection for discrimination on the basis of sexual orientation, in 1998, President Clinton issued Executive Order 13087 that explicitly prohibits discrimination on the basis of sexual orientation in federal civil service. The U.S. Equal Employment Opportunity Commission, Executive Order 13087, <http://www.eeoc.gov/federal/eo11478/eo13087.html> (last visited Dec. 4, 2008). See also, Peter Freiberg, *President’s Order Protects Workers: Anti-Gay Discrimination Banned in Civilian Jobs*, FedGlobe.org, <http://www.fedglobe.org/actions/a.htm> (last visited Dec. 4, 2008).

¹⁰² 42 U.S.C. § 2000e-2(a)(1) (“...because of such individual’s race, color, religion, sex, or national origin...”).

¹⁰³ See *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Schroer v. Billinton*, No. 05-1090-JR, 2008 WL 4287388 (D.D.C., 2008).

¹⁰⁴ See Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 Brandeis L.J. 145 (2004-05). See also Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561 (2007).

¹⁰⁵ 490 U.S. 228 (1989).

¹⁰⁶ *Price Waterhouse*, *supra* note 105, at 235. See also *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that the claimant, a straight male who was perceived as being too feminine, was the target of impermissible sex stereotyping).

¹⁰⁷ “In the context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.” *Price Waterhouse*, *supra* note 110, at 250.

because of sex,¹⁰⁸ and courts began to rely on the interchangeability of the terms “sex” and “gender.”¹⁰⁹

The court in *Smith v. City of Salem, Ohio*,¹¹⁰ used the reasoning in *Price Waterhouse* to hold that impermissible sex-stereotyping extends to transgender people who are discriminated against because of their gender non-conforming conduct. The Sixth Circuit stated,

After *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.¹¹¹

Further, said the court, sex stereotyping is not conditional on the biological make-up of a person. Discrimination against a transgender person for failing to conform to his birth-gender norms is no different than discriminating against a woman for not acting like a woman.¹¹²

In light of the Sixth Circuit’s conclusion that gender stereotyping discrimination against a transgender person can violate Title VII,¹¹³ and in conjunction with other Circuits that have relied on this reading of *Price Waterhouse* in their interpretation of other federal statutes,¹¹⁴ it appears that transgender claimants may continue to prevail on some claims. However, in order to prevail, a claimant must provide direct evidence that his or her specific behavior, appearance,

¹⁰⁸ In their now-famous and often-cited words, the Court said, “[A]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group. *Price Waterhouse*, *supra* note 105, at 251.

¹⁰⁹ See *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

¹¹⁰ 378 F.3d 566 (6th Cir. 2004).

¹¹¹ *Smith*, *supra* note 103, at 574, 575.

¹¹² *Id.*

¹¹³ The Tenth Circuit also addressed the application of *Price Waterhouse* sex-stereotyping to transgender people. In *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007), the court acknowledged that a transgender employee may be able to bring a discrimination claim based on sex stereotyping. However, the court stated that because Etsitty failed to present a genuine issue of fact, they “need not decide whether such a claim may extend Title VII protection to transsexuals who act and appear as a member of the opposite sex.” *Id.* at 1224.

¹¹⁴ See *e.g.*, *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-216 (1st Cir. 2000); *Schwenk*, *supra* note 109, at 1202.

and/or mannerisms do not conform to the employers' stereotypes of how a person of that birth-gender *should* look and behave. Furthermore, the claimant must provide direct evidence that these stereotypes were the "driving force"¹¹⁵ behind the adverse action. As an example, for a MTF¹¹⁶ person to prevail, she would have to argue that she was discriminated against for being too feminine; it would not be sufficient for her to argue that she was discriminated against for being too masculine.¹¹⁷

b. Gender Identity as "Sex"¹¹⁸

Historically, courts declined to interpret Title VII's prohibition of discrimination on the basis of sex as reaching gender identity discrimination,¹¹⁹ instead giving "sex" its "traditional definition based on anatomical characteristics."¹²⁰ The two leading cases supporting this contention are *Ulane v. Eastern Airlines*¹²¹ and *Holloway v. Arthur Andersen & Co.*¹²² These courts examined the language of the statute and balanced that with Congressional intent and legislative inactivity in enacting amendments to Title VII.¹²³ They concluded that, particularly given the absence of legislative history, they must give the term its plain, traditional meaning, which, according to the courts, limits the interpretation of "sex" to only include "biological sex."¹²⁴ Furthermore, the courts noted Congress' failure to enact amendments that would extend

¹¹⁵ *Smith*, *supra* note 115, at 572.

¹¹⁶ Male-to-female, *see supra* pt. I(A).

¹¹⁷ *Etsitty*, *supra* note 113, at 1224. *See also*, T. Cameron McEwen, *Etsitty v. Utah Transit Authority: A Narrow Interpretation of Title VII*, 29 Am. J. Trial Advoc. 515 (2005).

¹¹⁸ *See* Andrea Meryl Kirshenbaum, "Because of ... Sex": Rethinking the Protections Afforded Under Title VII in the Post-Oncale World, 69 Alb. L. Rev. 139 (2005); Andrew Gilden, *Toward a More Transformative Approach: The Limits of Transgender Formal Equality*, 23 Berkeley J. Gender L. & Just. 83 (2008).

¹¹⁹ *Etsitty*, *supra* note 113; *Ulane*, *supra* note 99; *Holloway*, *supra* note 100.

¹²⁰ *Holloway*, *supra* note 100, at 662. *See also* *Ulane*, *supra* note 99, at 1085 ("[I]t is unlawful to discriminate against women because they are women and against men because they are men.").

¹²¹ *Ulane*, *supra* note 99.

¹²² *Holloway*, *supra* note 100, at 662.

¹²³ *Ulane*, *supra* note 99, at 1085-1086; *Holloway*, *supra* note 100, at 662.

¹²⁴ *Ulane*, *supra* note 99, at 1085; *Holloway*, *supra* note 100, at 663.

the definition of “sex” to include gender identity,¹²⁵ stating that this Congressional inactivity provides further proof of Congress’ intent to limit Title VII protection to biological sex.

Several years later, in *Oncale v. Sundowner Offshore Serv.*,¹²⁶ the Supreme Court concluded that same-sex sexual harassment is actionable under Title VII’s prohibition on sex discrimination. In its reasoning, the Court acknowledged that while same-sex harassment was likely not what Congress intended when it enacted Title VII, it is important to recognize that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils.”¹²⁷ Thus, in both *Price Waterhouse*¹²⁸ and *Oncale*, the Court showed a willingness to interpret “sex” quite broadly, effectively eviscerating the conclusions in *Ulane* and *Holloway* that limited “sex” to its traditional meaning.¹²⁹

Recently, in *Schroer v. Billington*,¹³⁰ the D.C. District court held that Diane Schroer, a transgender woman, had been the victim of impermissible discrimination on the basis of sex.¹³¹ In its decision, the court relied on the Library of Congress’ own admission that it declined to hire Schroer *only after* she informed them “that she planned to change her anatomical sex by undergoing sex reassignment surgery.”¹³² The Library hired David Schroer, a male, and when it was faced with hiring a female, the Library retracted its offer. Had Diane Schroer been male she

¹²⁵ *Ulane*, *supra* note 99, at 1085; *see also Holloway*, *supra* note 100, at 662.

¹²⁶ 523 U.S. 75, 79 (1998).

¹²⁷ *Oncale*, *supra* note 126, at 79.

¹²⁸ 490 U.S. at 250 (concluding that stereotypes based on sex are discrimination. This conclusion came from the Court broadening the interpretation of “sex” in Title VII to include not just biological sex, but also gender.

¹²⁹ *Ulane* and *Holloway* both denied the plaintiffs’ claims because “they were considered victims of ‘gender’ rather than ‘sex’ discrimination.” *Smith*, 378 F.3d at 573. However, *Price Waterhouse*’s interpretation that “sex” includes gender rendered these arguments moot. *See also, Smith*, *supra* note 103, at 573; *Schroer*, *supra* note 103, at *12.

¹³⁰ *Schroer*, *supra* note 103.

¹³¹ “Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its offer of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-nonconforming transsexual.” The court also analogized discrimination based on gender identity to discrimination based on religious conversion. “Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute.” *Schroer*, *supra* note 103, at *11, *12.

¹³² *Schroer*, *supra* note 103, at *11, *13.

would have been hired. But for her sex, her *new* sex, she was a good candidate, and, the court concluded, she was therefore, literally, discriminated against on the basis of sex.¹³³

Part III: Transgender Teachers As Role Models

Even if discrimination on the basis of gender identity is recognized by the courts and legislators, transgender teachers are faced with another barrier to being absolutely protected from discrimination and adverse actions. There are both statutory and judicially created exceptions to Title VII's protections: the bona fide occupational qualification and the Role Model Rule.

A. Bona Fide Occupational Requirement

Title VII provides a statutory exception to its prohibition for making employment decisions on the basis of a protected class. The Bona Fide Occupational Qualification ("BFOQ") exception¹³⁴ states that it is lawful for an employer to refuse to hire a person because of their sex,¹³⁵ if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business."¹³⁶

The BFOQ exception is to be interpreted extremely narrowly,¹³⁷ and, as such, there are a number of circumstances where the BFOQ does not apply. For example, an employer cannot hire

¹³³ *Schroer*, *supra* note 103, at *13. Sex stereotyping is not a claim that is available to plaintiffs on the basis of sexual orientation. Courts may therefore require more extensive evidence, as a precaution in recognizing a transgender person's claim for sex stereotyping for fear that the claim will "be used to bootstrap protection for sexual orientation into Title VII." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006).

¹³⁴ 42 U.S.C. § 2000e-2(e)(1); *see also* the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2.

¹³⁵ The BFOQ only applies to religion, sex, or national origin. It does not apply to employment decisions on the basis of race or color. § 2000e-2(e)(1).

¹³⁶ § 2000e-2(e)(1).

¹³⁷ *Dothard v. Rawlinson*, 433 U.S. 321, 334 (1977). *See also* The Equal Employment Opportunity Commission's (EEOC) Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2(a); *International Union, UAW v. Johnson Controls*, 499 U.S. 187, 201 (1991) ("The wording of the BFOQ defense contains several terms of restriction that indicate that the exception reaches only special situations. . . . 'certain instances' . . . 'reasonably necessary' . . . 'normal operation' . . . 'particular' business."); *Torres v. Wis. Dept. of Health & Soc. Serv.*, 859 F.2d 1523, 1527 (7th Cir. 1988); *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697, 704 (8th Cir. 1987).

on the basis of gender stereotypes¹³⁸ or client preference.¹³⁹ Furthermore, sex is generally not a BFOQ for teaching positions. For instance, courts have held that sex is not a BFOQ for an assistant principal position,¹⁴⁰ a full-time Physical Education teacher,¹⁴¹ or a school bus driver.¹⁴²

B. The Role Model Rule

“[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values.”¹⁴³ Parents and society alike have long worried about this important influence.¹⁴⁴ For example, in 1939, a woman was found to work as a waitress in a bar while being concurrently employed as a teacher.¹⁴⁵ The school board discharged her, stating, “Educators have always regarded the example set by the teacher as of great

¹³⁸ *Everson v. Mich. Dept. of Corr.*, 391 F.3d 737, 748 (6th Cir.2004); *see also* 29 C.F.R. § 1604.2.; *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199, 208 (3rd Cir. 1975) (“Discrimination based on stereotypes or overly categorized distinctions between men and women are forbidden by Title VII.”); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 717 (7th Cir. 1969) (prohibiting the use of class stereotypes including those based on sex); *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235-236 (5th Cir. 1969) (“What does seem clear is that using these class stereotypes denies desirable positions to a great many women perfectly capable of performing the duties involved.”); *Longo v. Carlisle DeCoppet & Co.*, 403 F.Supp. 692, 694 (S.D.N.Y. 1975).

¹³⁹ 29 C.F.R. § 1604.2(a)(1)(iii) (“...because of the preference of coworkers, the employer, clients or customers.”); *Rucker v. Higher Educational Aids Bd.*, 669 F.2d 1179, 1181 (7th Cir. 1982); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981)(citing the EEOC guidelines); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971), *cert. denied*, 404 U.S. 950, 92 S.Ct. 275, 30 L.Ed.2d 267, 389 (1971) (“While we recognize that the public's expectation of finding one sex in a particular role may cause some initial difficulty, it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome. Thus, we feel that customer preference may be taken into account only when it is based on the company's inability to perform the primary function or service it offers.”); *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F.Supp. 1450, 1472 (S.D.N.Y. 1987).

¹⁴⁰ *See e.g., Becknell v. Board of Educ. of Owsley County, Ky.*, No. 6:07-154-KKC, 2008 WL 1924232, *8 (E.D.Ky., 2008) (Discrediting the Board's argument that it needed a male principal to discipline male students).

¹⁴¹ *McCardle v. Mitchell Sch. Dist.*, No. 03-4092-KES, 2005 WL 1118154, *3-4 (D.S.D. 2005)(concluding that being male is not a BFOQ for a PE teach position because there were alternatives available so that a woman teacher would not supervise the boys' locker room).

¹⁴² *Bollenbach v. Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist.*, 659 F.Supp. 1450, 1472 (S.D.N.Y. 1987)(“the BFOQ defense does not apply because driving a bus does not require any special physical characteristics that are possessed by males, but not females”).

¹⁴³ *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

¹⁴⁴ *See e.g., Andrews*, 507 F.2d (female teachers were discharged for becoming pregnant out of wedlock).

¹⁴⁵ *Horosko v. School Dist. of Mount Pleasant Tp.*, 6 A.2d 866, 868 (Sup.Ct. Pa. 1939).

importance, particularly in the education of the children in the lower grades,”¹⁴⁶ and the example she set by not only working in a bar, but also consuming beer and playing dice was not an appropriate example for school-aged children.

The concern of the influence that teachers exert over their pupils, has led to extensive debate as to what makes a good role model. There has been some consensus that a teacher should teach tolerance and acceptance, among other social responsibilities, to young children.¹⁴⁷ And there is a collective belief that the tolerance and acceptance that educators teach should conform to society’s attitudes and community norms. Beyond that, however, there is little accord.

1. Judicial Theory – *Chambers v. Omaha Girls Club, Inc.*

The judicial theory of the Role Model Rule, articulated most prominently in *Chambers v. Omaha Girls Club, Inc.*,¹⁴⁸ is premised on the BFOQ.¹⁴⁹ The Rule states that an employer may take an adverse employment action against an employee if the employee is not a positive role model in line with the employer’s business purpose.¹⁵⁰ Unlike the statutory Role Model Rule discussed next, the *Chambers* construction of the Role Model Rule is based on sex.¹⁵¹ Furthermore, as it is based on the BFOQ, it is subject to the same limitations, and thus it must be construed narrowly and cannot be based on community preference.¹⁵²

¹⁴⁶ *Id.*

¹⁴⁷ *Ambach, supra* note 150, at 79; *see also* Ruth L. Davison, John L. Strobe & Donald F. Uerling, *The Personal Lives and Professional Responsibilities of P-12 Educators: Off-Duty Conduct as Grounds for Adverse Employment Actions*, 171 Ed. Law Rep. 691, 693 (2003) (“Any legal obligation a teacher has to serve as an exemplar or role model for students rests on the belief that students, in part, acquire their social attitudes, values, and behaviors by copying those of their teacher.”).

¹⁴⁸ *Chambers v. Omaha Girls Club, Inc.*, 834 F.2d 697 (8th Cir. 1987).

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions...” Pregnancy Discrimination Act of Title VII, 42 U.S.C. § 2000e(k).

¹⁵² *Thompson v. Wis. Dept. of Pub. Instruction*, 541 N.W.2d 182, 186 (Wis. Ct. App. 1995). *See also, Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981)(citing the EEOC guidelines); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971); *Bollenbach, supra* note 142, at 1472.

Transgender Teachers as Role Models for a Tolerant Society

In *Chambers*,¹⁵³ the Omaha Girls Club terminated Chambers, an arts and crafts instructor, when she became pregnant out of wedlock. The Girls Club asserted that Chambers was no longer a positive role model for the Club¹⁵⁴ as its purpose was to provide girls between the ages of eight and eighteen years “with exposure to the greatest number of available positive options in life.”¹⁵⁵ Thus, the Girls Club felt that “to permit single pregnant staff members to work with the girls would convey the impression that the Girls Club condoned pregnancy for the girls.”¹⁵⁶ The Eighth Circuit applied a version of the BFOQ Test:¹⁵⁷ 1) Is there a basis in fact to believe that the job qualification is reasonably necessary for the job; 2) Does the job qualification have a manifest relationship to the fundamental purpose of the organization; 3) Are there any reasonable alternatives to discrimination?¹⁵⁸ The court concluded that the Girls Club’s positive role model requirement was in fact a BFOQ, and Chambers’ termination was upheld.¹⁵⁹

However, one problem with the *Chambers* Test is that while requiring a finding of fact that the job qualification is reasonably necessary in the first prong, the court did not delineate what factual evidence would satisfy the requirement. Instead of relying on empirical studies,¹⁶⁰ the court relied on the Girls Club’s honest belief that Chambers was a poor role model for the young girls.¹⁶¹ A “basis in fact” then, can be construed in this context to mean nothing more

¹⁵³ *Chambers*, *supra* note 148.

¹⁵⁴ *Id.* at 699.

¹⁵⁵ *Id.* at 701.

¹⁵⁶ *Id.* at 702.

¹⁵⁷ The Sixth Circuit in *Everson v. Mich. Dept. of Corr.*, 391 F.3d 737, 748 (6th Cir.2004), laid out a three-prong test to determine when the BFOQ defense has been established. First, the employer must be able to prove a “basis in fact” to believe that the job qualification based on sex discrimination is reasonably necessary for the job. Second, the BFOQ must relate to the essence, the “central mission,” of the business. And third, the employer must prove that there are no reasonable alternatives to discriminate.

¹⁵⁸ *Chambers*, *supra* note 148, at 704.

¹⁵⁹ *Id.* at 705.

¹⁶⁰ *Id.* at 702.

¹⁶¹ *Id.* at 701-702.

than an honest belief by the employer that the employee's morals are contradictory to the primary purpose of the organization.¹⁶²

In *Vigars v. Valley Christian Center of Dublin, California*,¹⁶³ the court applied the *Chambers* Test. In that case, the plaintiff was a librarian at a Christian school who was terminated for her out-of-wedlock pregnancy.¹⁶⁴ The school claimed the BFOQ defense, stating that Vigar's pregnancy, and thus her moral character, violated the school's concept of what a role model should be.¹⁶⁵ Furthermore, they argued that the parents of the students expected a certain "moral character" of the teachers, and had the school not discharged Vigars, the parents would have become "upset."¹⁶⁶ The court dismissed the parental preference argument, reiterating the long-held rule that customer preference and community attitudes never qualify as a BFOQ.¹⁶⁷

The *Vigars* court then emphasized the narrow focus of the BFOQ exception¹⁶⁸ and said that for the Role Model BFOQ to apply, "the person's job must *depend upon* the discriminatory characteristic."¹⁶⁹ In determining whether Vigars' position as a school librarian depended upon being a role model, the court distinguished Vigars' position to Chambers' position as an instructor at the Girls Club. The court stated that while it is a counselor's "*function ... to act as* role models for young girls,"¹⁷⁰ the function of a librarian is unlikely that of a role model.¹⁷¹

¹⁶² The Dissent in *Chambers* pointed out this contradiction, criticizing the majority's blind acceptance of the employer's assertion, "[T]his court, accepts without any proof OGC's assumption that the presence of an unwed pregnant instructor is related to teenage pregnancies. ... instead [relying] on two or three highly questionable anecdotal incidents to support the rule." *Chambers, supra* note 148 (McMillian, J., dissenting).

¹⁶³ 805 F.Supp. 802 (N.D.Cal. 1992).

¹⁶⁴ "... 'pregnant without benefit of marriage' ..." *Id.* at 804.

¹⁶⁵ *Id.* at 808.

¹⁶⁶ *Id.* at 808 n.4.

¹⁶⁷ *Id.* at 808 n.4. *See also, Andrews*, 507 F.2d; *Thompson v. Wis. Dept. of Pub. Instruction*, 541 N.W.2d 182, 186 (Wis. Ct. App. 1995).

¹⁶⁸ "Although the analogy here is tempting, it is ultimately not persuasive because it loses sight of the very narrow focus of the BFOQ and business necessity defenses." *Vigars*, 805 F.Supp. at 808.

¹⁶⁹ *Id.* at 808.

¹⁷⁰ *Id.* at 808.

However, as this was a ruling on a motion for summary judgment, the court declined to make any solid findings of fact.¹⁷²

In consideration of the above information, the judicial theory of the Role Model Rule requires an assessment of the following elements: 1) What is the primary purpose of the business; 2) Does the job position depend upon the discriminating characteristic; and 3) Do any reasonable alternatives to discrimination exist?

2. Statutory Construct – Immorality¹⁷³

The statutory construct of the Role Model Rule is based on state statutes regulating teacher certifications based, in part, on their moral character.¹⁷⁴ These statutes state that a teacher's certificate may be revoked for "any charge affecting the moral character of any teacher within his district."¹⁷⁵ In fact, some state statutes go as far as to require all applicants for a teaching credential to "submit reasonable evidence of ... good moral character."¹⁷⁶

However, a glaring problem with these statutes is that the term "immorality" is rarely defined or explained, creating an understanding that is unduly broad and vague.¹⁷⁷ Indeed, the courts have recognized this problem and created a solution, "[T]he terms 'immoral' or

¹⁷¹ "However, there is serious disagreement about how central her moral life was to her job as librarian, whether or not she was truly expected to act as a role model in the *Chambers* sense, and what impact her pregnancy truly had on her ability to perform either of those functions." *Vigars*, 805 F.Supp. at 809.

¹⁷² *Id.* at 809.

¹⁷³ Immorality covers a wide range of conduct. This paper will only deal with immoral conduct so far as it applies to public notions of transgender people, and thus will not discuss or consider illegal conduct.

¹⁷⁴ See e.g., Ariz. Rev. Stat. Ann. § 15-539(B) (2003); 14 Del.C. § 1411 (2008); Mo. Ann. Stat. § 168.114(1)(2) (2000); N.Y. Educ. Law § 3018 (2001); Ohio Rev. Code § 3319.16 (1994).

¹⁷⁵ N.Y. Educ. Law § 3018. See also, Ariz. Rev. Stat. Ann. § 15-539(B) ("charges wherein the alleged cause for dismissal constitutes immoral or unprofessional conduct"); W. Va. Code, § 18A-3-6 ("The state superintendent may ... revoke the certificates of any teacher for any of the following causes: Intemperance, untruthfulness, cruelty, immorality...").

¹⁷⁶ Cal. Educ. Code § 44339 (2006).

¹⁷⁷ John Trebilcock, *Off Campus: School Board Control Over Teacher Conduct*, 35 Tulsa L.J. 445, 451 (2000) ("It [immorality] is a word with differing meanings from community to community and time to time."); Jason R. Fulmer, *Dismissing the "Immoral" Teacher for Conduct Outside the Workplace – Do Current Laws Protect the Interests of Both School Authorities and Teachers?* 31 J.L. & Educ. 271, 272 (2002); Amber Fischer, *"Immoral Conduct": A Fair Standard for Teachers?* 28 J.L. & Educ. 477, 477 (1999).

‘unprofessional conduct’ are so broad and vague that, standing alone, they could be constitutionally infirm; hence the proper criteria is fitness to teach.”¹⁷⁸

In an attempt to define which factors should be considered in determining whether immoral conduct renders a teacher unfit to teach,¹⁷⁹ the courts have articulated various factors to be considered. A compilation of common factors across state laws include: 1) “the likelihood that the teacher's conduct will have adversely affected students or other teachers;”¹⁸⁰ 2) “the degree of the anticipated adversity;”¹⁸¹ 3) “the proximity or remoteness in time of the conduct;”¹⁸² 4) the intent behind the conduct;¹⁸³ and 5) the “extent to which discipline may have a chilling effect upon either the rights of the teacher involved or other teachers.”¹⁸⁴ This analysis is not an “and” test, but rather it is a factual determination based on the totality of the circumstances.¹⁸⁵

Courts have also discussed what weight should be given to community attitudes regarding the teacher as a role model.¹⁸⁶ However, they have generally agreed that the decision is not an issue of fact to be determined by the school board, but rather one of law to be determined by the legislature or interpreted by the courts;¹⁸⁷ it is too nebulous and broad a concept that is

¹⁷⁸ *Bd. of Educ. v. Jack M.*, 566 P.2d 602, 604 (Cal. 1977). See also, *Thompson v. Southwest School Dist.*, 483 F.Supp. 1170, 1182 (D.C.Mo., 1980), *Alford v. Ingram*, 931 F.Supp. 768, 773 (M.D.Ala., 1996); *Morrison v. State Board of Education*, 461 P.2d 375, 382 (Cal. 1969); *Weissman v. Board of Ed. of Jefferson County School Dist. No. R-1*, 547 P.2d 1267, 1272 (Colo. 1976); Amber Fischer, “Immoral Conduct”: A Fair Standard for Teachers? 28 JLEDUC 477, 478 (1999).

¹⁷⁹ *Thompson*, 483 F.Supp. at 1182.

¹⁸⁰ *Id.* at 1182; *Morrison*, *supra* note 178, at 386-387.

¹⁸¹ *Thompson*, *supra* note 178, at 1182; *Morrison*, *supra* note 178, at 386-387.

¹⁸² *Thompson*, *supra* note 178, at 1182; *Morrison*, *supra* note 178, at 386-387.

¹⁸³ *Thompson*, *supra* note 178, at 1182; *Morrison*, *supra* note 178, at 386-387. See also *Youngman v. Doerhoff*, 890 S.W.2d 330, 342 (Mo. Ct. App. 1994) (“immoral conduct requires at least an inference of conscious intent”).

¹⁸⁴ *Weissman v. Bd. of Ed. of Jefferson County Sch. Dist. No. R-1*, 547 P.2d 1267 (Colo. 1976). See also, *Morrison*, 461 P.2d at 386-387; *Youngman v. Doerhoff*, 890 S.W.2d 330, 341 (Mo. Ct. App. 1994); *Lile v. Hancock Place School Dist.*, 701 S.W.2d 500 (Mo. Ct. App. 1985); *Thompson*, *supra* note 178; *Trebilcock*, *supra* note 184, at 452.

¹⁸⁵ *Thompson*, *supra* note 178, at 1183.

¹⁸⁶ *Thompson*, *supra* note 178, at 1183; *Ross v. Springfield Sch. Dist. No. 19*, 716 P.2d 724, 727, 728 (Or. 1986); *Kinniry v. Abington Sch. Dist.*, 673 A.2d 429, 432 (Pa. Commw. Ct. 1996).

¹⁸⁷ *Kinniry*, 673 A.2d at 432.

subject to arbitrary views, and has the potential to result in discrimination to leave in the ever-changing views of what the public considers moral.¹⁸⁸ Therefore, community viewpoints are not to influence the determination of what or who makes a positive role model; rather, it is for the legislature to determine, or the courts to interpret.

3. Societal Viewpoints

Determining whether a transgender teacher can be an acceptable role model for school-age children has recently sparked extensive debate. This debate over whether a transgender person can be a good, moral, and effective teacher can be understood by surveying commentary in the blogosphere. In recent years the media has publicized several teachers whose transition became public knowledge,¹⁸⁹ and blog posting and commenting has become an easy and oft-used way for people to respond with their viewpoints, and to debate them with others.¹⁹⁰

The prevailing view on several blogs is that transgender people are the antithesis of a good role model.¹⁹¹ While there are many arguments for this view, there appear to be three main arguments that encompass a host of other concerns: 1) Transgender people by definition are mentally and sexually unstable and thus incapable of competently teaching children; 2) transgender people are deceptive and thus not trustworthy; and 3) the only reason why transgender people come out is to “‘proselytize’ the child, expose the child to abnormality, pornography or overt sexuality...”¹⁹²

¹⁸⁸ *Ross*, 716 P.2d at 727.

¹⁸⁹ See e.g., Gerrick Brenner, *Private School Keeps Transgender Teacher on Staff*, ABC News, Aug. 30, 2007, <http://abclocal.go.com/wtvd/story?section=triangle&id=5620082>; Sarah Netter, *Parents, Students Surprised at Change in Teacher’s Gender Identity*, ABC News, Oct. 16, 2008, <http://abcnews.go.com/US/story?id=6050076&page=1>; *Transgender Teacher Catches Parents by Surprise*, KSDK.com, <http://www.ksdk.com/news/local/story.aspx?storyid=157570>.

¹⁹⁰ See e.g., DebatePolitics.com, <http://www.debatepolitics.com/education/37980-transgender-teacher-catches-parents-surprise.html>; FreeRepublic.com, <http://www.freerepublic.com/focus/f-news/2107088/posts>.

¹⁹¹ See e.g., Netter, *supra* note 189; DebatePolitics.com, *supra* note 190; KSDK.com, *supra* note 189.

¹⁹² Ummni Khan, *Perpetuating the Cycle of Abuse: Feminist (Mis)use of the Public/Private Dichotomy in the Case of Nixon v. Rape Relief*, 23 Windsor Rev. Legal & Soc. Issues 27, n.38 (2007). See also Nancy J. Knauer,

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The contention that transgender people are unstable is based on prejudiced and stereotyped notions of what and who transgender people are.¹⁹³ For example, one person said, “If someone is so screwed up in the head that they aren’t convinced they were born as the correct sex, I have a hard time seeing how they could be competent enough to teach children. It seems like more liberal idiocy, trying to force their [lack of] values on other people, especially our children and then making a big flatulent (sic) noise about ‘tolerance’ (all the while being as intolerant and hateful in their speech as possible!) when they get caught.”¹⁹⁴ Other people argued that all transgender people are sexual deviants¹⁹⁵ and thus will abuse the children.¹⁹⁶ Statements

Homosexuality As Contagion: From the Well of Loneliness To The Boy Scouts, 29 Hofstra L. Rev. 401, 469 (2000) (“The [Family Research Council] cautions parents that ‘[g]rooming young students for ‘coming out’ as homosexuals, bisexuals and ‘transgenders’ is a central plank of the homosexual education movement.”).

¹⁹³ California’s recent passage of Proposition 8 banning gay marriage is a good example of the role uncertainty and fear can play in society. Prop 8 stated, “Changes the California Constitution to eliminate the right of same-sex couples to marry in California. Provides that only marriage between a man and a woman is valid or recognized in California.” California General Election, Official Title and Summary of Proposition 8, Prepared by the Attorney General, <http://www.voterguide.sos.ca.gov/title-sum/prop8-title-sum.htm> (last visited Dec. 4, 2008). The Proposition thus provided only for marriage, and said nothing about what would or would not be taught in schools. However, in their attempt to pass Prop 8, proponents played on parental and societal fears, and advertised that the failure to enact Prop 8 would work to inculcate homosexuality into the minds of young children. PinoyWired, *Vote YES on Proposition 8 California!*, October 30, 2008, <http://pinoywired.com/2008/10/30/vote-yes-on-proposition-8-california/>. For example, one Yes on Proposition 8 “ad goes on to say that teaching marriage is required in 96 percent of all California schools, according to the State Public School superintendent’s website.” Tomas Roman, *Parents Outraged After Kids Shown in Prop 8 Ad*, ABC7 News, Oct. 27, 2008, <http://abclocal.go.com/kgo/story?section=news/local&id=6471449>. This strategy appeared to work, as Prop 8 passed by a margin of 4.6%. Secretary of State, California General Election Website, <http://vote.sos.ca.gov>Returns/props/map190000000008.htm> (last visited Dec. 4, 2008). A recent LA Times article addressed the link between the efforts of Prop 8 Proponents and the passage of Prop 8, “The measure on the ballot was only 14 words long -- a simple statement that ‘only marriage between a man and a woman is valid or recognized in California.’ But supporters of Proposition 8, in what political analysts said was an extremely effective strategy, made the race about much more than that. They were able to focus the debate on their assertion that without the ban, public school children would be indoctrinated into accepting gay marriage against their parents’ wishes, churches would be sanctioned for not performing same-sex weddings and the institution of marriage would be irreparably harmed.” Dan Morain and Jessica Garrison, *Backers Focused Prop. 8 Battle Beyond Marriage*, LOS ANGELES TIMES, Nov. 6, 2008, <http://www.latimes.com/news/local/la-me-gaymarriage6-2008nov06,0,2331815.story>.

¹⁹⁴ Posting by Sirius to Feminocracy, <http://feminocracy.wordpress.com/2008/10/15/kids-pulled-from-transgender-teachers-class/> (October 17, 2008, 4:36 pm).

¹⁹⁵ “If someone is that sexually unstable, they should not be teaching the young minds of our country.” Posting by Ksharper to DoSomething.org, <http://www.dosomething.org/blog/chatterbox/transgender-teacher-trouble>; “I would not want my children being taught by a sexual deviant.” Posting by Dominator Overlord to This Is Mudvayne, <http://thisismudvayne.ning.com/forum/topic/show?id=1104133%3ATopic%3A57649&page=1&commentId=1104133%3AComment%3A57669&x=1#1104133Comment57669> (October 16, 2008, 9:53am).

¹⁹⁶ “It can use either bathroom. Probably does to get thrills off the little girls.” Posting by YonderWays to Military.com, <http://forums.military.com/eve/forums/a/tpc/f/409192893/m/3720000302001> (October 15, 2008,

like these portray the misconceptions that people hold regarding transgender people—that they are abnormal and have serious mental issues,¹⁹⁷ and they have no morals. People then rely on these arguments to say that a transgender teacher would not “be able to connect with and motivate the children as well as gain the confidence of the parents.”¹⁹⁸

The second common argument against transgender teachers is that they are pretending to be something that they are not, and are thus not trustworthy.¹⁹⁹ This argument often rests on the argument that transgender people “misrepresent” themselves as the “wrong” gender. “Would you want a guy who thinks he is a duck teaching your kids? Anyone (sic) who tries to be a gender they are not is a nut job, its (sic) no different than someone trying to be a duck, cow (sic)²⁰⁰ or something else they are not.” However, this argument is flawed. As discussed above,²⁰¹ this is a misconception of transgender people and should not be relied on.

The third prevalent argument against transgender teachers is that they have the intent to corrupt and “recruit” children. This can be traced to the doctrines of influential religious leaders in the community. A prominent voice in the argument that transgender people are negative role models is Dr. James Dobson. Dr. Dobson, named one of Time Magazine’s Twenty-five Most Influential Evangelicals in America,²⁰² is the founder of Focus on the Family,²⁰³ and has been

06:57 PM). This myth has repeatedly been discredited. See e.g., Sheila Hatami & David Zwerin, *Educating the Masses: Expanding Title VII to Include Sexual Orientation in the Education Arena*, 25 Hofstra Lab. & Emp. 311, 347 (2007); Nancy J. Knauer, *Homosexuality As Contagion: From the Well of Loneliness To The Boy Scouts*, 29 Hofstra Lab. & Emp. 401, 480 (2000).

¹⁹⁷ “Get them kids out of that school first of all the teacher is confused...” Posting by MzDeeDee to KSDK.com, *supra* note 189 (October 16, 2008, 9:24 PM CDT).

¹⁹⁸ Posting by bill_kananen to Military.com, *supra* note 196 (October 15, 2008, 11:46 AM).

¹⁹⁹ “Dealing with young, impresionable (sic) minds is difficult enough without having to brainwashing them.” Michael Warren to Topix.com, *Batavia Transgender Teacher*, <http://www.topix.com/forum/news/transgendered/T1BHTGF6A789RRTBE> (September 6, 2006); “...they are being chastized (sic) for being someone they are not.” Posting by STLCardsPhan to KSDK.com, *supra* note 189 (October 16, 2008, 9:58 AM CDT).

²⁰⁰ Posting by jamesrage to DebatePolitics.com, *supra* note 190 (October 16, 2008, 10:58 AM).

²⁰¹ *Supra* pt. I(B).

²⁰² *The 25 Most Influential Evangelicals in America*, TIME, <http://www.time.com/time/covers/1101050207/photoessay/7.html> (last visited Dec. 4, 2008).

labeled by the New York Times as “the nation’s most influential evangelical leader.”²⁰⁴ As part of his evangelical work on his website, Dr. Dobson posts monthly letters addressing various social issues.²⁰⁵ In his letter of June 2006, entitled *Education Turned Perversion, Dr. James Dobson Warns of A “Grand Strategy” To Entrap Our Children*,²⁰⁶ Dr. Dobson stated, “All the ranting and raving about ‘tolerance’ is a ruse. The real purpose here is to promote [homosexuality, transexuality, and bisexuality] ‘lifestyles’ among the young. Hence, the fate of California's children, and by extension, the children of the nation, hangs in the balance.”²⁰⁷ With a highly influential leader of a large portion of America’s Christian population²⁰⁸ decrying the morality of transgender teachers, it is likely that the perception of a negative role model is, and will remain, a prevailing community opinion. However, it may not be the dominant view.

Interestingly, several bloggers also stated that they would not want their children exposed to a transgender teacher because it would create an uncomfortable situation for the parent. For example, one parent-blogger stated, “As a parent, one of my most favorite ways of spending time with my kids is laying in bed talking with them just before they go to sleep. My children are bright and rather inquisitive and I find that this is the time for their most heartfelt and poignant questions of the day. I would much rather spend that time answering questions pertaining to their faith, family, or friends, etc. then trying to explain why Ms. Whoever wants to become Mr.

²⁰³ Focus on the Family, http://www.focusonthefamily.com/about_us/profiles/dr_james_dobson.aspx (last visited Dec. 2, 2008).

²⁰⁴ David D. Kirkpatrick, *Evangelical Leader Threatens to Use His Political Muscle Against Some Democrats*, NEW YORK TIMES, January 1, 2005, <http://query.nytimes.com/gst/fullpage.html?res=9B00E3DF1539F932A35752C0A9639C>.

²⁰⁵ Dr. Dobson’s Study, <http://www2.focusonthefamily.com/docstudy/> (last visited Dec. 2, 2008).

²⁰⁶ Dr. Dobson’s Monthly Letters, <http://www2.focusonthefamily.com/docstudy/newsletters/A000000293.cfm> (last visited Dec. 2, 2008).

²⁰⁷ *Id.*

²⁰⁸ *The 25 Most Influential Evangelicals in America*, *supra* note 202.

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Whoever or visa versa (sic).”²⁰⁹ This person, and others like her, unabashedly stated her anger at transgender teachers for creating a situation that made the parents uncomfortable. However, other bloggers merely voiced their uncertainty as to how to explain the change in a teacher.²¹⁰

On the other end of the opinion-spectrum are those who believe that a teacher’s status as a positive role model is not contingent on whether he or she is a transgender person.²¹¹ “It’s the person that matters in the classroom. Not the gender of the teacher.”²¹² This view was echoed throughout the blogs and comments surveyed for this paper.²¹³ Many people also went further to assert that transgender teachers are actually positive role models, reinforcing the “important lessons on life....acceptance, compassion, and respect. This teacher probably felt they didn't fit in their "body" their entire life and has finally been able to feel complete. How many kids go through their entire schooling feeling uncomfortable with some aspect of their life and are given hope by this teachers decision. Sometimes just knowing that you have a choice, and being different is accepted is ENOUGH!”²¹⁴

Several people also made the point that parents should be the role models for their children—teaching acceptance and tolerance at home.²¹⁵ One person stated, “I’d suspect that this

²⁰⁹ Posting by to texmom2 to Netter, *supra* note 189 (October 17, 2008); “...how devastatng (sic) for the parents...” Posting by policewife1 to KSDK.com, *supra* note 189 (October 16, 2008, 5:33 PM).

²¹⁰ “I think that would be extremely difficult to explain something like that to an elementary school-aged child.” Posting by AAAA to This Is Mudvayne, *supra* note 195 (October 17, 2008, 12:41pm).

²¹¹ “There’s really nothing to fear because a person is transgender,” said Karina Mari, a mother of three school-age children who said she has transgender relatives.” John Curran, *District OKs transgender teacher’s return*, gay.com, Feb. 28, 2006, <http://www.gay.com/news/article.html?2006/02/28/3>.

²¹² Brenner, *supra* note 189.

²¹³ “Frankly, the only thing I would care about is whether Clark is a good teacher.” Posting by Eleonora27 to Netter, *supra* note 189 (October 16, 2008); “Was the teacher doing their job well? If so, why is this an issue?” Posting by trainingpro4u to KSDK.com, *supra* note 195 (October 15, 2008, 12:13 PM CDT).

²¹⁴ Posting by pinkdeer to KSDK.com, *supra* note 189 (October 16, 2008, 7:28 AM CDT).

²¹⁵ “I strongly believe in teaching tolerance and acceptance of everyone starting at a young age. Do I have a problem with my son’s preschool teaching him to accept gay people? Not at all, because I know that it wouldn’t be the only thing that he would be learning about.” Posting by mommytotwo to <http://parenting.families.com/blog/homosexual-agenda-being-promoted-in-schools> (August 31, 2006, 04:43PM); “Both Ogden and Lostak said that for the kids who were pulled out of Clark’s class, it’s the parents who are upset, not the children.” Netter, *supra* note 189; “Education needs to start at 2 and 3 years old. Answering a child’s question in an age appropriate way is how you keep communication open and ensure that your children, as they grow, will continue to ask questions. Ignoring questions

would be less of a problem for the children than the parents as kids that age tend to accept things without the weight of preconceptions that you pick up with age.”²¹⁶ Another stated, “[expecting] someone else to remain in a way that makes you feel most comfortable and avoid discussing the issue with your child directly is incredibly selfish and cruel.”²¹⁷ Furthermore, a few people noted that children are more able than adults to simply accept what they are presented with and not be so confused and afraid.²¹⁸

Finally, many people made the argument that transgender teachers would actually be positive role models. There are those who feel that transgender teachers would be positive role models in general, teaching children about tolerance and acceptance,²¹⁹ and there are those who believe that there is a need for positive transgender role models for transgender youth.²²⁰ Several studies have shown that transgender youth are at a higher risk for drug use,²²¹ homelessness,²²² prostitution,²²³ and suicide.²²⁴

will only make them more curious and less likely to ask a question in the future.” Posting by August66 to KSDK.com, *supra* note 190 (October 16, 2008, 1:21 PM CDT).

²¹⁶ Posting by Bladensburg to Military.com, *supra* note 196 (October 15, 2008, 12:27 PM).

²¹⁷ Posting by ctygrl to KSDK.com, *supra* note 195 (October 16, 2008, 12:12 PM CDT).

²¹⁸ “But Scott Rodas, whose son is a third-grader in Eagleswood, said McBeth's hiring ‘should have been a no-brainer. We should give enough credit to our children to know that someone like this isn't going to hurt them.’” Wayne Perry, *Schools Adjust to Transgender Teachers*, ASSOCIATED PRESS, <http://phobos.ramapo.edu/~jweiss/ap2.htm>.

²¹⁹ *Ambach*, 441 U.S. at 79.

²²⁰ See e.g., Amanda Kennedy, *Because We Say So: The Unfortunate Denial of Rights to Transgender Minors Regarding Transition*, 19 *Hastings Women's L.J.* 281 (2008); Barbara Fedders, *Coming Out For Kids: Recognizing, Respecting, and Representing LGBTQ Youth*, 6 *Nev. L.J.* 774 (2006); Carlo A. Pedrioli, *Lifting the Pall of Orthodoxy: The Need for Hearing a Multitude of Tongues In and Beyond the Sexual Education Curricula at Public High Schools*, 13 *UCLA Women's L.J.* 209, 209-210 (2005) (“High school is a difficult time for many young adults, but it is especially difficult for sexual minorities who struggle with the added burden of not fitting into a heteronormative culture.”).

²²¹ Kennedy, *supra* note 220, at 28.

²²² Fedders, *supra* note 220, at 789.

²²³ Kennedy, *supra* note 220, at 285.

²²⁴ “‘If you refuse [to help] me, all I will have left is suicide . . . I am a gay teen. When my friends found out, they all disowned me. Some even come (sic) together to beat me up. I am not afraid or ashamed to say that I have never hurt or cried as much as I am doing right now. I am so alone. Even my father will have nothing to do with me. My mother does not know, and I plan to keep it like that for as long as I can. Right now she is the only person talking to me. You guys are my only hope. I beg of you to help.’” Pedrioli, *supra* note 228, at 210-211, quoting a letter from a transgender teenager, cited in Chris Bull, *Suicidal Tendencies: Is Anguish over Sexual Orientation Causing Gay and Lesbian Teens to Kill Themselves?*, *Advocate*, Apr. 5, 1994, at 34, 42.

4. Application of the Role Model Theories to Transgender Teachers

a. Judicial Theory

As stated above, the judicial construct of the Role Model Theory proposes a three-prong test.²²⁵ The first prong requires an assessment of the primary purpose of a school. In the simplest of terms, it can be said that the purpose of a school is to provide academic and social education to children.²²⁶ The second prong asks whether a teaching position depends on being a positive role model for children. The discussion *supra*²²⁷ of societal views of teachers clearly concluded that teachers are expected to be positive role models for children. However, what is left inconclusive is whether transgender people are positive or negative role models for school children. There appear to be strong arguments on either side of the coin. However, as the judicial Role Model Theory is an off-shoot of the BFOQ, it is subject to the same limitations, and therefore the Role Model Rule cannot be based on community attitudes.²²⁸ Therefore, any adverse employment action taken under the umbrella of the Role Model Rule would have to be done by assessing individual character traits divorced from being transgender.

The third prong of the judicial Role Model Rule asks whether there are any reasonable alternatives to discrimination. Several bloggers and commentators suggested that a teacher who transitions should be transferred to another school.²²⁹ While this may be a feasible approach, and some teachers may prefer this option, it is an approach that is grounded in community attitudes

²²⁵ See *supra* pt. III(A)(1).

²²⁶ It is the “preparation of individuals for participation as citizens.” *Ambach*, 441 U.S. at 76.

²²⁷ *Supra* pt. III(B)(3).

²²⁸ “[A] standard based on community attitudes cannot be applied consistently. Community attitudes are difficult to measure, they vary from community to community, and they change over the course of time.” *Thompson*, 541 N.W.2d at 186; see also *Vigars*, 805 F.Supp. at 808 n.4.

²²⁹ “This caring teacher should have transferred to another school if he/she was truly sincere about teaching children and not obsessed, tee hee, with her wonderous (sic) sex change.” Posting by Joyce Buckley to <http://www.parentdish.com/2008/10/17/transgender-teacher-has-parents-upset/#comments> (Oct. 18, 2008, 12:59 PM); “People not knowing, and protecting the children, isn't part of the plan. Otherwise, the teacher would have requested a transfer. Desensitizing kids and making transgenderism (sic) 'normal' to young children (I'M a tranny (sic), maybe YOU'RE one, TOO!!) is the plan.” Posting by informavoracious to FreeRepublic.com, *supra* note 190 (October 16, 2008, 2:01:57 PM).

and a fundamental belief that a transitioning transgender teacher would not be a positive role model. And, as stated, this violates of the BFOQ.

Therefore, it does not appear that school boards can ground an adverse employment action against a transgender person under the guise of the judicial Role Model Theory.

b. Statutory Construct

Due to the inherent vagueness of “immorality” in state statutes, courts have dictated their own standard for determining immorality²³⁰—it must be conduct that renders the teacher unfit to teach.²³¹ To assess whether a teacher is unfit to teach, the courts make a factual determination of several factors, and it must be done without influence of parental and community attitudes.²³²

The first prong asks whether it is likely that the teacher’s conduct may adversely affect students.²³³ One argument that there may be an adverse affect is that a teacher’s transition may confuse children, resulting in unnecessary stress.²³⁴ However, this is not a very strong argument. In response, it can be argued that “being confused (1) is a part of life and (2) not a terrible thing! It’s all part of the learning experience.”²³⁵ In fact, it can be a great opportunity to teach children about acceptance, tolerance, and the overall complexity of human existence.²³⁶ Furthermore, it can be argued that children rebound from confusion much easier and much quicker than

²³⁰ Amber Fischer, “*Immoral Conduct*”: *A Fair Standard for Teachers?* 28 J.L. & Educ. 477, 478 (1999).

²³¹ *Supra* pt. III(B)(2).

²³² *Supra* pt. III(B)(2).

²³³ *Thompson*, 483 F.Supp. at 1182; *Morrison*, 461 P.2d at 386-387.

²³⁴ “This kind of situation could be very confusing to kids this young and parents should have had a chance to talk to their children before-hand.” Posting by tdw79 to KSDK.com, *supra* note 195 (October 16, 2008, 7:03 AM CDT); “[T]he teacher should have a little more respect for the students and parents and request that he/she be moved to another school so that the students would not be subject to such a confusing thing as to why their girl teacher became a boy teacher, just my opinion.” Posting by banker2008 to KSDK.com, *supra* note 189 (October 16, 2008, 12:55 PM CDT).

²³⁵ Posting by aps to DebatePolitics.com, *supra* note 196 (October 17, 2008, 07:22 AM).

²³⁶ “The teacher left in the summer a woman and came back in fall a man and nothing was discussed with ELEMENTARY aged children?! What an opportunity lost for communication.” Posting of lynn to Feminocracy, *supra* note 194 (October 16, 2008 at 2:48 pm).

adults.²³⁷ Therefore, being a transgender teacher, without evidence of prior disciplinary problems, is not sufficient to render the teacher unfit to teach.²³⁸

The second factor may pose more of a problem for transgender teachers. It looks to whether “community reaction will be so adverse to plaintiff to make her ineffective in the classroom and thus unfit to teach.”²³⁹ This consideration requires a very high degree of adversity, “The mere fact that some parents may have an adverse attitude towards plaintiff is not sufficient evidence in the Court's view to demonstrate that an attitude would prevail in the classroom that would undermine the learning environment.”²⁴⁰

It is clear from news stories reporting that teachers pulled their children from the teacher's class,²⁴¹ as well as parent postings on blogs,²⁴² that there is adversity when a teacher transitions. However, there are also several reports of students, parents, and other teachers standing up for their transgender teacher.²⁴³ The second factor requires a showing, however, of such a high degree of parental adversity that would prevent the teacher from being effective. In the reported news stories, no school district has determined that such an extreme point has been reached. Therefore, this factor is almost too tenuous to determine at present.

²³⁷ “Now that I've had time to think about this, I agree with some others on here that the kids can handle it better than the adults can. Making a huge deal out of it is the worst thing that can be done for the kids.” Posting by rwsmith29456 to Netter, *supra* note 189 (October 16, 2008); “For the first year or two of school, half the time kids accidentally call the teacher he/she anyway. All they care about is getting the attention of the teacher, not obeying the grammatical & syntactic rules of the English language. The only way it could harm the children is if everyone starts making a big deal about it - oh that's what they're doing. Idiots.” Posting by haroldboot to Netter, *supra* note 189 (October 17, 2008).

²³⁸ *Thompson*, 483 F.Supp. at 1182.

²³⁹ *Id.* at 1183.

²⁴⁰ *Id.*

²⁴¹ *See e.g.*, *Feminocracy*, *supra* note 194; Netter, *supra* note 189.

²⁴² “Leave your body the way it was created. This is just sick. I would have pulled my child as well. Should we go on teaching our child that it is perfectly ok to have a sex change because he/she feels a little out of place? Wouldn't it be better to teach our kids to cope with the problem rather than opt for surgery to fix it? BTW Baxter, they aren't (sic) chastized (sic) for being who they are, they are being chastized (sic) for being someone they are not.” Posting by STLCardsPhan to KSDK.com, *supra* note 189 (October 16, 2008, 9:58 AM CDT).

²⁴³ “‘I don't see how this is an issue, honestly, because he's a totally competent teacher and I don't see how that could have changed,’ said student Leandra Bourdot, 17.” *Community Divided*, ABC News, Mar. 3, 2006, <http://abcnews.go.com/GMA/story?id=1682922&page=1>; *See*, BNET, *Transsexual teacher's ouster sparks student protest*, The Advocate, Nov. 9, 1999, http://findarticles.com/p/articles/mi_m1589/is_1999_Nov_9/ai_57155911.

Transgender Teachers as Role Models for a Tolerant Society

The third factor requires consideration of the proximity or remoteness in time of the teacher's transition. Application of this factor shows the arbitrariness of firing on the basis of gender identity—it essentially says that if one teacher transitioned ten years ago and another teacher last year, the latter teacher may be terminated, while the former may not. This arbitrariness is impermissible discrimination.

The fourth factor looks at the intent behind the conduct. This factor speaks to the viewpoint held and promoted by Dr. Dobson,²⁴⁴ that “[t]he real purpose [of transgender teachers] here is to promote sexual ‘lifestyles’ among the young.”²⁴⁵ As explained above,²⁴⁶ Gender Identity is not a choice; it is an inherent “internal, personal sense of being a man or a woman (or a boy or girl).”²⁴⁷ Further, in a case of a school board dismissing a homosexual teacher,²⁴⁸ the court stated that not only does the teacher have a right to privacy, but he has a *duty* of privacy.²⁴⁹ This duty prohibits a teacher from speaking to children about his sex life, or other personal matters.²⁵⁰ However, outside this duty and absent factual evidence of attempts to actively promote transitioning in unwilling children, or other nefarious acts, merely being a transgender teacher is not sufficient to render the teacher unfit to teach.

The final factor asks whether an adverse action taken against a transgender teacher would have a chilling effect upon the rights of either the teacher involved, or any other teacher. For example, this would occur if the teacher in question were discharged in violation of the Due Process Clause of the 14th Amendment.²⁵¹ However, this would not occur if the teacher involved claimed a violation of his or her right to privacy, because one cannot expect the same level of

²⁴⁴ See *supra* pt. III(B)(3).

²⁴⁵ Dr. Dobson's Monthly Letters, <http://www2.focusonthefamily.com/docstudy/newsletters/A000000293.cfm>.

²⁴⁶ See *supra* pt. I.

²⁴⁷ GLADD, *Transgender Glossary of Terms*, *supra* note 24; ACLU, *Transgender Terminology*, *supra* note 39.

²⁴⁸ *Acanfora v. Bd. of Ed. of Montgomery County*, 359 F.Supp. 843, 855 (D.C. Md., 1973).

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ U.S. Const. amend. XIV, § 1.

privacy in the workplace as in the home.²⁵² Furthermore, any violation of Title VII, or state or local anti-discrimination laws, would clearly have a chilling effect upon the rights of both the teacher involved and other teachers. Therefore, it is likely that any adverse action taken against a teacher simply for being transgender will have a chilling effect upon that teacher's rights.

IV. Conclusion

While courts appear to be interpreting Title VII's "sex" broadly, and more Appellate Courts are interpreting "sex" to include gender identity, the Supreme Court has yet to rule on the issue. However, it is equally important to recognize the rate at which states, counties, and cities are enacting their own trans-inclusive anti-discrimination laws.

This article began by describing a case where two women were denied employment simply because they were single mothers. When that case was decided thirty-five years ago,²⁵³ society classified unwed mothers as possessing an "irredeemable moral disease," and labeled them poor role models.²⁵⁴ The archaism of this reasoning is clear today, but in 1975 it was conventional thought. Thus when considering who or what a role model is, it is important to remember that "conduct socially acceptable today may be anathema tomorrow."²⁵⁵

²⁵² See e.g., *Vega-Rodriguez v. Puerto Rico Tel. Co.*, 110 F.3d 174 (1st Cir. 1997).

²⁵³ *Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611 (5th Cir. 1975).

²⁵⁴ *Id.* at 615.

²⁵⁵ *Morrison v. State Bd. of Educ.*, 461 P.2d 375, 384 (Cal. 1969).