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**TRANSGENDER IDENTITY, TEXTUALISM, AND THE SUPREME COURT: WHAT IS THE “PLAIN MEANING” OF “SEX” IN TITLE VII OF THE CIVIL RIGHTS ACT OF 1964?**

**Jillian Todd Weiss [FN1]**

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Introduction: “Sex” Discrimination and Transgender Employees

Title VII of the Civil Rights Act of 1964 (“Title VII” or the “Act”) prohibits discrimination based on race, color, religion, sex, or national origin. Federal courts have been called upon to decide whether the Act's prohibition against sex discrimination forbids discrimination based on transgender identity—gender identity or expression that does not conform to the social expectations for one's sex assigned at birth. These cases call into question the default assumptions about sex, such as the notion that sex is a simple matter of biological difference. Because of these assumptions, however, many courts have decided that transgender identity falls outside the prohibition against sex discrimination. The Seventh, Eighth, Ninth, and Tenth Circuits have ruled that discrimination because of transgender identity does not constitute discrimination “because of sex.” District courts in the Fourth and Fifth Circuits have ruled similarly. However, as discussed below, some federal courts have now ruled that, in many circumstances, transgender discrimination can be categorized as Title VII sex discrimination. In fact, no less an authority than the U.S. Equal Employment Opportunity Commission has stated that transgender employees are eligible for Title VII protection. Because of this conflict among federal courts, this matter may soon be ripe for United States Supreme Court adjudication. That adjudication will probably hinge, as discussed below, on the meaning of the term “sex.”

In decisions on this issue, the first of which came down in 1972, most courts have applied the canons of statutory interpretation narrowly, construing the term “sex” to mean “anatomical sex,” and relying heavily on legislative intent. These courts have reasoned that Congress would have been explicit in the legislative history if it had intended sex to include transgender identity. Congress's failure to do so is a signal that the intent of Congress in 1964 was to restrict the term sex to its plain meaning. Since the plain meaning of the word is one's anatomical status as a natal male or female, it does not refer to discrimination based on transgender identity. Therefore, employment discrimination based on transgender identity is not discrimination “because of sex,” as meant by Title VII.

Courts have used this type of reasoning to deny transgender employees' claims with remarkably little change over the last four decades. However, while the type of reasoning has remained the same, the specifics of the argument and reasoning have undergone a surprising, albeit subtle, transformation. In a recent Tenth Circuit opinion, Etsitty v. Utah Transit Authority, the court reasoned:

In reaching this conclusion, this court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII. (“[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”). Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of “sex” encompasses anything more than male and female. In light of the traditional binary conception of sex, transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual. Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female.

In this new version of the old argument, the Etsitty court specifically disavowed the use of legislative intent, the mainstay of the reasoning of prior court decisions. Instead, it relied solely on an analysis of the current meaning of sex and rejected the idea that legislative intent had anything to do with its decision. This is surprising because the court thereby declined to use the main reasoning that would have allowed the court to rely on the safe harbor of stare
decisis. This rhetorical shift essentially unmoored the meaning sex in Title VII from legislative intent. In this view, the issue in a Title VII case brought by a transgender plaintiff is not what the term “sex” meant in 1964; the issue is what it means now. Why would a court abandon the reasoning that has been so successful in the past? The answer is that, as discussed below, a major shift in judicial philosophy threatens the success of that reasoning. [FN25]

In rejecting the importance of legislative intent, the Tenth Circuit recognized that the current Supreme Court Justices are far less interested in legislative intent than prior Justices have been. [FN26] In Etsitty, the court used the words of Justice Scalia, quoting: “'[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'” [FN27] This is a significant change from the past forty years. Previously, the Supreme Court statutory interpretation relied heavily upon legislative intent to determine the meaning of words in a statute. [FN28] In contrast, several current Supreme Court Justices adhere to the judicial philosophy of textualism, believing that judges must not interpret words based on anything outside the text. [FN29] It is not the intent or *578 understanding of Congress that controls statutory interpretation, but the plain meaning of the words themselves. [FN30] Understanding this philosophy is crucial to understanding how the Etsitty court ruled and how the Supreme Court would rule if faced with a similar case.

The Tenth Circuit clearly was trying to assert a textualist basis, as evidenced by the quote from Justice Scalia’s opinion. However, the attempt to do so was a failure from the standpoint of textualist philosophy itself. The court tried to cover its rhetorical tracks by suggesting that the shift from legislative intent to plain language made no difference in the case. [FN31] “Sex” means now, as it meant in 1964, only the traditional binary conception of male and female anatomy. [FN32] The court claimed that the meaning of sex has not changed since the law was written more than forty years ago. [FN33] If this is true, then the reasoning used by courts since 1972 to refuse relief to transgender plaintiffs is still valid. If it is not true, then the old reasoning is in doubt, opening the door for arguments from transgender plaintiffs that the Supreme Court may be inclined to consider. In this Article, I specifically focus on the historical progression of the meaning of sex and the place of that meaning in Title VII. While many arguments can be made for and against textualist jurisprudence, [FN34] this Article does not debate textualism. Nor does it enter into the doctrinal or policy debates about whether transgender plaintiffs should receive protection. [FN35] Rather, I concentrate solely on the history and meaning of the *579 term sex within a textualist understanding of Title VII and as applied to transgender plaintiffs.

The main difficulty with the Tenth Circuit’s reasoning in Etsitty--that the meaning of sex has not changed--is that there are many events and trends in the past forty years that have affected our understanding of sex: the invention of the birth control pill; the sexual revolution; the increasing percentage of women in the workforce; the solidification of constitutional rights to marriage, contraception, abortion, and gay sex; the AIDS crisis; gay rights; civil unions; and same-sex marriage. The Supreme Court has interpreted the term “sex” in Title VII in a way that demonstrates a changing of its meaning. Over time, the Supreme Court has issued rulings broadening the meaning of sex in Title VII to include discrimination against males as well as females, [FN36] “verbal or physical conduct of a sexual nature,” [FN37] use of stereotypes of male or female behavior, [FN38] and same-sex sexual harassment. [FN39]

A number of courts around the country have written opinions suggesting that Title VII now includes transgender employees because of changes in our understanding of the term “sex.” In Smith v. City of Salem, [FN40] the Sixth Circuit ruled that Title VII protected a transgender plaintiff from sex discrimination. [FN41] The First [FN42] and Ninth [FN43] Circuits have given indications that they might rule similarly. *580 District courts in the Second, [FN44] Third, [FN45] Fifth, [FN46] Seventh, [FN47] and D.C. Circuits [FN48] have ruled in favor of transgender plaintiffs in Title VII sex discrimination cases. The outcome of these cases suggests that sex refers to more than the traditional binary distinction of sex that it once connoted. A review of the historical progression of the term “sex” demonstrates that it now includes elements of gender [FN49] and gender identity. [FN50]
This Article will review the meaning of sex and transgender in a historical perspective in order to illuminate the question of whether sex as used in Title VII currently includes transgender plaintiffs from a textualist perspective. Section I discusses the meaning of transgender, Section II discusses the meaning of sex, Section III discusses the history of transgender plaintiffs in Title VII cases, and Section IV discusses how the current Supreme Court might view the interaction of these words in light of the philosophy of textualism.

*581 I. The Meaning of “Transgender”

A. Defining “Transgender”

As with so many words defining matters touched by social change, the term “transgender” has come to mean something different from what it originally described. When it was originally created in the 1980s (as “transgenderist”), it referred to those who lived in a sex role different from their sex assigned at birth, but who did not opt for medical or surgical intervention. [FN51] In other words, transgender described someone who retained his or her original anatomy, but who used gender expressions, such as dress, grooming, and voice, to live in a different sex role. [FN52] It was coined in distinct opposition to the term “transsexual,” which at that time referred to someone who sought medical and surgical intervention to achieve sex reassignment. [FN53] While to the uninitiated these terms might seem similar, the natures of these identities are quite distinct. In order to determine their relationship with the term “sex” as used in Title VII, it is imperative to understand their significant differences in connotation, which requires a brief history of their etymology.

1. Homosexuals and Transvestites

In 1864, the German sex researcher Karl Heinrich Ulrichs created the term “urning” to refer to men who constituted a “third sex.” [FN54] In prior centuries, it was believed that anyone could be led astray, rather than a distinct subgroup of people who had inclinations towards same-sex relations. [FN55] Ulrichs, who considered himself an urning, theorized that these men were similar to hermaphrodites, [FN56] though in a psychological, rather than physical sense. [FN57] In 1868, Hungarian writer Karl-Maria Kertbeny, who disagreed with Ulrichs’ theory, coined the term “homosexual” to refer to men who had the inborn and unchangeable desire for *582 same-sex romantic partners. [FN58] While Ulrichs’ term cast a wider net, Kertbeny’s narrower term became the preferred one. In 1910, Dr. Magnus Hirschfeld, a German sex researcher, came up with a different term, “transvestism,” to distinguish men who crossdressed in female clothing from homosexuals. [FN59] Hirschfeld’s group of transvestites consisted of both males and females, with heterosexual, homosexual, bisexual, and asexual orientations. [FN60]

These identities, as conceived at that time, could be diagramed as follows:

Circa 1910

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*583 2. Transvestites and Transsexuals

While transvestism was a phenomenon primarily defined by clothing choice, it was clear to Hirschfeld at the time he coined the term that those defined as transvestites had different meanings attached to their crossdressing. [FN61] Some did so for pleasure (both erotic and non-erotic), to attract romantic partners, or for work (as female impersonators in the theater, as women engaged in male occupations, or as prostitutes). [FN62] Others, however, felt that their clothing choices were dictated by their inner cross-gender identity. [FN63] Hirschfeld first mentioned “psychological transsexual-
ism” (“seelischer transsexualismus”) in 1923. [FN64] This new term did not refer to medical or surgical intervention because there were no such techniques available at that time. [FN65] Rather, this new term allowed identification of a subgroup that wore their gendered identity not only on the outside, but also on the inside. [FN66] There were other subgroups within the transvestite category, but the scientific community did not distinguish them. These subgroups were known by various informal names in different communities, such as drag queens (in the gay community) [FN67] and two-spirit people (in certain Native American tribes). [FN68] There were and are dozens of such informal groupings. [FN69] The term “transsexual” did not become widely used, however, until popularized by the books of Dr. Harry *584 Benjamin [FN70] and Christine Jorgensen [FN71] in the 1960s. The new term's place in the taxonomy could be diagramed as follows:

Circa 1965

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*585 3. Transsexuals and Transgenders

The preceding diagram quickly became inaccurate because of a series of developments. When the story of Christine Jorgensen was published in 1951, debates began about whether she was properly classified as homosexual or transsexual. [FN72] In the first case study of Jorgensen, published in 1951 by her endocrinologist, he referred to her “homosexual tendencies.” [FN73] Jorgensen herself, however, specifically distinguished her condition from homosexuality, referring to the prevalent theory of transsexuality as a mistake of nature in which a woman is trapped in a man’s body. [FN74] She took pains to distinguish her situation from “a much more horrible illness of the mind. One which, although very common, is not as yet accepted as a true illness, with the necessity for great understanding.” [FN75] This “horrible illness of the mind” is likely a reference to homosexuality. [FN76] In this way, Jorgensen, and many transsexuals of the time, attempted to avoid the severe mid-century stigma of homosexuality. [FN77] Jorgensen’s endocrinologist later changed his mind, deciding that Jorgensen's condition differed fundamentally from homosexuality. [FN78] Many other prominent scientists and doctors agreed, provoking intense controversy. [FN79]

Jorgensen’s story and the writings of Dr. Harry Benjamin suggested that the transsexual label should be reserved for those who wanted surgical intervention to assist them in sex reassignment. [FN80] The placement of this label in the taxonomy caused some confusion. Some continued to see this group as a subset of the homosexual group, while others considered it a severe form of transvestism. [FN81] The vast majority of transsexual people not only desired to reassign their sex, but also considered themselves members of that new sex. [FN82] Therefore, even if their sex assigned at birth was the same as that of their romantic partners, their new sex was now the opposite of that of their romantic partners, making them heterosexuals. Thus, in order to correctly understand the meaning of the transsexual identity, the transsexual group must be separated from the homosexual group. At the same *586 time, however, it must be recognized that many transsexuals prefer romantic partners of their new sex. [FN83]

There were also many people who had intense cross-gender feelings, so much so that they lived in the opposite sex role in a more permanent way, but did not desire sex reassignment surgery. [FN84] The latter group specifically disavowed the transsexual's persistent desire to change physical sex characteristics. [FN85] Nor would it be accurate to say that they dressed in the clothing of the opposite sex occasionally for personal enjoyment. [FN86] The term “transgender” was coined by Virginia Prince in the 1970s as a demarcation of a space separate from the transsexual category, [FN87] though its popular usage did not adhere to this fine distinction. People began to use transgender to refer to all types of cross-gender behavior. [FN88] This broader use of the term gained substantial ground in the academic world, when feminist scholars began to take the theoretical stance that greater social acceptance of deviations from traditional gender roles was an important goal. [FN89] The use of the term transgender began to gain a connotation of political unity among
people with types of cross-gender behavior previously seen as separate and unrelated. [FN90]

Further complicating the picture, a subgroup of transvestites emerged who were not homosexuals and wished to mark a separate identity outside of homosexual transvestites. [FN91] This group, known as crossdressers, contains self-proclaimed heterosexual males, sometimes with girlfriends and wives, who occasionally dress in female clothing, mostly in private or in private groups. [FN92]

*587 As a result of all this shifting, today's understanding of cross-gender behavior is much more complex and nuanced. As shown in the diagram below, the transsexuals, some of whom are homosexual and some of whom are not, are now considered entirely separate from the transvestites. Some transvestites are recognized as outside the homosexual group. Lastly, the transgender group, some of whom are homosexual and some of whom are not, contains transsexuals, transvestites, some homosexuals, heterosexual crossdressers and other identity descriptors, such as “genderqueer.” [FN93] It is a complicated framework, resulting from tensions within and between the scientific, medical, and trans communities in the United States and western Europe. [FN94] Other cultural groups and areas of the globe have their own frameworks, which are often in conflict. [FN95] In the United States, fragments of the older discourses are floating underneath the surface, ready to rise up and displace the carefully arranged islands of identity listed in this neat diagram. No definitive assertions are possible.

*588 Today

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*589 Today, “transgender” has taken on a different usage—as an umbrella term to denote transsexuals, transvestites, crossdressers, and anyone else whose gender identity or gender expression varies from the dimorphic norm. [FN96] Although, typically, male and female biological attributes go with certain distinct gender attributes, the correspondence is not certain. Some people have nontraditional gender identity or expression—male biological attributes are combined with “female” gender attributes, or female biological attributes are combined with “male” gender attributes. [FN97] The most widely known transgender identity/expression is that of post-operative transsexuals, who live in the opposite sex role from that of their birth and have received surgical and medical intervention to change their anatomical configuration to match that of the opposite sex. [FN98] Many people think of this identity when they hear the word transgender. This is, however, only one of many transgender identities. An employee’s gender identity categorization has become an issue when trying to decide whether a transgender employee is covered by Title VII.

Although many of the cases addressing nontraditional gender identities use medical terms, such as transsexual and transvestite, these terms presume a set of relationships between sex and gender that are not inherent in Title VII analysis. The statute specifically refers to discrimination “because of . . . sex,” not “because of transsexuality.” [FN99] The important issue for an employee seeking redress is whether sex is involved, not whether they are classified as a transsexual or a transvestite. [FN100] Many assume that there is a precise line marked by surgery dividing transvestite and transsexual. This is incorrect. Many of those who are classified as male-to-female transvestites have breast augmentation and facial feminization surgery. [FN101] Many of those who are classified as female-to-male transsexuals do not have phalloplasty. [FN102] The genitalia of a transgender person may or may not correspond to their gender. The actual state of the genitalia of a transgender person is, however, rarely at issue in the employment setting because employee genitalia are rarely uncovered. This is crucial to Title VII analysis because it demonstrates *590 that employers generally do not know the anatomical sex of their transgender employees. [FN103] Rather, they presume their sex from their gendered appearance, and this sex-derived presumption leads to the dismissal. [FN104]

It should be noted that transgender identity or expression is different from issues of the sexual orientation of lesbians,
gays, and bisexuals. Transgender refers to “gender identity or expression,” meaning “our own deeply held conviction and deeply felt inner awareness that we belong to one gender or the other.” [FN105] Transgender also refers to “gender expression,” the behavioral and social expressions traditionally engaged in by persons of a particular gender. [FN106] Transgender self-identification and self-expression does not correspond to the physical body in the usual way. In contrast, lesbian, gay, and bisexual individuals who are not transgender identify and express themselves as male or female according to their physical anatomy. The distinguishing characteristic of lesbian, gay, and bisexual identity is attraction to sex partners with the same anatomy (although bisexuals are also attracted to the opposite sex). In contrast to laws protecting transgender people, which often refer to “gender identity or expression,” laws protecting lesbians, gays, and bisexuals refer to “sexual orientation,” [FN107] which defines the sex of the individuals to whom one is emotionally and erotically attracted.

B. Defining Transgender In Law

As we have seen, transgender identity is complex. Thus, it is not surprising that courts and government agencies have had great difficulty understanding it. The rules for transgender people and their place in the legal hierarchy are far from uniform. There are no statutes or regulations that specifically state whether or when a person becomes legally male or female. No court in the United States has ever ruled that a person became legally male or legally female for all purposes. Thus, it cannot be said in any meaningful way that “I am now legally male,” or “I am now legally female.” One can truthfully say that a birth certificate, driver's license, or passport says “M” or “F,” but that is not the same thing. One can, at most, say that “for X purpose, I am now legally male.” Statements such as “I am now legally male” are a statement of opinion, rather than a statement of law. For example, the New York State Division of Motor Vehicles permits a change of sex on drivers' licenses with a note from a medical or mental health professional stating that the person is in the process of transition prior to sex reassignment surgery. [FN108] A change of birth certificate in New York City, however, requires proof of sex reassignment surgery. [FN109] Other legal authorities recognize a change of sex upon proof of various types of psychological, medical, and/or surgical changes. [FN110] The fact that sex has been changed for one purpose, however, does not mean that change will be recognized for other purposes or in other jurisdictions. For example, changing one’s sex on a birth certificate after sex reassignment surgery has not been recognized as a change of sex for purposes of marriage or the rights accruing to married persons. [FN111]

A recent case in which the courts were squarely faced with transgender identity received full appellate process, up to and including the United States Supreme Court, which denied certiorari, [FN112] is In re Estate of Gardiner. [FN113] J’Noel Gardiner was assigned to the male sex at birth. [FN114] She was diagnosed by mental health professionals with transsexualism, [FN115] lived successfully as the opposite sex, was administered cross-sex hormones and sex reassignment surgery, and changed her birth certificate, as authorized by state law, to reflect her female status. [FN116] On the authority of her changed birth certificate, she married her husband, Marshall *592 Gardiner. [FN117] When Marshall died without a will, Kansas law entitled J’Noel to half of his estate, valued at approximately $3 million. [FN118] However, Marshall’s estranged son, Joe Gardiner, contested the award of the spousal share of his father’s estate to J’Noel on the grounds that as a transsexual, she was not legally entitled to marry his father. [FN119]

Three levels of Kansas courts came up with three different rulings based on three different theorizations of transgender identity. [FN120] The trial court ruled that medical and surgical intervention does not change sex and awarded the entire estate to the son. [FN121] Although the plaintiff had followed the legal procedures permitting her to change her Wisconsin birth certificate, [FN122] the trial court rejected her constitutional claim that the Kansas court had to give full faith and credit to the Wisconsin birth certificate. [FN123] The case was appealed to the Kansas Court of Appeals, which reversed the lower court's ruling. [FN124] The court of appeals held that sex can be changed with certain medical, sur-
gical, and legal procedures and is not simply a matter of chromosomes at birth. [FN125] Therefore, it was possible that J'Noel Gardiner was female at the time of her marriage. [FN126] The appellate court remanded the case to the trial court with instructions to reconsider the issue based upon the court's conclusions and the legal and scientific research relied upon in reaching those conclusions. [FN127] However, prior to the trial court's rehearing of the case, the decedent's son appealed to the Supreme Court of Kansas. [FN128] The state's highest court ruled that the legislature intended the Kansas statute prohibiting same-sex marriage to define a woman as one with the “ability to 'produce ova and bear offspring’” [FN129] and possessing a “womb, cervix, or ovaries.” [FN130] The court ruled that *593 it is impossible to change sex for purposes of marriage, [FN131] and the change of birth certificate was not controlling. [FN132]

The contrary ruling of the Kansas Court of Appeals, that sex can be changed, [FN133] is based upon the theory that gender attributes impact a person's maleness or femaleness. [FN134] Specifically, the court noted a study finding that transsexuals have brain structures different from typical structures in people of the same birth sex. [FN135] The study concluded that male-to-female transsexuals have certain brain structures within the female range. [FN136] The court also addressed the issue of chromosomes, which typically differ between males and females, and situations of ambiguity in which chromosomes are atypical, cautioning against rigid sexual stereotypes:

If one concludes that chromosomes are all that matter and that a person born with “male” chromosomes is and evermore shall be male, then one must confront every situation which does not conform with such a rigid framework of thought. . . .


. . . .

‘The assumption is that there are two separate roads, one leading from XY chromosomes at conception to manhood, the other from XX chromosomes at conception to womanhood. The fact is that there are not two roads, but one road with a number of forks that turn in the male or female direction. Most of us turn in the same direction at each fork.’

“The bodies of the millions of intersexed people have taken a combination of male and female forks and have followed the road less traveled. These individuals have noncongruent sexual attributes.” [FN137] *594 The court reviewed various types of chromosomal and gonadal combinations, [FN138] questioning long-held assumptions about the legal definitions of sex, gender, male and female. [FN139]

The Kansas Supreme Court, however, rejected the reasoning of the court of appeals. [FN140] It disagreed with the idea of “crediting a mental component, as well as an anatomical component, to each person's sexual identity.” [FN141] The supreme court held that a woman is defined by her internal sexual organs, ova, chromosomes, and capacity to bear children, not by her mind. [FN142]

Webster's New Twentieth Century Dictionary (2nd ed. 1970) states the initial definition of sex as “either of the two divisions of organisms distinguished as male or female; males or females (especially men or women) collectively.” “Male” is defined as “designating or of the sex that fertilizes the ovum and begets offspring: opposed to female.” “Female” is defined as “designating or of the sex that produces ova and bears offspring: opposed to male.” . . .

A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to “produce ova and bear offspring” does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes. [FN143]

The major difference between the Kansas Court of Appeals opinion and the Kansas Supreme Court opinion is the definition of “sex.” [FN144] The Kansas Court of Appeals understood sex to be a changeable combination of biological and gender attributes. [FN145] The Kansas Supreme Court, however, understood sex to be solely a biological attribute fixed at birth. [FN146] The Kansas Supreme Court is not alone in this view. Appellate courts in Texas and Florida have
written similar opinions. [FN147] But *595 it is important to note that those opinions rely heavily on legislative intent. [FN148] If legislative intent is not followed, then the conclusions of these courts also fall into question.

Some states have specifically defined the term “sex” to include gender identity. For example, the California Government Code states as follows:

“Sex” includes, but is not limited to, pregnancy, childbirth, or medical conditions related to pregnancy or childbirth. “Sex” also includes, but is not limited to, a person's gender, as defined in Section 422.56 of the Penal Code. [FN149]

Interestingly, the cited section of the California Penal Code defines “gender” as a part of sex: “‘Gender’ means sex, and includes a person's gender identity and gender related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.” [FN150]

Recognizing that courts have different definitions of “sex,” some states and cities that wish to protect transgender persons from discrimination have used “gender identity” and “gender expression” in an attempt to more clearly demarcate the types of identities to which their non-discrimination statutes refer. [FN151] These *596 statutes generally define these terms as referring to one's identification or expression as male or female, whether or not that corresponds to one's sex assigned at birth. [FN152] As used in non-discrimination statutes, these terms mean that a person who was born male but identifies herself as a woman may not be discriminated against on that basis. The definitions do not make distinctions based on medical or surgical intervention. [FN153] The definitions are also broad enough to include other cross-gender identities within the transgender spectrum. The term “gender identity” is generally used in these statutes rather than transgender because including the term “transgender” would protect only gender identity that is trans, that is, crossing or combining genders. [FN154] The general trend in such statutes, however, is to include the general category, rather than the particular identity, historically subjected to discrimination. In other words, anti-discrimination statutes use the term race, rather than specific references to African Americans or Asian Americans, and use the term religion, rather than specific references to Catholics or Jews. [FN155] In the same way, gender identity, or sometimes gender identity or expression, is used to include the gendered characteristics of any person, not just transgender persons. [FN156]

These attempts to use gender identity to produce more clarity have not been completely successful. Courts have had some difficulty understanding gender identity. For example, in Goins v. West Group, [FN157] a male-to-female transgender employee was denied access to the women's bathroom. [FN158] The relevant state statute, effective in 1993, was the first in the country to explicitly protect transgender persons. [FN159] Although it does not use the term “gender identity,” it includes what is now recognized as the classic definition: “having or being perceived as having a self-image or identity not traditionally associated with one's *597 biological maleness or femaleness.” [FN160] The court, however, held that she was not female for the purposes of bathroom use. [FN161] Unsurprisingly, this result was based, like so many of the others, on reasoning from legislative intent. [FN162] The statute did not require access to the women's bathroom because of the “cultural preference” for sex-segregated facilities, and because there was nothing in the legislative history of the statute to indicate that the legislature intended to change it. [FN163] Relying on Goins, the same result was reached by a New York appeals court. [FN164]

These cases show that the courts have had a great deal of difficulty understanding transgender identity. The reasoning uniformly used to decide cases involving transgender identity is that legislatures were unaware of transgender identity and never meant to include it, and, therefore, courts cannot do so. If legislative intent is not followed, then the decisions of these courts fall into question.

II. The Meaning of “Sex”
A. Historical Development of the Term “Sex”

The Oxford English Dictionary shows the etymology of the term “sex”: it comes from the Latin sexus, a division or grouping, a variant of seco, to cut or divide. [FN165] Thus, the word itself merely refers to the division of species into two groups. Prior to the twentieth century, sex was used to describe the division of the human species into two groups. [FN166] As shown below, the word could not be used to refer to one specific physical or anatomical trait. [FN167] Rather, it was an essentialist reference to one's group affiliation, with concomitant physical, psychological, behavioral, and social characteristics. [FN168] The idea that physical sex characteristics were separate from social sex characteristics was unknown. [FN169] From our twenty-first century Western perspective, it may be hard to envision such a world, but it is necessary to understand the trajectory of the word. In its original conception, sex refers to one's membership in the male world or the female world. [FN170] It is similar to our modern conception of ethnicity. When we refer to African Americans, Hispanics, Germans, or other such identity descriptors, the reference inevitably carries a connotation of some identifiable characteristics of such groups. While contemporary society has condemned judging individuals on the basis of group characteristics, “German engineering” has such a clear meaning that it is used to sell automobiles and watches, and African American is connected with athletic ability, though Hispanic is not so connected (though there are many fine Hispanic athletes). In the centuries before stereotyping was condemned, our usage of male and female were also inextricably tied to certain social, psychological, and behavioral characteristics, now retained in words such as “mannelijk,” “womanish,” and “effeminate.”

Sex, originally a generic word meaning “group,” [FN171] came to refer to the differing characteristics of the two groups, which were seen as deeply and immutably divided into their respective physical and social categories. [FN172] The Oxford English Dictionary provides a quote from 1532, in which Thomas More talks about the “frail feminine sex” as a group: “I had as leve he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in love.” [FN173] Roughly translated, it means that the speaker would prefer that he feel somewhat charitable towards the frail feminine sex, rather than an intense love. The reference is to women as a group, and is clearly not a reference to biological characteristics. The “feminyne sex” is not talking about genitalia, nor could it be a reference to sex hormones or chromosomes, which would not be discovered until the early twentieth century. [FN174] It is, rather, a reference to the “feminyne sex” as “frayle,” a word referring to weakness in both a physical and moral sense. [FN175] The Dictionary also notes the uses of the term “female” as “the fair[er], gentle[er], soft[er], weak [er] sex, the devout sex,” and, in reference to the male sex, “the sterner sex.” [FN176] From these descriptions it is understood that one's sex meant one's group affiliation, not in an anatomical or psychological sense, but in an ontological sense. This sense of *599 sex as a constellation of physical, psychological, behavioral, and social attributes continued late into the nineteenth century.

This understanding of the term sex is found in American legal texts of that time. An 1872 quote from Justice Bradley, concurring in Bradwell v. Illinois, [FN177] brings this meaning into clear focus.

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . . [T]he domestic sphere [is] that which properly belongs to the domain and functions of womanhood . . . .

. . . The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator . . . .

The humane movements of modern society, which have for their object the multiplication of avenues for woman's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. . . . [I]n view of the peculiar characteristics, destiny, and mission of woman, it is within the province of the legislature to
ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the stern-er sex. [FN178]

Here we have a clear description of the far-flung constellation of physical, psychological, behavioral, and social characteristics that belong to sex. Mrs. Bradwell’s sex is not her genitalia, though that is what fits her for the “noble and benign offices of wife and mother,” but her group membership, which implies “timidity and delicacy,” [FN179] and lack of “energies and responsibilities,” [FN180] and “decision and firmness.” [FN181] There is no distinction between the physical and social here, nor is such a distinction possible in that world.

This essentialist understanding of the concept of sex as a constellation of physical, psychological, behavioral, and social characteristics rests upon three assumptions. First, it assumes that sex is dimorphic, having two different forms, male and female, which have distinct anatomical structures and biological functions. Second, each form has different physical characteristics. Males have larger musculo-skeletal systems and larger brains, and are by nature bigger, *600 stronger,* and faster than females. Third, each form has different psychological and behavioral characteristics. Males are loud, competitive, and aggressive; good in math, science, and engineering; good with tools; instrumental in communication style; emotionally restrained; and in possession of a strong or uncontrollable libido. To the contrary, females are quiet, cooperative, and submissive; nurturing; good with babies and cooking; expressive in communication style; emotionally unrestrained; and with a weak or repressed libido. Thus, “manly” describes someone who is strong, [FN182] whereas “womanish” describes someone who is weak. [FN183] It is this essentialist understanding that constituted the primary meaning of the term sex prior to the twentieth century, and well into it, and that the Civil Rights Act of 1964 seeks to displace in some areas, such as employment and education. [FN184]

B. Early 20th Century: Linking Sex and Character

In the early twentieth century, defining the term “sex” as a constellation of physical, psychological, behavioral, and social characteristics continued to hold sway, but the background understanding of this constellation began to change. Scientists began to find the biological bases of sex characteristics. Sex chromosomes were discovered in the early 1900s, [FN185] and the role of sex hormones was established in the late 1920s. [FN186] These discoveries discredited the dualistic assumption that men and women were two different types of human beings whose bodies were homologous. [FN187] Women were also being given more and more civil rights, including, in 1920, the right to vote. [FN188] While there was an increasing recognition that biological sex characteristics were structures distinguishable from social sex characteristics, the two nonetheless remained inextricably linked. It was difficult to discard the link between sex and character because biological and social sex characteristics always occurred together, and it was difficult to prove whether the social characteristics were a product of biology or society. The most prominent psychologists, sociologists, and anthropologists of the time promoted theories of structuralism and functionalism, which posited that basic human social structures, including sexual differences in character, are generated by their performance of certain necessary functions, such as child-bearing and child-rearing, without which society could not operate. [FN189] The feminist demands for equal rights seemed *601 ludicrous in light of the obvious empirical observations that men and women were not, in fact, biologically equal. [FN190] The idea that sex was merely an anatomical peculiarity with no relation to social, behavioral, and psychological roles would have been rejected out of hand.

Sigmund Freud was one of the first to offer an explanation of the inequality of men and women from the point of view of the newly developing science of psychology. In 1924, he famously wrote that “anatomy is destiny.” [FN191] He theorized that a young girl’s discovery that her genitals are not the same as those of little boys creates a sense of inferiority that prepares her for her role as a woman. [FN192] All informed discussions of sex differences during the next three
decades incorporated this understanding, and dissent from this viewpoint was deemed unthinkable. [FN193] To some, it is still unthinkable. Again we see that sex does not refer to genitalia, but to a complex of structures with different functions.

The female sex, too, develops an Oedipus complex, a super-ego and a latency period. . . . Here the feminist demand for equal rights for the sexes does not take us far, for the morphological distinction is bound to find expression in differences of psychical development . . . . A female child, however, does not understand her lack of penis as being a sex character; she explains it by assuming that at some earlier date she had possessed an equally large organ and had then lost it by castration. . . . The girl's Oedipus complex is much simpler than that of the small bearer of the penis, in my experience, it seldom goes beyond the taking of her mother's place and the adopting of a feminine attitude towards her father. . . . Her Oedipus complex culminates in a desire, which is long retained, to receive a baby from her father as a gift--to bear him a child. . . . The two wishes--to possess a penis and a child--remain strongly cathected in the *602 unconscious and help to prepare the female creature for her later sexual role. [FN194]

Whether one agrees with Freud or not, one can see that his use of the term “sex character” means that sexual biology is the determinant of one's psychical development and sex role. In so doing, he explained why individual psychological development and social sex roles are part and parcel of the term sex.

Around the same time, the idea of sex as a complex of characteristics was implicit in anthropologist Claude Lévi-Strauss' famous analysis of “culture” as an exchange of women among dominant males. [FN195] He famously analogized man to culture and woman to nature. [FN196]

But if, as we try to show here, it is true that the transition from nature to culture is determined by man's ability to think of biological relationships as systems of oppositions: opposition between the men who own and the women who are owned; opposition among the latter between wives who are acquired and sisters and daughters who are given away . . . then no doubt it could be said that “Human societies tend automatically and unconsciously to disintegrate, along rigid mathematical lines into exactly symmetrical units.” [FN197]

The idea expressed by Lévi-Strauss is that sex determines whether one is the “owner” or the “owned.” His anthropological explanation is intended to demonstrate an identity relation between biological sex and social sex role.

Talcott Parsons, the eminent Harvard sociologist who led the structural-functional movement, similarly distinguished the female role from the male role in his paper, Sex Roles in the American Kinship System:

The wife and mother is either exclusively a “housewife” or at most has a “job” rather than a “career.”

There are perhaps two primary functional aspects of this situation. In the first place, by confining the number of status-giving occupational roles of the members of the effective conjugal unit to one, it eliminates any competition for status, especially as between husband and wife, which might be disruptive of the solidarity of marriage. So long as lines of achievement are segregated and not directly comparable, there is less opportunity for jealousy, a sense of inferiority, etc, to develop. Secondly, it aids in clarity of definition of the situation by making the status of the family in the community relatively definite and unequivocal. There is much evidence that this *603 relative definiteness of status is an important [factor] in psychological security. [FN198]

Parsons used sociology, just as Freud used psychology and Lévi-Strauss used anthropology, to demonstrate how dimorphic social sex roles are a product of, and serve the interests of, a well-functioning society.

A dictionary from 1982 illustrates this older meaning.

Sex, n.
1. either the male or female division of a species, esp. as differentiated with reference to the reproductive functions.

2. the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. [FN199]

As the 1982 dictionary noted, “sex” means one of two divisions, which can also refer to all of the structural and functional differences between males and females.

In her award-winning book How Sex Changed, historian Joanne Meyerowitz discussed the meaning of sex as it was understood in the early twentieth century.

At the dawn of the century the word sex covered a range of phenomena. In popular and scientific formulations, sex signified not only female and male but also traits, attitudes, and behaviors associated with women and men and with erotic acts. . . . The desires and practices known as masculine and feminine seemed to spring from the same biological processes that divided female and male. All came bundled together within the broad-ranging concept of “sex.” [FN200]

As Meyerowitz explained, “sex” meant a bundle of traits, attitudes, and behaviors. [FN201] It did not mean sex chromosomes, physical sexual characteristics, or genitalia. However, after World War II, scientists, philosophers, and other thinkers would increasingly distinguish sex itself from the psychology, behaviors, and social structures surrounding it.

C. After the War: Delinking “Sex” and “Gender”

World War II created great changes in the United States. Because so many men had left to fight in the war, women were encouraged to and did take men’s roles, as the still-familiar image of “Rosie the Riveter” demonstrates. After the horrors and deprivations of the war, many people sought to return to “normal” life and gender roles, as illustrated by the popularity of television shows of the 1950s showing idealized domesticity, such as Ozzie and Harriet. Many women, however, had no wish to return to a world in which women were restricted to the domestic roles of wife and mother. Feminist scientists began to challenge Freud’s notion that “anatomy is destiny.” [FN202] They began to distinguish sex from character or gender. [FN203] There was, however, no word for non-physical sex-linked characteristics other than sex.

At the same time, the scientific positivism of pre-World War II began to give way to a postmodern consciousness, permitting sex to be viewed outside of the structural-functional paradigm. This new way of thinking proposed the notions that structure and function depended greatly on one’s point of view, that science did not presuppose any particular value system, and that scientific efficiency was suspect because it could cause harm. [FN204] Positivism was further undermined by the collapse of the colonial system, in which Western powers had sought to bring the scientific efficiency of Western civil administration to the “benighted” populations of Asia and Africa, with disastrous results to the colonized. [FN205] These developments brought changes to the scientific study of sex. The old view of sex as a fixed set of physical, psychological, behavioral, and social structures with corresponding functions, was being successfully challenged.

Margaret Mead was one of the scientists who challenged the structural-functional view of sex. [FN206] She was an anthropologist who used her knowledge of different human cultures to challenge the idea that sex has fixed characteristics.

In every known society, mankind has elaborated the biological division of labour into forms often very remotely related to the original biological differences that provided the original clues. . . . Sometimes one quality has been assigned to one sex, sometimes to the other. . . . Some peoples think of women as too weak to work out of
doors, others regard women as the appropriate bearers of heavy burdens, “because their heads are stronger than men’s. . . .” [W]e find this great variety of ways, often flatly contradictory one to the other, in which the roles of the two sexes have been patterned. But we always find the patterning. We know of no culture that has said, articulately, that there is no difference between men and women except in the way they contribute to the creation of the next generation; that otherwise in all respects they are simply human beings with varying gifts, no one of which can be exclusively assigned to either sex. [FN207]

Mead’s research showed that sex is not necessarily linked to social functions, and that qualities attributed to sex are, in fact, formed by culture. [FN208] This contradicted the positivist understanding of sex by delinking sex from the qualities attributed to it.

Another well-known writer and thinker of the time, Simone de Beauvoir, is often cited for this famous quote, in which she challenged the idea that sex naturally leads to certain qualities.

One is not born, but rather becomes, a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society; it is civilization as a whole that produces this creature, intermediate between male and eunuch, which is described as feminine. [FN209]

De Beauvoir attributed the linkage between sex and qualities to the effects of civilization, much as the post-colonialist thinkers and writers attributed second-class status of Third World countries to the same cause.

In 1955, John Money, a well-known sex researcher, coined a term for the psychological, behavioral, and social qualities that are attributed by society to sex: “gender role.” [FN210]

[T]he term gender role is used to signify all those things that a person says or does to disclose himself or herself as having the status of boy or man, girl or woman, respectively. It includes, but is not restricted to, sexuality in the sense of eroticism. [FN211]

His use of the word “gender” was interesting, for it was formerly a reference only to the division found in many languages that partitions nouns into two or three distinct categories, to which adjectives, and sometimes verbs, must conform. [FN212] There is no correlation between sex and grammatical gender. His use of the term, however, permitted a lexical dichotomy between the psychological, behavioral, and social qualities from the person’s sex itself. From then on, writers discussing sex could discuss these qualities separately by using the referent gender. For example, in a popular work on sex in 1963, the psychiatrist-author Alex Comfort used the term to explicitly describe the splitting between sex and gender in transgender individuals.

[T]he gender role learned by the age of two years is for most individuals almost irreversible, even if it runs counter to the physical sex of the subject. [FN213]

In 1972, sociologist Ann Oakley, picking up on this usage, wrote Sex, Gender and Society, in which she introduced the term “gender” into sociological discourse as a way of distinguishing the social treatment of men and women from the biology of sex. [FN214] “[S]ex differences may be ‘natural,’ but gender differences have their source in culture, not nature.” [FN215]

In 1975, anthropologist Gayle Rubin wrote an article deconstructing Freud’s “anatomy is destiny” dictum and Lévi-Strauss’s “man is to culture as woman is to nature” thesis. [FN216] The Traffic in Women: Notes on the Political Economy of Sex enriched the concept of sex by theorizing gender as a part of sex. [FN217] Rubin used anthropological examples to demonstrate that sex is a construct that includes both anatomy and psycho-social characteristics. [FN218] Psycho-social characteristics are not naturally dictated by biological sex differences, but the two components are part of a larger sex/gender system.
A woman . . . is no more the helpmate of man than gold in itself is money. . . . [Freud and Lévi-Strauss] provide conceptual tools with which one can build descriptions of the part of social life which is the locus of the oppression of women. . . . I call that part of social life the “sex/gender system,” for lack of a more elegant term. [FN219]

Rubin continued:

[Gender is] a socially imposed division of the sexes. It is a product of the social relations of sexuality. . . . The idea that men and women are more different from one another than either is from anything else must come from somewhere other than nature. Furthermore, although there is an average difference between males and females on a variety of traits, the range of variation of those traits shows considerable overlap. There will always be some women who are taller than some men, for instance, even though men are on the *607 average taller than women. But the idea that men and women are two mutually exclusive categories must arise out of something other than a nonexistent “natural” opposition. Far from being an expression of natural difference, exclusive gender identity is the suppression of natural similarities. [FN220]

Rubin went farther than the previous authors in distinguishing gender, for she explicitly called for a separation between sex and gender. She argued that male and female gender identities are naturally similar and suggested the dismantling of the sex/gender system. [FN221]

In 1990, Judith Butler, a professor of comparative literature at the University of California, wrote Gender Trouble, in which she explained the trouble caused by the emerging distinction between sex and gender. [FN222]

Originally intended to dispute the biology-is-destiny formulation, the distinction between sex and gender serves the argument that whatever biological intractability sex appears to have, gender is culturally constructed: hence, gender is neither the causal result of sex nor as seemingly fixed as sex. . . . If gender is the cultural meanings that the sexed body assumes, then a gender cannot be said to follow from a sex in any one way. Taken to its logical limit, the sex/gender distinction suggests a radical discontinuity between sexed bodies and culturally constructed genders. Assuming for the moment the stability of binary sex, it does not follow that the construction of “men” will accrue exclusively to the bodies of males or that “women” will interpret only female bodies. . . . When the constructed status of gender is theorized as radically independent of sex, gender itself becomes a free floating artifice, with the consequence that man and masculine might just as easily signify a female body as a male one, and woman and feminine a male body as easily as a female one. [FN223]

Under this formulation, a female-bodied person can correctly claim to be of male gender identity, and a male-bodied person can correctly claim to be of female gender identity. It is not entirely clear from the book whether Butler agrees with this formulation or not, though it is obvious that she is in sympathy with the aims of women’s liberation movements. The reader gets the impression that she is not explaining the trouble caused by the absence of gender as a concept, but by the formulation of the concept itself.

After a generation educated on the difference between sex and gender in colleges around the United States and in Western Europe, the distinction passed into popular language. The Oxford English Dictionary took pains to explain the difference between biological and social distinctions. Gender is social:

*608 Gender, n. . . .

In mod. (esp. feminist) use, a euphemism for the sex of a human being, often intended to emphasize the social and cultural, as opposed to the biological, distinctions between the sexes. [FN224]

Sex is biological:
Sex, n. . . .

The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned. [FN225]

The American Heritage Dictionary weighed in with its own usage note, explaining that gender refers to “sex-based categories.”

Traditionally, gender has been used primarily to refer to the grammatical categories of “masculine,” “feminine,” and “neuter,” but in recent years the word has become well established in its use to refer to sex-based categories, as in phrases such as gender gap and the politics of gender. This usage is supported by the practice of many anthropologists, who reserve sex for reference to biological categories, while using gender to refer to social or cultural categories. According to this rule, one would say The effectiveness of the medication appears to depend on the sex (not gender) of the patient, but In peasant societies, gender (not sex) roles are likely to be more clearly defined. This distinction is useful in principle, but it is by no means widely observed, and considerable variation in usage occurs at all levels. [FN226]

Transgender advocates have used this distinction between sex and gender to explain transgender identity as a separation between sex and gender. [FN227] A common formulation of this distinction is “sex is between the legs, and gender is between the ears.” Thus, one may be of the male sex, but with a female gender. Some go so far as to say that gender is a continuum between masculinity and femininity, with each person having their own individual gender. As explained by well-known transgender activist Nancy Nangeroni:

*609 In order to understand the difference between someone who is gay, lesbian, or bisexual, and someone who is transgender, you need to know the difference between sex and gender. Simply put, sex is polarity of anatomy, gender is polarity of appearance and behavior. As one gains familiarity with transgenderism, these definitions quickly break down, but they serve as a good starting point.

Most people think there are just two sexes, male and female. Such is not the case. People who are intersexed and people who are transsexual constitute sexes which are neither exactly male nor exactly female. (Some intersex people identify as trans; most do not) . . . .

Likewise, gender is not a simple case of “either/or.” Gender is exhibited by countless signals, from articles of clothing to cosmetics, hairstyles, conversational styles, body language and much more. . . .

Our gender “norms” are not symmetric. Women have won for themselves the right to a wide range of gender expression. Men have not made a corresponding effort. Most men live within a much narrower range of “acceptable” gender.

Though our culture tends to group characteristics into “masculine” and “feminine,” many people find some amount of gender transgression exciting, so there is some crossover between the two categories. Ultimately, gender is a “mix and match” mode of self-expression, and people within our culture are ever finding new ways to express their gender, with exciting subtleties and intriguing implications.

In general, it works best to think of all effects--sexual orientation, gender identity, sexual identity, and any others--as varying along a continuous spectrum of self-expression, rather than in just one of two or three ways. . . .

Gender Identity is how you see yourself socially: man, woman, or a combination of both. One may have a penis but prefer to relate socially as a woman, or one may have a vagina but prefer to relate as a man. One might prefer to be fluid, relating sometimes as a man and sometimes as a woman. Or one might not identify as either one, relating androgynously. [FN228]

Gender is an intentional psychological state as individual as personality, a mix and match mode of self-expression.
Gender has nothing to do with sex, which the author equated with physical anatomy. This post-modern understanding completely reverses the pre-modern meaning of sex. In the pre-modern understanding, sex was a constellation of physical, psychological, behavioral, and social characteristics, and gender did not exist. Now, sex is being limited to the physical anatomy, and gender is being limited to the psychological mindset. Thus, in this conception, sex and gender have been entirely delinked. [FN229]

Interestingly, federal courts addressing claims of sex discrimination have used the terms sex and gender interchangeably. Some federal judges are aware that there is a distinction in the usage, but many are not, and the law on the subject has made it impossible to recognize what the distinction might be or how it might affect Title VII law. [FN230] As will be discussed in the next Section, perhaps this is for the best. It is not only federal judges who are confused. The academic world has also created a conceptual mess on the subject because, in its rush to claim new conceptual territory, it has failed to understand the practical consequences of its radical disjunction between sex and gender.

D. The Sex/Gender Distinction: How Far Does It Go?

Some academics, contemplating the new gender theory, began to express concerns in the early 1990s that the sex/gender distinction had gone too far. They found problematic the bland assumption that the sex/gender distinction could do the work of dismantling systemic discrimination against women, and they also expressed concern that the complete dissociation of gender from sex would obscure the source of the discrimination. The idea that sex and gender are unrelated does free up gender from the domination of the two-sex model. However, it also makes it irrelevant because it privileges sex. For example, in 1990 anthropologist Shelly Errington argued that the distinction between sex and gender results in an understanding of sex as a purely natural phenomenon. “[I]t is rather difficult to imagine what the topic of ‘gender’ would refer to if it had no relation to sex. . . . [D]issociating sex and gender completely is not likely to clarify matters.” [FN231] Errington defined sex as

the whole complex of beliefs about genitals as signs of deeper substances and fluids and about the functions and appropriate uses of genitals; the assignment of the body into the category of “natural” (itself a culturally constructed category); and the cultural division of all human bodies into two mutually exclusive and exhaustive Sex categories. [FN232]

Errington also distinguished the use of the word sex, with a lower-case “s,” and the capitalized term Sex, “to point to something that exists but has no meaning outside the way it is construed within specific cultures and historical periods.” [FN233] Errington noted that “[t]he body is a malleable vehicle of meaning. The issue is not what bodies are ‘really’ like without culture, or what sex is ‘really’ like without gendered constructions of it, . . . but what meanings bodies are asked to bear in particular cultures and historical periods.” [FN234]

The use of Sex as a system of standards of normality has created a system which constructs many of our bodies, lives and understandings of identity as unintelligible and unnatural. Bodies which are suspect are not what have to be explained, rather, the requirement that they explain themselves should itself be investigated. [FN235] Thus, defining sex (little “s”) as without gender obscures our underlying belief that Sex (capital “S”) is a constellation of physical, psychological, behavioral, and social characteristics. This dissociation transforms the sex/gender distinction into a faux nature/culture distinction, in which sex is a natural phenomenon and gender is a cultural artifact. Far from eliminating cultural bias based on sex, this transformation makes it seem as if sex is privileged because it is natural, thus re-privileging sex-based distinctions. Discrimination based on sex may be forbidden, but if that only refers to biological characteristics, then women are still subject to discrimination when their feminine gender marks them as weak, un-assertive, too chatty or too sexy. If sex is biology, then discrimination on the basis of transgender identity or expression
is gender discrimination, which is, if the sex/gender dichotomy is carried to its abstract logical extreme, not actionable.

Judith Butler went to some lengths in her 1993 book, Bodies That Matter, to explain that she did not completely buy into the sex/gender distinction explained in Gender Trouble. She suggested that our understanding of sex should not, contrary to popular opinion, be that of a natural phenomenon.

Consider first that sexual difference is often invoked as an issue of material differences. Sexual difference, however, is never simply a function of material differences which are not in some way both marked and formed by discursive practices. . . . The category of “sex” is, from the start, normative; it is what Foucault has called a “regulatory ideal.” In this sense, then, “sex” not only functions as a norm, but is part of a regulatory practice that produces the bodies it *612 governs, that is, whose regulatory force is made clear as a kind of productive power, the power to produce--demarcate, circulate, differentiate--the bodies it controls. . . . In other words, “sex” is an ideal construct which is forcibly materialized through time. It is not a simple fact or static condition of a body, but a process whereby regulatory norms materialize “sex” and achieve this materialization through a forcible reiteration of those norms. That this reiteration is necessary is a sign that materialization is never quite complete, that bodies never quite comply with the norms by which their materialization is impelled. Indeed, it is the instabilities, the possibilities for rematerialization, opened up by this process that mark one domain in which the force of the regulatory law can be turned against itself to spawn rearticulations that call into question the hegemonic force of that very regulatory law. [FN236]

Sex, Butler said, is itself fraught with meaning that is constantly changing. [FN237] Thus, sex cannot be said to be more objectively real than gender. It must not be assumed that sex refers to nothing more than physical anatomy, objectively real and devoid of cultural meaning.

Author and advocate Riki Wilchins went further and explicitly said that sex, not gender, is an effect of culture.

Gender is not what culture creates out of my body's sex; rather, sex is what culture makes when it genders my body. The cultural system of gender looks at my body, creates a narrative of binary difference, and says, “Honest, it was here when I arrived. It's all Mother Nature's doing.” [FN238]

The effect of Wilchins’ point is that culture doesn't create gendered differences in character based on sex; that conclusion gives culture too much credit and more power than it actually has. Rather, culture gives us stories about sexual difference, marks us as sexed, and gives us a sexed standard to achieve, failing which we are devalued or ostracized by society. Thus are we induced to create in ourselves the ideal image of our sex, including gendered differences in character. Understanding this, one cannot sustain the argument that sex and gender are unrelated.

Ultimately, the radical separation of sex and gender results not in freedom of gender, but in the privileging of the two-sex model. The transgender category creates a catch-all for non-traditional gender identity that allows the rest of us to get on with the business of solidifying the gender roles of “normal” people.

In short, I will argue that “transgender” has arisen so rapidly and has become so broadly used because it depends on, and upholds, an emerging cultural model of gender and sexuality in the US. . . . [T]his emerging model relies on an understanding that while gender *613 and sexuality are related human experiences, they describe theoretically and ontologically different experiences. Such an understanding has been at the heart of feminist, gay and lesbian, and psychiatric model of gender and sexuality since the 1970s, and stands against a more powerful, but slowly shifting, US American model of gender and sexuality which has seen them as intrinsically linked and inseparable. . . . [I]ronically, the progressive politics which has underpinned the theoretical and political separation of gender and sexuality has also, I will argue, resulted in a solidification of binary gender in US American culture.
around the category of transgender. [FN239]

Aside from philosophical considerations, the problem I am trying to raise is the effect of the sex/gender distinction on law. Viewing the sex/gender distinction as a radical disjunction removes the gendered component from sex discrimination law. As Katherine Franke noted in her 1995 article, this makes sex discrimination law ultimately ineffective.

Contemporary sex discrimination jurisprudence accepts as one of its foundational premises the notion that sex and gender are two distinct aspects of human identity. That is, it assumes that the identities male and female are different from the characteristics masculine and feminine. Sex is regarded as a product of nature, while gender is understood as a function of culture. This disaggregation of sex from gender represents a central mistake of equality jurisprudence. . . . [S]exual equality jurisprudence has uncritically accepted the validity of biological sexual differences. By accepting these biological differences, equality jurisprudence reifies as foundational fact that which is really an effect of normative gender ideology. This jurisprudential error . . . explains why sex discrimination laws have been relatively ineffective in dismantling profound sex segregation in the wage-labor market, in shattering “glass ceilings” that obstruct women's entrance into the upper echelons of corporate management, and in increasing women's wages, which remain a fraction of those paid men. . . . In the end, biology or anatomy serve as metaphors for a kind of inferiority that characterizes society's view of women. [FN240]

Thus, says Franke, law cannot effectively battle sex discrimination while it persists in privileging biological anatomy, and it is the insistence that gender is unrelated to sex that permits that privileging.

What makes the sex/gender distinction so problematic is not the distinction itself. Rather, the problem lies in the attempt to reduce sex and gender to their barest elements and make them mutually exclusive. Without gender, sex is reduced to an abstract proposition of natural structures--chromosomes, ovaries, testes and genitalia--that have no social meaning. This is like defining a car as four wheels and a motor, and arguing that the car's body is irrelevant. Under this definition, a BMW and a Honda both have the same elements.

Properly understood, sex includes both biological and gender attributes. Gender is a distinct part of sex. If the sex/gender distinction were understood as a radical disjunction, reading sex as nature (i.e., genitalia and chromosomes) and reading gender as culture (i.e., psychological, behavioral, and social effects), it could lead to a radical form of gender-blindness--ignoring gender and pretending it does not exist. This would invalidate all sex discrimination claims involving gender, for if one accepts the nature/culture distinction, then sex can be said to be a natural phenomenon that is objectively real, and gender is a psychological state relative to culture that is entirely subjective. From this theoretical standpoint, claims about gender are nothing more than claims to an individual personality. “Women need not apply,” the most obvious of sex discrimination, would remain protected. However, “feminine women need not apply,” “effeminate men need not apply,” or “transgender people need not apply” would not be covered because they could be considered gender discrimination and not sex discrimination.

These kinds of results thwart the ameliorative purpose of sex discrimination law. Indeed, it seems clear that from the Court's opinion in Price Waterhouse v. Hopkins [FN241] that Title VII sex includes not only biological sex, but also cultural stereotypes about sex, that is, gender roles.

As 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, for “‘[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” . . . An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this
bind. [FN242]

E. Sex Includes Gender

The failure to understand that gender is a distinct part of sex leads to absurd results. For example, in Jespersen v. Harrah’s Operating Co., [FN243] the Ninth Circuit held that it is permissible to require women to come to work with teased hair and full makeup. [FN244] This reasoning was based on the idea that differential dress codes do not discriminate on the basis of sex, since both sexes have to adhere to dress codes, albeit to different ones. [FN245] “Harrah’s ‘Personal Best’ policy contains sex-differentiated requirements regarding each employee’s hair, hands, and face. While those individual requirements differ according to gender, none on its face places a greater burden on one gender than the other.” [FN246] The court intimated that sex-differentiated requirements are not sex stereotyping, but are merely gender-differentiation (i.e., it is merely gender discrimination, not sex discrimination). The court also declared that the makeup requirements “do not require Jespersen to conform to a stereotypical image.” [FN247] The confusion is similar to that found in Goins, [FN248] which prohibited transgender employees from using the bathroom of their gender identity because it is permissible to discriminate on the oxymoronic basis of “biological gender.” [FN249] Taken to an extreme, the mutual exclusion of sex and gender could be used as an argument that women’s complaints about sex discrimination are attributable to women’s inappropriate gender presentations, that is, that they should wear different clothing, talk differently, undertake different physical activities on the job, or be more or less assertive.

Although transgender advocates have been saying for years that “sex is between the legs and gender is between the ears,” [FN250] creating such a radical separation is not in accord with the social and historical development of the concept of sex. The simplistic idea of a radical disjunction between sex and gender, while correctly understanding that gender is a concept separate from sex, incorrectly conceptualizes the two as mutually exclusive, distinct, and unrelated concepts. This promotes the outdated view that sex is natural and gender is cultural. [FN251] If it is taken as true, then gender is arguably not real, and claims about gender identity can be disregarded on the grounds that only physical sex is objectively verifiable. This leads to a requirement that transgender identity is not real unless the person surgically alter their genitals in order to receive credence and be allowed to change the sex/gender marker on government and corporate records and identification, to use the appropriate bathroom and locker room, or to be received into the appropriate single-sex facilities. However, this leads to a catch-22 because, as discussed above, courts in the United States have uniformly refused to recognize a change of sex, even where a surgical change by means of sex reassignment surgery has been consummated. [FN252] The temptations of the teleological argument do not disappear when sex is reduced to physical anatomy. The appeal of structural-functionalism does not wane. “Woman” is still reduced to “womb,” even if lip service is paid to the idea that she has no specific gender role to fulfill.

For these reasons, a radical disjunction between sex and gender is neither desirable nor realistic. It is, of course, neither possible nor desirable to return to the uncomplicated time when sex and gender were fused. However, the most plausible and fruitful theoretical stance is to consider both gender and biological attributes distinct components of sex. Thus, sex would be understood as a combination of two parts: biological attributes and gender attributes. The biological attributes include genitalia, chromosomes, and secondary sex characteristics. The gender attributes are composed of two different parts: a psychological gender identification as male or female and a social-behavioral expression of masculinity or femininity. Thus, both biological attributes and gender bear on the issue of a person’s sex. This model gives proper expression to the meaning of sex, maintaining the conceptual integrity of both sex and gender, without creating each as puzzlingly separate and unrelated. With this understanding in mind, let us proceed to examine the history of transgender employees in the courts, taking a careful look at how the courts have understood the relationship among sex, gender, and gender identity.
A. 1975--The First Title VII Transgender Lawsuit: Grossman

It is important to understand judicial precedents regarding transgender Title VII plaintiffs in historical context, because the meanings of key terms such as “transgender” and “sex” have changed since the first legal precedent was handed down in 1975. That precedent has been followed rather blindly during the past thirty-three years, and a review of the development of the law is in order.

Although transgender persons have existed since time immemorial, [FN253] and were certainly in the United States population at the time of the Civil Rights Act of 1964, it took seven years from the passage of the Act before any transgender person brought a claim under the rubric of Title VII sex discrimination. The legal history of claims by transgender persons begins in 1971 when Paula Grossman was terminated from her employment by the Bernards Township Board of Education in Bernards Township, New Jersey because she had undergone a change of sex. [FN254] She sued on the grounds of Title VII sex discrimination, and the United States District Court for the District of New Jersey ruled against her in 1975. [FN255]

The decision was never reported in the official law reports, probably because it seemed like a subject that was unlikely to come up frequently. Thirty years later, however, the subject is still a matter of controversy. [FN256] Interestingly, the reasoning that surfaced in the 1975 decision is the same reasoning being discussed today, making discussion of that first case a useful first step in understanding the issues.

In 1971, Paula Grossman was a music teacher working with fourth, fifth, and sixth graders. [FN257] This was obviously not the best “test case” to bring to the courts in 1971, although, in fairness, later cases showed that the courts had just as little sympathy for people in other professions. [FN258] After her sex reassignment surgery, the school district cited potential psychological harm to students as its reason for terminating Paula Grossman. [FN259] Judge Barlow, looking at Title VII's prohibition of employment discrimination “because of sex,” came up with three reasons that have surprisingly stood the test of time. [FN260] First, although Ms. Grossman was terminated from her employment by the Bernards Township Board of Education in Bernards Township, New Jersey because she had undergone a change of sex. [FN254] She sued on the grounds of Title VII sex discrimination, and the United States District Court for the District of New Jersey ruled against her in 1975. [FN255]

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While the case usually cited in decisions on the subject is the 1984 Seventh Circuit ruling in Ulane v. Eastern Airlines, Inc., [FN264] that court relied on the same reasons that Judge Barlow relied on in Grossman. [FN265]

B. What Is “Sex”? Judge Barlow's Three Reasons

Judge Barlow marshaled three reasons that Title VII did not cover Paula Grossman: Sex reassignment does not implicate sex. [FN266] Plaintiff's termination was because of change of sex rather than sex. [FN267] Lastly, Title VII sex should be interpreted narrowly. [FN268] These three reasons may be classified, respectively, as definitional (what is sex?), causative (is termination after sex change caused by sex?), and interpretive (do we construe narrowly or broadly?).

In assessing the definitional reason in its 1975 context, one must take into account the historical situation with regard
to the meaning of sex. As discussed in detail above, at that time, sex was understood to refer not only to physical anatomy but also to the whole complex of social, psychological, and behavioral characteristics that were thought to be part and parcel of being male or female. [FN269] It was generally understood that female biology suited women for bearing and raising children and the necessary concomitants thereto: keeping house, cooking, and sewing. [FN270] Judge Barlow’s first reason came straight from this context when he used the narrowest possible definition of “sex,” finding that it refers only to females qua females. [FN271] The judge referenced two examples: stereotypical concepts about the ability of females to perform certain tasks and conditions common only to females, such as pregnancy. [FN272] Since sex reassignment is not a female concept or condition, it does not fit within the Title VII definition of sex. [FN273]

The second reason is causative in that it addresses the “because of” element of Title VII. The question here is why the employee was terminated. When a transgender employee is terminated after transitioning from one gender to another, the cause is not sex, but change of sex. The third reason discusses interpretive methods that could be used to understand Title VII sex. Two well-known methods are mentioned: legislative intent and plain meaning. [FN274]

The case most often discussed in reference to this issue, Ulane v. Eastern Airlines, Inc., decided almost ten years later, reiterated slight variations of Judge Barlow’s definitional, causative, and interpretive reasons, as do most of the other judicial opinions denying transgender persons protection under Title VII. [FN275] However, there are now a growing number of federal courts that have ruled that Judge Barlow’s reasons no longer hold sway. [FN276] Why have they done so? The answer to this question begins with an analysis of the first reason, the definitional argument that sex change does not implicate sex.

When Judge Barlow wrote his opinion, and, indeed, when the Civil Rights Act of 1964 was passed, sex had a meaning functionally different from its meaning today. It was generally accepted that, as Freud had explained, “anatomy is destiny.” [FN277] Sex referred to a whole constellation of biological characteristics inextricably intertwined with correlative social, behavioral, and psychological conventions. [FN278] “Woman” did not refer simply to those with female anatomy, but also a category that irrefutably implied certain social locations (e.g., “a woman’s place is in the home”), physical characteristics (e.g., “women are weak”), behavioral characteristics (e.g., “women are good listeners”), and emotional qualities (e.g., “women are sympathetic”). [FN279]

The idea that sex reassignment could affect this inherited socio-biological complex was not accepted. Thus, although some characteristics are clearly affected by sex reassignment, judges could not accept that sex can be changed. Sex must have been an immutable characteristic to Judge Barlow, however sympathetic he may have been to Paula Grossman. Therefore, whether or not sex reassignment made Ms. Grossman into a woman (and the judge kindly conceded that she was a woman for purposes of his decision), discrimination based on sex reassignment does not, in fact, implicate sex.

Logical as this reasoning may have been when Judge Barlow wrote it, it is now generally accepted in the scientific community that anatomy is not destiny. [FN280] In addition, it is also generally recognized in the scientific community that the characteristic of gender is a distinct part of sex. [FN281] However, the judge sidestepped the whole issue of sexual identity by conceding that Ms. Grossman was a woman for purposes of his decision, but deciding that the discrimination directed against her was not based on her being female.

The Court finds it unnecessary and, indeed, has no desire, to engage in the resolution of a dispute as to the plaintiff’s present sex. Rather, we assume for the purpose of this action that the plaintiff is a member of the female gender. In such an instance, despite the plaintiff’s conclusory allegations of sex discrimination, it is nevertheless apparent on the basis of the facts alleged by the plaintiff that she was discharged by the defendant school board not because of her status as a female, but rather because of her change in sex from the male to the female gender. No
facts are alleged to indicate, for example, that plaintiff's employment was terminated because of any stereotypical concepts about the ability of females to perform certain tasks, nor because of any condition common only to woman. [FN282]

This quote shows an attempt by Judge Barlow to bolster his reasoning by noting that the complaint does not allege the typical evidence adduced in a sex discrimination suit in 1975: stereotypical concepts about women or pregnancy. This is particularly interesting because some of the courts that later ruled against Judge Barlow's reasons specifically did so on the basis of sex stereotyping of transgender plaintiffs. [FN283] The difference, however, is that the later stereotyping cases ruled in favor of transgender plaintiffs because of stereotypical concepts about their birth sex. [FN284] Footnote three in the Grossman opinion demonstrates a further attempt to show that Ms. Grossman’s short complaint to the EEOC, in which she mentioned sex reassignment twice and sex only once, failed to adduce the proper formulae for a sex discrimination claim:

Indeed, in filing her charge of discrimination with the EEOC on August 11th, 1972, the plaintiff specifically stated: “I was suspended from my tenured teaching position after fourteen years on August 19, 1971 for having had a sex reassignment, which is an unusual, but nonetheless perfectly legitimate medical problem.” With the exception of various legal conclusions and a recitation of the procedural history of the case, the only substantive factual allegation in the body of the complaint appears in Paragraph 15, which states: “The plaintiff underwent a sex reassignment operation by which she became a woman. It is essentially her position that the defendant has unlawfully discriminated against her because of her sex.” [FN285]

This is not quite fair, since the school’s dismissal of Ms. Grossman was specifically based on her incapacity to teach based on her new sex. [FN286] By these means, Judge Barlow was able to reason that the crux of the issue was sex reassignment, and not sex.

In a present-day federal court, Judge Barlow’s reasons would not pass muster. First, it is no longer the law that sex discrimination means discrimination only against females. [FN287] The sex of the victim does not matter. [FN288] In addition, it is no longer the law that the plaintiff must prove that the employer has animus against all females, a Herculean task. [FN289] Rather, the victim need only show that the employer's animus was based on the victim's failure to adhere to stereotypes associated with their sex. [FN290] In Ms. Grossman’s case, the school board’s concern about the formerly male employee’s adoption of a female name, wearing of female attire, and use of female hormones to alter her bodily characteristics was clearly based on a stereotype of proper behavior for males. Some federal courts have ruled that such concerns, based as they are on sex stereotypes, fall within Title VII regardless of whether the plaintiff is considered transgender. [FN291]

There is one more reason given by Judge Barlow that remains. According to him, the specific use of the term sex in Title VII must be restricted to its plain meaning, thus excluding transgender employees. [FN292] Although not explicitly stated, he is deciding against the legal principle that remedial statutes must be construed broadly and liberally to effectuate its purpose. [FN293] Since Title VII is seeking to remediate the problem of employment discrimination, [FN294] its words must be given a broad interpretation to effectuate the broadest protection against employment discrimination. If that legal principle were put into effect here, it would put a fatal crimp in his first reason, that sex reassignment does not implicate sex. If the meaning of sex were to be given its broadest and most liberal interpretation, even Judge Barlow would have to admit that it would include sex reassignment. He craftily dodged, however, the danger of the liberal interpretation rule by misconstruing the purpose to be effectuated.

As Judge Barlow wrote:

In the absence of any legislative history indicating a congressional intent to include transsexuals within the
language of Title VII, the Court is reluctant to ascribe any import to the term “sex” other than its plain meaning. Accordingly, the Court is satisfied that the facts as alleged fail to state a claim of unlawful job discrimination based on sex. [FN295]

Here, Judge Barlow reasoned that the principle of liberal interpretation of remedial statutes to effectuate their purpose does not apply because there is no indication that the purpose of Title VII is to protect transgender employees.

Judge Barlow's reasoning about legislative history is interesting, but flawed. The legal principle that a remedial statute must be construed broadly and liberally to effectuate its purpose [FN296] is not an invitation to narrow the purpose by requiring explicit statements from Congress about all of the various persons who might fall within the categories named in the statute. The purpose of Title VII is to eliminate employment discrimination based on race, sex, religion, and national origin. [FN297] *622 That Congress failed to mention transgender persons as possible plaintiffs does not mean that transgender persons fall outside Title VII's remedial purpose.

Judge Barlow's ruling was summarily upheld by the Federal Circuit Court of Appeals for the Third Circuit, [FN298] and the United States Supreme Court denied certiorari. [FN299] For about ten years, all courts faced with the issues reiterated Judge Barlow's reasons, including the Eighth [FN300] and Ninth [FN301] Circuits, and district courts in the Fourth [FN302] and Seventh Circuits. [FN303]

C. 1975--The Interpretive Argument: Judge Williams

Only one additional argument has surfaced during the years since Grossman, and that one has had as much staying power as Judge Barlow's original three points. It supports Judge Barlow's interpretive reasoning, that statutory interpretation of sex must be narrow. In a case decided one month after Grossman, Judge Williams reasoned that Congress understood that sex did not include sex reassignment because legislation had recently been proposed to add “affectional or sexual preference” to Title VII. [FN304] If Congress understood Title VII to include affectional or sexual preference, reasoned Judge Williams, then no such legislation would be necessary. [FN305]

Judge Williams' reasoning is interesting, but can be explained otherwise. A federal court had ruled in 1973, two years before the legislation, that homosexuals were not covered under Title VII. [FN306] The legislation was likely prompted by congressional concern about the recent judicial limitation of Title VII, refuting Judge Williams' assertion about the limitations of Title VII. A less serious flaw in Judge Williams' reasoning is his conflation of affectional or sexual preference with sex reassignment. [FN307] These are different categories of identity and have little relationship to each other. In fact, courts addressing the issue have ruled that statutes protecting gay employees do not protect transgender employees. [FN308] Thus, *623 legislation on the subject of “sexual affection and preference” can have no effect on Title VII's coverage of transgender employees.

D. 1983--The First Pro-Transgender Opinion: Judge Grady

The first crack in this uniform line of cases against transgender employees was the district court ruling in Ulane, in which Judge Grady ruled that Title VII covered transgender employees. [FN309] His opinion is remarkable because, instead of relying simply on the pleadings and his own assumptions about sex, it utilized scientific evidence to understand sex. [FN310]

Judge Grady's opinion first dispatched Judge Williams' reasoning that legislative attempts to amend Title VII demonstrated congressional understanding that it did not cover transsexuals. [FN311] He did so by distinguishing between ho-
mososexuals and transvestites on the one hand, and transsexuals on the other. [FN312] He found no problem with the idea that Title VII did not cover “the matter of sexual preference, the preference of a sexual partner, or the matter of sexual gratification from wearing the clothes of the opposite sex.” [FN313] He distinguished these from “the matter of sexual identity,” noting that “[i]t seems to me an altogether different question as to whether the matter of sexual identity is comprehended by the word, ‘sex.’” [FN314]

Prior to my participation in this case, I would have had no doubt that the question of sex was a very straightforward matter of whether you are male or female. That there could be any doubt about that question had simply never occurred to me. I had never been exposed to the arguments or to the problem. After listening to the evidence in this case, it is clear to me that there is no settled definition in the medical community as to what we mean by sex. [FN315]

Unlike Judge Barlow, to whom sex could only mean male or female, [FN316] Judge Grady learned a more nuanced understanding of the term from the expert witnesses. The plaintiff’s expert witnesses testified that sexual identity is in part a psychological question. “That is to say, it is a question of one’s own self-perception: How does one perceive oneself in terms of maleness or femaleness? It *624 is also a social matter: How does society perceive the individual?” [FN317] Thus, Judge Grady, in accordance with many academicians studying the matter, [FN318] noted that sex is not only a reference to a physical fact, but also to a psychological and a social fact. [FN319]

One of the difficulties of Judge Grady’s opinion is the use of the terms “transsexual” and “transvestite” as if these terms were settled, and as if the label itself is of great importance. [FN320] In fact, arguments about whether either label applies to an individual are relatively meaningless. The important question is whether the employer practiced discrimination based on sex, including gender and gender identity. [FN321] Judge Grady rejected Judge Barlow’s reasoning about congressional intent, stating that Congress never intended anything one way or the other on the question of whether the term sex would include transsexuals.

The matter simply was not thought of. It was not discussed. Nothing was discussed that we have any record of that would have any relevance to the question before us. But I believe that working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way. I believe that the term, “sex,” literally applies to transsexuals and that it applies scientifically to transsexuals. That there is room for argument on the question does not release me from making a decision one way or the other, and I have made the decision which seems to me to be the one most consistent with the factual record that was developed in this case. [FN322]

Judge Grady raised several interesting reasons. He reasoned that the meaning of “sex” in Title VII is analogous to the meaning of “race,” noting that race discrimination was held to include discrimination based on Hispanic ethnic identity, even though it is not technically a race. [FN323] He also reasoned that Illinois’s statutory permittance of amending sex designations on birth certificates is “pertinent to the question of . . . sexual identity and the larger question of whether sex is a cut-and-dried matter of chromosomes.” [FN324] He specifically stated that plaintiff’s post-operative legal status was that of a female. [FN325]

*625 The following year, the Seventh Circuit Court of Appeals reversed Judge Grady, using the same reasoning as Judge Barlow. [FN326] This slammed the door shut for the next twenty years. [FN327] One court went so far as to state that the daily use of derogatory names such as “fag,” “punk bitch,” “whore bitch,” and “freak mother fucker” could not support a hostile work environment claim because they were “related” to the employee’s transsexual identity. [FN328]

E. 2001--The Reprise of Transgender Plaintiffs: Judge O’Malley
In 2001, Judge O'Malley of the District Court for the Northern District of Ohio, decided Doe v. United Consumer Financial Services. [FN329] The defense made the usual motion to dismiss, again trotting out Judge Barlow's reasons, but found Judge O'Malley surprisingly unsympathetic. [FN330] There are a number of reasons that might be attributed to this lack of sympathy with the defendant employer, but chief among them must be the radical changes in United States' society (and jurisprudence) since Judge Barlow formulated his reasoning over twenty-five years earlier. The consensus around understandings of sex, causation and interpretation, the three pillars of Judge Barlow's opinion, had fundamentally changed.

Instead of the usual losing argument that sex includes sex reassignment, plaintiff's counsel raised two recent developments in Title VII law. [FN331] The first was the 1989 holding in Price Waterhouse v. Hopkins [FN332] that discrimination against women based on failure to conform to female stereotypes violated Title VII. [FN333] The second was the 1998 holding in Oncale v. Sundowner Offshore Services [FN334] that Title VII sex not only included discrimination against men, but prohibited same-sex sexual harassment, whether motivated by sexual desire or hostility towards gender. [FN335] These arguments based on Price Waterhouse and Oncale had been raised the previous year in the context of transgender plaintiffs, once unsuccessfully in the Title VII context, and twice successfully outside of the Title VII context. [FN336]

Based on these cases, Judge O'Malley accepted the argument that it can no longer be of any importance whether a plaintiff is a man or a woman, and discrimination against an employee is actionable if it is based on failure to conform to sex stereotypes, whether male or female. [FN337] Thus, it would be a violation of Title VII to discriminate against any employee, transgender or non-transgender, because they fail to conform to stereotypes about how males or females should look and act. [FN338]

Judge O'Malley quoted language from the Oncale opinion that specifically disavowed the search for congressional intent that Judge Barlow thought so crucial.

Moreover, Ulane's reliance on Congressional intent is at odds with Oncale v. Sundowner Offshore Services. In holding that male-on-male workplace harassment may be actionable, the Oncale Court acknowledged that it was applying Title VII to a situation not likely considered by Congress when it passed the Civil Rights Act, and advised, “[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” [FN339] Thus, according to Judge O'Malley, whether or not Congress intended to protect transgender employees, they would be protected if they fit within the statutory requirements. [FN340] The defendants lamely suggested that this was a mere “transsexuality discrimination claim” foreclosed by Ulane, citing cases following Ulane after the Price Waterhouse decision in 1989 (most of which did not consider the effect of Price Waterhouse). [FN341] They failed, however, to explain how Ulane could have survived the Price Waterhouse holding. They could have done so by noting that, in disavowing legislative intent, Judge O'Malley undoes the reasoning used in the Price Waterhouse opinion, which relies upon legislative intent. [FN342] However, as discussed above, [FN343] the reasoning is better expressed as the relationship between sex and gender than as an issue of legislative intent. Judge O'Malley cited dicta in Schwenk v. Hartford, [FN344] which noted that “Ulane has been overtaken by the ‘logic and language of Price Waterhouse’ and that Title VII prohibits discrimination based on ‘sexual identity,’ not just based on biological sex.” [FN345] She also compared the Title VII issue to Rosa v. Park West Bank & Trust Co., [FN346] where the First Circuit interpreted the prohibition of sex discrimination in the federal Equal Credit Opportunity Act to include discrimination against a male who did not dress in accordance with his gender. [FN347] Judge O'Malley specifically declined to say whether Ulane remained good law, but nonetheless decided that Doe stated an actionable Title VII claim based on sex stereotyping. [FN348]
In this case, Doe's co-workers called her “Mrs. Doubtfire” behind her back. After receiving a complaint that “a man dressed as a woman was using the ladies room,” United Consumer questioned her about her gender. Cisccccson asked her, “Are you a man or a woman?” and, “What gender are you? . . . Just looking at you I can't tell.” Doe disclosed that she has been a transgendered woman since 1973. United Consumer fired her the next day.

Under these facts, it is certainly conceivable that she was fired for no reason other than the fact that she was a transsexual, and that her claim is, thus, precluded by Ulane. But, it is also conceivable that her transgendered status was not the sole issue, and that her termination may have been based, at least in part, on the fact that her appearance and behavior did not meet United Consumer's gender expectations (particularly in light of United Consumer's alleged inability to categorize [sic] her as male or female “just from looking”). For example, United Consumer may not have fired Doe if she looked and acted “fully female” or “fully male,” even if the company had independently discovered her transgender status. If *628 this is the case, United Consumer may be liable for its actions under Price Waterhouse. [FN349]

Under Judge O'Malley's rubric, the key to an actionable Title VII claim for transgender employees is the allegation that discrimination was based on the employee's failure to conform to sex stereotypes and not the employee's transgender status or sex reassignment surgery (or intent to undergo same). [FN350] Judge O'Malley's logic tries to separate gender, in the form of sex stereotypes, from sex itself, in the form of transgender status and sex reassignment. [FN351]

The sex stereotyping claim first decided by Judge O'Malley in Doe v. United Consumer Financial Services was later used in the Sixth Circuit case of Smith v. City of Salem. The Smith court's reasoning correctly understands the relationship between sex and gender:

In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in Ulane, Sommers, and Holloway)--as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity--were denied Title VII protection by courts because they were considered victims of “gender” rather than “sex” discrimination.

. . . By holding [in Price Waterhouse] that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII's reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms . . . .

. . . As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman. [FN352]

It would have been impossible for the courts in cases like Ulane, Sommers, and Holloway to have any discussion of gender discrimination or how it might differ from sex discrimination, for the sex/gender distinction was not a part of common discourse when those opinions were written in the late 1970s and early 1980s. However, the Smith court was correct to raise the failure of those prior cases to understand the importance of gender to sex, because the issue is now part of our social discourse.

*629 F. 2002--The Difference in Kind Argument: Judge Africk

Three federal courts have disagreed with Judge O'Malley since her 2001 ruling, including federal district courts in Indiana [FN353] and Louisiana, [FN354] and the Tenth Circuit Court of Appeals. [FN355] Suits by transgender plaintiffs have been called “end run[s] around Ulane.” [FN356]

Aside from reiterating Judge Barlow's reasoning, the Louisiana case of Oiler v. Winn-Dixie Louisiana Inc., [FN357]
written by Judge Africk, contains a new reason that specifically rebuts Judge O'Malley's reasoning about Price Waterhouse and sexual stereotyping. [FN358] In Oiler, the plaintiff, a truck driver for Winn-Dixie, mentioned in the presence of his supervisor that he occasionally crossdressed as a woman when at home with his wife, and sometimes in public. [FN359] Although he never exhibited this behavior at work or in the presence of other employees, he was subsequently fired on the basis of this information. [FN360] The employee brought suit under Title VII, and the employer filed for summary judgment. [FN361] The plaintiff argued that Winn-Dixie had engaged in discrimination against him because of his transgender gender expression. [FN362] Citing Price Waterhouse, the plaintiff argued that this is discrimination because of sex. [FN363] Judge Africk granted the employer's motion for summary judgment, stating that Ulane is still viable after Price Waterhouse. [FN364]

In making the case for Ulane, Judge Africk suggested a distinction between the types of gender expression engaged in by Anne Hopkins in the Price Waterhouse case, and the gender expression engaged in by Peter Oiler. [FN365]

*630 Plaintiff's actions are not akin to the behavior of plaintiff [sic] in Price Waterhouse. The plaintiff in that case may not have behaved as the partners thought a woman should have, but she never pretended to be a man or adopted a masculine persona . . . . This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex. [FN366]

After holding that transgender gender expression is different in kind from traditional gender expression, Judge Africk agreed with Ulane's use of legislative history, borrowed from Judge Barlow, that Congress would have specifically stated so if they intended sex to include transgender gender expression. [FN367]

After a review of the legislative history of Title VII and the authorities interpreting the statute, the Court agrees with Ulane and its progeny that Title VII prohibits employment discrimination on the basis of sex, i.e., biological sex. While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase "sex" has not been interpreted to include sexual identity or gender identity disorders. [FN368]

Judge Africk distinguished between Peter Oiler's behavior and the behavior addressed in Nichols v. Azteca Restaurant Enterprises Inc. [FN369] In Nichols, the Ninth Circuit Court of Appeals cited Price Waterhouse in overruling its previous decision, [FN370] DeSantis v. Pacific Telephone & Telegraph Co., Inc. [FN371] DeSantis held that "discrimination based on a stereotype that a man 'should have a virile rather than an effeminate appearance' [did] not fall within Title VII's purview." [FN372] Judge Africk distinguished Nichols by noting that Oiler was fired because he adopted a feminine persona, whereas the plaintiff in Nichols was effeminate and had mannerisms which were stereotypically feminine. [FN373] Ultimately, the question raised by Judge Africk was whether Title VII sex includes all gender identity and expression or only that engaged in by those with traditional gender identity and expression. [FN374]

*631 G. 2008--Gender as a Distinct Part of Sex: Judge Robertson

Another route taken by a federal court on this question is found in Schroer v. Billington. [FN375] This case is the most interesting because of a series of brilliant rhetorical moves made by the judge. Schroer applied for and was offered a position with the Library of Congress. [FN376] Prior to starting work, she met her future boss for lunch and told her about transitioning from male to female. [FN377] The following day, Schroer received a call rescinding the offer, telling her that she wasn't a "good fit" for the Library of Congress. [FN378] She sued, and the Library asked Judge Robertson of the Federal District Court for the District of Columbia to dismiss the case, arguing that Title VII doesn't cover transgender discrimination. [FN379] Judge Robertson, in a published opinion, decided not to dismiss the case. [FN380] He also ruled after a trial in favor of Ms. Schroer in another published opinion. [FN381] The most interesting part of the case
is the fact that the two published opinions were based on different theories of transgender identity. [FN382] The second
opinion constitutes the first time a court has correctly understood the relationship between sex, gender, and gender iden-
tity, recognizing that gender identity is a distinct component of sex. [FN383]

At trial, Judge Robertson decided in favor of Schroer on both the facts and the law. Factually, he decided that Schroer
had shown that the Library discriminated against her based on her gender identity. [FN384] In addition, some of the rea-
sons given by the Library for failure to hire Schroer were pretextual, and that the rest of the reasons were illegitimate and
discriminatory in and of themselves. [FN385] Legally, he also ruled in favor of Schroer's argument that sex discrimina-
tion, which is prohibited by federal statute, includes discrimination because of gender identity. [FN386] He did so on two
grounds. First, he held that failure to hire is based on sex if it is because an employee does not conform to the psycho-
logical or behavioral stereotypes of his or her birth sex. [FN387] Second, he held that sex (in relation to sex *632 discrim-
ination) includes gender identity. [FN388] Lastly, he decided that it was unnecessary to decide the scientific meaning of
sex and held that the statutory meaning of the word must include changing sex by analogy. [FN389]

Judge Robertson disallowed three of the Library's reasons, saying that they were pretexts for discrimination. [FN390]
In ordinary parlance, a pretext is a cover-up. It is an attempt to conceal one's true reason--in this case animus based on
gender identity--with a false reason that is otherwise legitimate. For example: “I didn't refuse to hire X because I don't
like people of that race, religion, gender identity, etc.; it's just that s/he wasn't as qualified as the other applicants.” There
are several ways to demonstrate that this is a pretext.

Most commonly, X shows that his or her qualifications were as good as or better than the others, or that the employer
admitted that the race, religion, or other protected category was a determinative factor. The three reasons given by the
Library that the judge found to be pretexts were: 1) gender transition would affect Schroer's security classification; 2)
Schroer's trustworthiness was in question because the disclosure did not come in the initial interview; and 3) the pres-
sures of gender transition would distract Schroer from her job duties. [FN391] Judge Robertson found that the Library
was essentially lying when it contended that these were the reasons for its refusal to hire Schroer. [FN392]

Judge Robertson disallowed the Library's other two reasons as being illegitimate and discriminatory in and of them-
selves. [FN393] The Library's hiring manager thought that Schroer's gender transition might diminish her credibility with
members of Congress, whom she would be called upon to serve, and that she might be unable to maintain contacts in the
military, an important qualification for the job. [FN394] The Library thought that these reasons were legitimate because
they were work-related qualifications not explicitly grounded in gender identity. [FN395] The judge disagreed.

The Library's final two proffered legitimate nondiscriminatory reasons-- that Schroer might lack credibility
with Members of Congress, and that she might be unable to maintain contacts in the military--were explicitly
based on her gender non-conformity and her transition from male to female and are facially discriminatory as a
matter of law. Deference to the real or presumed biases of others is discrimination, no less than if an employer acts
on behalf of his own prejudices. In any event, the Library made no effort to discern if its *633 concern was actu-
ally a reasonable one, as it easily could have done by contacting any of the high-ranking military officials that
Schroer listed as references. [FN396]

The Judge's reasoning goes directly to the heart one of the major concerns of employers of transgender people:
whether customers and clients will take their business elsewhere. Our society is based on the proposition that our govern-
ment should interfere with businesses as little as possible. Many employers have raised concerns about losing business
and have assumed that such concerns would justify dismissal of transgender persons or moving transgender personnel to
non-customer-facing positions (if available), without violating the law. Judge Robertson's ruling demonstrates that em-
ployers cannot safely make such assumptions.
Judge Robertson ruled that the Library was engaged in sex stereotyping. [FN397] However, he went a step further and ruled that sex includes gender identity as a distinct component, thus flying in the face of the traditional reading of the statute, rather than side-stepping by use of the sex-stereotyping reasoning. [FN398] For this reason, his opinion is rightly considered a landmark decision. In fact, the idea that an employer's objection to transsexuality is sex stereotyping presented a problem for Judge Robertson. Judge Robertson had expressed skepticism of this very view in the published ruling he handed down two years previously that denied the motion to dismiss. [FN399] At that time, the Library asked Judge Robertson to dismiss Schroer's lawsuit without a trial. [FN400] He refused to do so, but explained that he was skeptical about the application of sex stereotyping to transgender plaintiffs. [FN401] He needed to explain his prior ruling, because he essentially overruled himself in the more recent opinion. [FN402]

*634 In order to understand the problem, one must understand that there are two types of evidence in an employment discrimination claim. One type is direct evidence of discrimination, in which the employer says some variation of “you're fired because of your race/national origin/gender/religion.” Another type of evidence is “disparate treatment” evidence of discrimination, in which the employer never says anything about race/nationality/gender/religion. Rather, the employer treats the employee differently, and the different treatment appears to be on the basis of race/national origin/gender/religion. These distinctions should be unimportant in the Schroer case, because it involves direct evidence of discrimination and not disparate treatment.

In his prior ruling, Judge Robertson devoted substantial space to discussing sex stereotyping lawsuits of the disparate treatment type. [FN403] He gave the impression that Schroer could not successfully bring a sex stereotyping lawsuit because it was of this type. In the later opinion, he disavowed this thinking:

I held that what Price Waterhouse actually recognized was a Title VII action for disparate treatment, as between men and women, based on sex stereotyping. While I agreed with the Sixth Circuit that a plaintiff's transsexuality is not a bar to a sex stereotyping claim, I took the position that “such a claim must actually arise from the employee's appearance or conduct and the employer's stereotypical perceptions.” In other words, “a Price-Waterhouse claim could not be supported by facts showing that [an adverse employment action] resulted solely from [the plaintiff's] disclosure of her gender dysphoria.” [FN404]

While not explicitly stated, it appears that Judge Robertson is acknowledging that Schroer is not a disparate treatment case, and that Schroer is, in fact, entitled to bring a sex stereotyping claim. In his later opinion, he noted this was “before the development of the factual record that is now before me.” [FN405] Furthermore, his conclusion about a disparate treatment requirement in the prior opinion relied heavily on the flawed Ninth Circuit panel decision in Jespersen v. Harrah Operating Co., discussed above. [FN406] In Jespersen, the Ninth Circuit held that a requirement that women wear makeup and teased hair was not based on sex stereotyping because it did not impose an unequal burden on women. [FN407] Judge Robertson acknowledged that the Jespersen case involved a disparate treatment situation, whereas the Schroer case involved direct evidence of discrimination based on sex. [FN408] His rejection of Jespersen is important, because some have argued *635 that transsexuals may be fired based on dress code violations, regardless of direct evidence of discrimination. [FN409] Judge Robertson then detailed the compelling evidence that the Library's hiring decision was infected by sex stereotypes:

Charlotte Preece, the decisionmaker, admitted that when she viewed the photographs of Schroer in traditionally feminine attire, with a feminine hairstyle and makeup, she saw a man in women's clothing. In conversations Preece had with colleagues at the Library after her lunch with Schroer, she repeatedly mentioned these photographs. Preece testified that her difficulty comprehending Schroer's decision to undergo a gender transition was heightened because she viewed David Schroer not just as a man, but, in light of her Special Forces background, as a particularly masculine kind of man. Preece's perception of David Schroer as especially masculine made it all the...
more difficult for her to visualize Diane Schroer as anyone other than a man in a dress. Preece admitted that she
believed that others at CRS, as well as Members of Congress and their staffs, would not take Diane Schroer seri-
ously because they, too, would view her as a man in women's clothing. [FN410]

Although Judge Robertson seemed pretty clear that sex stereotyping had occurred, he noted a problem with a claim
on the basis of sex stereotyping because of Ulane and its progeny.

What makes Schroer's sex stereotyping theory difficult is that, when the plaintiff is transsexual, direct evidence
of discrimination based on sex stereotypes may look a great deal like discrimination based on transsexuality
itself, a characteristic that, in and of itself, nearly all federal courts have said is unprotected by Title VII. [FN411]

Judge Robertson took a very interesting approach to this difficulty. He could have discussed the differences
between the sex stereotyping cases and Ulane and, as Judge O'Malley did in Doe, sidestepped Ulane. Instead, he opined that Title
VII permits both sex stereotyping claims and claims of discrimination based on transgender status lawsuits by trans-
gender plaintiffs.

Ultimately, I do not think that it matters for purposes of Title VII liability whether the Library withdrew its of-
er of employment because it perceived Schroer to be an insufficiently masculine man, an insufficiently feminine
woman, or an inherently gender-636 nonconforming transsexual. One or more of Preece's comments could be
parsed in each of these three ways. While I would therefore conclude that Schroer is entitled to judgment based on
a Price Waterhouse-type claim for sex stereotyping, I also conclude that she is entitled to judgment based on the
language of the statute itself. [FN412]

In making this statement, Judge Robertson avoided the need to decide between the sex stereotyping claim and the sex
discrimination claim. He explained that his decision was based on expert testimony from Walter Bockting of The World
Professional Association for Transgender Health, Inc. (“WPATH”) showing that gender identity is a component of sex.
[FN413] This decision fits with the extensive discussion above regarding the changing meaning of the term sex, and the
inclusion of gender and gender identity as part of that term.

Another interesting tactic used by Judge Robertson was his refusal to get hung up on the issue raised by Judge Grady,
the district court judge who authored the lower court opinion in Ulane. [FN414] Judge Grady discussed in careful detail
the various scientific bases for defining “sex,” which was ultimately reversed by the Seventh Circuit. [FN415] Instead,
Judge Robertson recognized that the definition of “sex” is a hotly contested area, stating that it is unnecessary to decide
the scientific definition of “sex.” [FN416] Rather, the only question was the statutory definition, and he used an analogy
to determine whether changing sex is included within the meaning of the term. [FN417] He reasoned that, since Title VII pro-
hibits discrimination based on race, national origin, sex, and religion, the sex claim is analogous to the religion claim.
[FN418] He noted that no court would accept the argument that discrimination based on changing religion is allowed.
[FN419] He also noted that race discrimination had not been limited to exclude discrimination based on interracial mar-
rriage or interracial friendships. [FN420] Therefore, Judge Robertson noted, discrimination based on sex is also not so
limited. [FN421]

The last rhetorical move by Judge Robertson was one of the most brilliant. Grossman, [FN422] Ulane [FN423] and
their progeny relied heavily on the idea that the Congress in 1964 did not intend to include transsexuals in sex discrimi-
nation. Judge Robertson quoted Justice Scalia--one of the most conservative Supreme Court Justices on the Supreme
Court--for the proposition that using legislative *637 intent to interpret a federal statute would elevate “judge-supposed
legislative intent over clear statutory text.” [FN424]

Judge Robertson went a step further. He said that even if Ulane is still good law, firing Diane Schroer for intending
to go through anatomy-changing sex reassignment surgery was still literally sex discrimination within that view. [FN425]
It is noteworthy that Judge Robertson later awarded the plaintiff almost $500,000 in compensation. [FN426]

H. Analysis

From the preceding Sections, we have learned that courts found three different answers to the question of whether, when an employer discharges an employee because of his or her gender identity, the employer is discriminating because of sex. Each of these hinges on a different definition of sex. Judge Barlow's answer was that sex is protected as a class of biological attributes, and that discrimination based on changing sex is not protected. [FN427] This reasoning is followed by the Seventh and Ninth Circuits. [FN428] Although Judge Barlow did not discuss gender, he did refer to stereotypical concepts about sex. He made it clear that, even assuming arguendo that the employee was female, the employer did not discriminate against the employee based on stereotypes of what females can do. [FN429]

Judge Barlow's decision did not consider the issue of discrimination against an employee based on stereotypes of the behavior or social roles of males. Judge O'Malley's reasoning, however, squarely confronts this issue, pointing to Price Waterhouse's recognition that violating sex stereotypes meant changing the behavioral characteristics and social roles assigned to sex, without regard to whether the sex is male or female. [FN430] Based on this recognition, Judge O'Malley held that reassignment to the protected class, resulting in violation of the stereotypes of behavioral characteristics and social roles of the class, would be protected from discrimination. [FN431] This position is reflected in the later decision in Smith. [FN432] Judge Africk, however, rejected this view, stating, as did Judge Barlow, *638 that changing gender attributes is different in kind from gender attributes themselves. [FN433] In Schroer, however, we see a third position that finds it unnecessary to decide between causes of action for sex stereotyping and sex discrimination, and avoids the need to determine the scientific definition of sex. [FN434]

IV. The Supreme Court, Textualism, and Transgender Plaintiffs

As noted at the beginning of this Article, it is likely that the doctrinal split among the lower federal courts as to the meaning of the term sex in Title VII will bring this issue to the United States Supreme Court. Transgender identity involves a series of related, yet distinct gender identities, and the meaning of the term sex has changed since 1964, and now includes the concepts of gender and gender identity. [FN435] If this issue does come before the Supreme Court, the Court will have to address the question of whether discrimination because of transgender identity or expression is discrimination because of sex. If the Court correctly understands the meaning of the term sex, then it will answer the question in the affirmative.

As discussed below, the major decisions against transgender employees are at least twenty years old. Their reasoning is based on an understanding of statutory interpretation that is quite problematic. The major decisions are based on legislative intent, and, furthermore, an argument that legislative intent can be divined from the absence of evidence. These judges reasoned that sex did not include transsexuals (the term transgender did not yet exist) because Congress would have made a specific reference to transsexuals if they intended to protect them from employment discrimination. [FN436] Since Congress did not make a specific reference, therefore, transsexuals are not protected by Title VII. The Justices who comprise the current Supreme Court have demonstrated that they are not sympathetic to such arguments. [FN437]

At the time of this writing, Justice Souter has announced plans to step down. [FN438] His successor is unknown, and we must therefore await further developments to decide where the future Justice will stand on these issues.
A. Justices Scalia, Kennedy, and Thomas and the Canon of the Canine Judge

What is the proper interpretation of this lack of legislative history? There are three sitting Justices who have repeatedly made known their disdain for what one of them has called the “Canon of Canine Silence,” and the “Conan Doyle *639 approach.” [FN439] The issue first became a subject of controversy in 1980, when Justice Stewart, writing for the Court, said “[i]n ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.” [FN440] This theory of the dog that did not bark is the specific theory relied upon by Judge Barlow in Grossman, and the Seventh Circuit in Ulane. [FN441] The Arthur Conan Doyle story that gave this theory its name involved the theft of a prize-winning thoroughbred horse heavily favored to win a race. Only Sherlock Holmes sees the significance of the curious behavior of the dog.

Colonel Ross still wore an expression which showed the poor opinion which he had formed of my companion’s ability, but I saw by the Inspector’s face that his attention had been keenly aroused. “You consider that to be important?” he asked.

“Exceedingly so.”

“Is there any point to which you would wish to draw my attention?”

“To the curious incident of the dog in the night-time.”

“The dog did nothing in the night-time.”

“That was the curious incident,” remarked Sherlock Holmes.

. . . . 

“I confess,” said the Colonel, “that even now I cannot see how it helps us.”

. . . “The Simpson incident had shown me that a dog was kept in the stables, and yet, though some one had been in and had fetched out a horse, he had not barked enough to arouse the two lads in the loft. Obviously the midnight visitor was some one whom the dog knew well.” [FN442]

Which sitting Justices share the disdain for this “Canon of the Canine Silence”? We find our first clue in Chisom v. Roemer, [FN443] wherein the Justices were interpreting changes to the Voting Rights Act that seemed to eliminate coverage of judicial elections because the new statute used the term “representative.” [FN444] The *640 majority of the Justices in that 1991 decision felt that Congress would have made a specific reference at some point in the extensive legislative history to such a significant change. [FN445] This is similar to Judge Barlow’s reasoning, later adopted by the Seventh [FN446] and Ninth [FN447] Circuits, because Judge Barlow also felt that Congress would have made a specific reference in the legislative history of Title VII to specify that sex included sex change. Of the Justices included in that majority opinion, only Justice Souter is still sitting today who has since announced his resignation. However, Justice Scalia, writing for the dissent, noted:

First is the notion that Congress cannot be credited with having achieved anything of major importance by simply saying it, in ordinary language, in the text of a statute, “without comment” in the legislative history. As the Court colorfully puts it, if the dog of legislative history has not barked nothing of great significance can have transpired. Apart from the questionable wisdom of assuming that dogs will bark when something important is happening, we have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past. We are here to apply the statute, not legislative history, and certainly not the absence of legislative history. Statutes are the law though sleeping dogs lie. [FN448]

Justice Scalia made the point that the Chisom majority had departed from the Court’s prior practice in using this Conan Doyle approach. [FN449] Justice Thomas had not yet taken his seat on the Court when Chisom was decided. However, he is clearly of similar mind. He has joined in several opinions with Justices Scalia and Kennedy on this point. [FN450]
Justice Scalia's later statements bear out his antipathy towards appeals to legislative history.

“Legislative history,” of course, refers to the pre-enactment statements of those who drafted or voted for a law; it is considered persuasive by some, not because they reflect the general understanding of the disputed terms, but because the legislators who heard or read those statements presumably voted with that understanding. [FN451]

Justice Kennedy’s enthusiasm for textualism might be a bit less than Justice Scalia’s, for he had recently written an opinion which turned on legislative history. [FN452] However, that case might properly be considered a specific exception to the general rule because it involves the “clear statement” rule peculiar to the habeas corpus context. Clearly, Justice Kennedy went out of his way to explain the specific need for legislative history in the constitutional context of a direct congressional response to a statement from the Court.

We acknowledge, moreover, the litigation history that prompted Congress to enact the MCA. In Hamdan the Court . . . noted the relevance of the clear statement rule in deciding whether Congress intended to reach pending habeas corpus cases . . . . If the Court invokes a clear statement rule to advise that certain statutory interpretations are favored in order to avoid constitutional difficulties, Congress can make an informed legislative choice either to amend the statute or to retain its existing text. If Congress amends, its intent must be respected even if a difficult constitutional question is presented. . . . [W]e cannot ignore that the MCA was a direct response to Hamdan’s holding . . . . The Court of Appeals was correct to take note of the legislative history when construing the statute . . . . [FN453]

Based on this understanding of Justices Scalia, Kennedy, and Thomas’s positions on statutory interpretation, it is inconceivable that they would agree with the argument that legislative intent by virtue of congressional failure to discuss gender attributes means that transgender employees receive no protection. Rather, they would look to the meaning of the word “sex.” If they interpret sex as including both biological attributes and gender attributes, then it must logically be conceded that transgender identity or expression is protected. In order to make the contrary argument, one must be able to demonstrate an inequality between gender and its manifestations in gender identity and gender expression. If gender is, as shown above, a psycho-social identification and expression and gender identity is identification with a particular gender, and gender expression is the expression of a particular gender, then gender identity and gender expression are simply parts of the whole we call gender. There is no distinction that makes a difference between, on the one hand, discrimination because of sex stereotyping, that is, stereotypes of behavior or expression traditionally associated with a person’s sex, unquestionably prohibited by Title VII, and discrimination because of gender identity or expression not traditionally associated with one’s sex at birth, on the other hand.

Ultimately, the best evidence indicating that Justices Scalia, Kennedy, and Thomas would read Title VII sex to include both biological attributes and gender attributes is Oncale v. Sundowner Offshore Systems:

As some courts have observed, male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] . . . because of . . . sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements. [FN454]

This explicitly recognizes the idea that sex in Title VII goes beyond the ideas that legislators had in 1964.

B. Chief Justice Roberts and Justice Alito

Chief Justice Roberts and Justice Alito are much harder to read. They are too new to the Court and have thus parti-
icipated in too few Supreme Court decisions, to provide much evidence as to how they would view the legal issues presented in the type of case discussed in this Article. In one example, Justice Alito wrote, in a dissenting opinion joined by Chief Justice Roberts and Justices Scalia and Thomas, “Statutory provisions may often have a reach that is broader than the specific targets that the lawmakers might have had in mind at the time of enactment.” [FN455] There are, however, many opinions from both Justices in their tenure on lower courts.

Chief Justice Roberts' tenure as a judge on the D.C. Circuit court seems to point in the direction of favoring meaning over intent, which would favor including gendered attributes in sex discrimination. Justice Roberts was appointed to the United States Court of Appeals for the D.C. Circuit in 2003. [FN456] In that same year, he wrote an opinion noting his preference for text over history: “Since the statute's language is so plain, however, I hesitate to resort to legislative history even though the history suggests a Congressional intent different from the plain language that appears in the statute.” [FN457] He acknowledged a litigant’s argument that the courts have explicitly permitted use of legislative history even where the meaning of the text seems to be clear by noting that “[w]hile such history can be used to clarify congressional intent even when a statute is superficially unambiguous, the bar is high.” [FN458] He rarely finds ambiguity in the text:

“[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.” . . . This case does not present the very rare situation where the legislative history of a statute is more probative of congressional intent than the plain text. [FN459]

He has specifically rejected the argument that the results of a court's statutory interpretation should reflect congressional understandings of the words in the statute. [FN460] In that case, the statute created civil liability for one who presents a false claim to an officer or employee of the United States. The actual situation at issue involved presentation of an allegedly false claim to Amtrak. [FN461]

Totten and the United States do not suggest that the language of Section 3729(a)(1) is somehow not plain; they merely argue that a plain language reading would yield results at variance with the legislative history of the 1986 amendments. Given that we are dealing with plain language, however, there is no way to “construe” the language so that it is satisfied when claims are presented to Amtrak. We could say that submitting a claim to Amtrak is “just like” or “equivalent to” or “effectively” submitting a claim to “an officer or employee of the United States Government,” and that subsection (a)(1) is therefore satisfied, but those would just be different ways of saying that we are not going to read (a)(1) as written by Congress . . . . Totten and the United States imply that the asserted variance with the legislative history empowers us to ignore the plain language of subsection (a)(1), but such extraordinary power is limited to the situation in which adherence to the plain text leads to an “absurd” result . . . . and no one has suggested that to be the case here. [FN462]

He has also specifically noted that “appeals to purpose” cannot override a statute's language. [FN463] Amoco Production Co. v. Watson, [FN464] for example, involved a statute of limitations that prohibited the federal government from bringing an action for money damages founded on contract unless the complaint was filed within six years of when the right of action accrued. [FN465] The question was whether this barred a 1996 administrative order from the Secretary of the Interior requiring Amoco and other natural gas producers to pay royalties retroactively to 1989. [FN466] The Secretary argued that administrative orders were not covered by the statute, [FN467] but Amoco pointed to a section of the law that specifically exempted certain administrative orders from the statute of limitations. [FN468] Amoco suggested, naturally enough, that Congress understood administrative orders to be generally included within the statute's meaning. [FN469] Then-Judge Roberts disagreed with Amoco, noting that, “[a]lthough other courts addressing this question have emphasized the underlying purpose of repose animating section 2415 . . . the Supreme Court has frequently warned that such appeals to purpose cannot override a statute's clear language.” [FN470]
Recently, Justice Alito wrote an opinion suggesting that, while he does not reject legislative history, neither will he accept an argument based on it unless the evidence is clear and convincing. [FN471]

The Government contends first that a 1984 Senate Report accompanying the bill that reenacted EAJA unequivocally expressed congressional intent . . . . We are not persuaded. In our view, the legislative history does not even address the question presented, much less answer it in the Government's favor. . . .

. . . Because the legislative history is a wash in this case, we need not decide precisely how much weight it deserves in our analysis. [FN472]

Given these rulings, their reasoning is analogous to the reasoning required by the case of a transgender plaintiff seeking the assistance of Title VII. Chief Justice Roberts would similarly reject an appeal to purpose by those who would argue that Congress intended to bar transgender plaintiffs from relief by use of the word sex.

*645 Justice Alito was appointed to the Court of Appeals for the Third Circuit in 1990. [FN473] Although his opinions have stated on many occasions that plain meaning is more important than legislative history, [FN474] Justice Alito's opinions from the Third Circuit are rife with references to legislative history. [FN475] He does not appear willing to depart from the meaning of a text in order to indulge legislative history, but he does seem to look to legislative history as indicative of textual meaning. [FN476] It is not clear from these whether the absence of legislative history means anything to Justice Alito. At the time of this writing, he had written two Supreme Court opinions that discussed the role of legislative history in his decision-making. [FN477] In one, he specifically used legislative history to justify his understanding:

This interpretation is entirely in accord with the Act's legislative history. As both the 1974 House and Senate Reports illustrate, the Act was designed not just to benefit defendants but also to serve the public interest by, among other things, reducing defendants’ opportunity to commit crimes while on pretrial release and preventing extended pretrial delay from impairing the deterrent effect of punishment. [FN478]

In another, Justice Alito disregarded the legislative history, but in a way that clearly noted his willingness to use it when necessary. [FN479] He indicated that it would have weight in other contexts:

Whatever weight this legislative history would merit in another context, it is not sufficient here. Putting the legislative history aside, we see virtually no support for respondents' position. Under these circumstances, where everything other than the legislative history overwhelming suggests that expert fees may not be recovered, the legislative history is simply not enough. In a Spending Clause case, *646 the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds. Here, in the face of the unambiguous text of the IDEA and the reasoning in Crawford Fitting and Casey, we cannot say that the legislative history on which respondents rely is sufficient to provide the requisite fair notice. [FN480]

He has issued similar opinions while on the Third Circuit using congressional intent, statutory purpose, ambiguity, and legislative history in this way. [FN481] However, none of this is to say that Justice Alito would rule against a transgender plaintiff. Rather, it is to say that Justice Alito has not allied himself so clearly with the textualist jurisprudence favored by other Justices on the Court. On the issue of sympathies with transgender employees subjected to discrimination, it is interesting to note that Justice Alito wrote an opinion very sympathetic to a young plaintiff who alleged that he was not receiving a fair and appropriate education from his local school because of his treatment at the hands of bullies, undisciplined by the school, who routinely taunted him with the epithets “faggot,” “gay,” “homo,” “transvestite,” “transsexual,” “slut,” and “queer,” among others. [FN482] After the school district refused to allow him to transfer to another school, the plaintiff’s parents unilaterally placed him in another school and took legal action to seek reimbursement for out-of-district education. [FN483] Then-Judge Alito reversed the District Court's determination that the school could
provide a fair and appropriate education in such circumstances, allowing the plaintiff reimbursement for out-of-district education and attorney fees. [FN484] Nor was then-Judge Alito strict when it comes to expansions of Title VII. He wrote a ground-breaking opinion in a sex discrimination case, ruling that retaliation based on a hostile working environment claim is actionable. [FN485] Would Justice Alito be as sympathetic to a transgender employee complaining of sex discrimination under Title VII? This one might be too close to call.

C. Justices Stevens, Breyer, and Ginsburg

Justices Stevens, Breyer, and Ginsburg would not likely join in the enthusiasm of Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas for the argument that the meaning of the text is paramount to presumed legislative intent and legislative history. There are, nonetheless, clear indications that Justices Stevens, and Breyer would construe sex broadly in Title VII to include both biological attributes and gender attributes, and would hold that Title VII protects transgender employees from sex discrimination. [FN486]

Recently, there was an interesting alignment between Justices Scalia and Thomas, and joined by Justice Ginsberg, in United States v. Santos. [FN487] Justice Stevens wrote a concurring opinion, and joined in the judgment of the Court, basing his opinion on an analysis of the absence of legislative history. [FN488] As the majority opinion noted:

We think it appropriate to add a word concerning the stare decisis effect of Justice STEVENS' opinion. Since his vote is necessary to our judgment, and since his opinion rests upon the narrower ground, the Court's holding is limited accordingly. But the narrowness of his ground consists of finding that “proceeds” means “profits” when there is no legislative history to the contrary. That is all that our judgment holds. It does not hold that the outcome is different when contrary legislative history does exist. Justice STEVENS' speculations on that point address a case that is not before him, are the purest of dicta, and form no part of today's holding. Thus, as far as this particular statute is concerned, counsel remain free to argue Justice STEVENS' view (and to explain why it does not overrule Clark v. Martinez). They should be warned, however: Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent. [FN489]

Justices Stevens, Ginsburg, and Breyer are often known to hold more liberal political opinions than Justices Scalia, Kennedy, and Thomas. They have aptly been called “the liberal bloc” of the Court. [FN490] They have generally dissented from the Court's narrowing rulings in civil rights cases. [FN491] They have shown a willingness to look to the social history to understand concepts in civil rights statutes. [FN492] Their views on sex discrimination show a liberal understanding of the concept. [FN493] They have also been sympathetic to claims by gay persons in the discrimination context, as in their dissent in Boy Scouts of America v. Dale. [FN494] There is, of course, no guarantee how they would rule on the question of whether sex discrimination covers discrimination on the basis of transgender identity. But if they follow paths similar to their previous opinions, it would seem that Justices Stevens, Ginsburg, and Breyer will credit the arguments of a transgender plaintiff looking to Title VII for a remedy.

D. Reading the Crystal Ball

It is always risky to predict what one judge will do, let alone nine. But predicting the law is the business of lawyers, who are adept at issuing disclaimers. Now is the time for me to issue some disclaimers of my own. I do not claim to know what any individual Justice will do when faced with a transgender plaintiff relying on Title VII's prohibition of sex discrimination. I do know what some judges in the past have done, as well as how they have explained their actions, and I do know what “sex” means. I also know what the Justices have said (and done) regarding their jurisprudential methodology in similar situations. Despite all this, however, it is possible that the situation of a transgender plaintiff involving
novel social questions may induce Justices to depart from their prior courses.

Putting aside these cavils, it is possible to make a prediction based on past positions. Given the avowed textual orientation (if you will forgive the pun) of Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas, it is hard to imagine that they would interpret the meaning of sex differently in Title VII than the way it is generally defined in other contexts. They would not be disposed to interpret congressional silence on the issue as meaning that sex should be interpreted in a narrow, confined, or traditional manner different from other contexts. After all, Justice Scalia wrote the unanimous opinion in Oncale. [FN495] If they follow their prior courses, the conclusion that a transgender employee who received discriminatory treatment because of their transgender identity or expression is entitled to protection under Title VII also follows. However, Justice *649 Alito, as we have seen, is rather bi-textual, dallying with both statutory language and legislative history, and seems comfortable using both to suit his purpose. We will have to wait to see which side receives his favor. At the same time, Justices Stevens, and Breyer, while they would not credit the textualism of the others, would probably look to the remedial intent of Title VII, finding that transgender employees who are fired because of their gender identity or expression are encompassed within Title VII's protection.

Based on this analysis and considering the textualism of Chief Justice Roberts, and Justices Scalia, Kennedy, and Thomas, as well as the liberalism of Justices Stevens, Souter, and Breyer, it is not difficult to predict that a transgender plaintiff may find a surprisingly sympathetic hearing in the United States Supreme Court. Only time will tell.

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[FN2]. See Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, Transgender Rights 3, 3-4 (Paisley Currah, Richard Juang & Shannon Minter eds., 2006) (reviewing the original use of transgender by Virginia Prince to distinguish those living “full time in the gender opposite to their anatomy” from both transsexual individuals and crossdressers through current usage as an “umbrella term”); see also Am. Psychological Ass'n, Answers to Your Questions About Transgender Individuals and Gender Identity 1 (2006), available at http://www.apa.org/topics/Gender3.pdf.

Transgender is an umbrella term used to describe people whose gender identity (sense of themselves as male or female) or gender expression differs from that usually associated with their birth sex. Many transgender people live part-time or full-time as members of the other gender. Broadly speaking, anyone whose identity, appearance, or behavior falls outside of conventional gender norms can be described as transgender. However, not everyone whose appearance or behavior is gender-atypical will identify as a transgender person.

Id.

[FN3]. See, e.g., Judith Butler, Bodies that Matter: On the Discursive Limits of “Sex” 1 (1993) (“Sexual difference, however, is never simply a function of material differences which are not in some way both marked and formed by discursive practices.”); Suzanne J. Kessler & Wendy McKenna, Gender: An Ethnomethodological Approach 163 (1978) (“Biological, psychological, and social differences do not lead to our seeing two genders. Our seeing of two genders leads to the ‘discovery’ of biological, psychological, and social differences.”); Stephen Whittle, Where Did We Go Wrong? Feminism and Trans Theory--Two Teams on the Same Side?, in The Transgender Studies Reader, 194, 199-200 (Susan Stryker & Stephen Whittle eds., 2006) (“The default assumption that underlies any notion of a transgendered existence is that gender is immutable and it is fixed through biological constraints, and social construction merely affects any representation that the biological may take.”).

[FN5]. Sommers v. Budget Mktg., Inc., 667 F.2d 748, 749 (8th Cir. 1982).

[FN6]. Holloway v. Arthur Andersen & Co., 566 F.2d 659, 663 (9th Cir. 1977).

[FN7]. Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221-22 (10th Cir. 2007).


[FN10]. See, e.g., Smith v. City of Salem, 378 F.3d 566, 578 (6th Cir. 2004) (finding a transgender plaintiff's Title VII claims valid on equal protection grounds); Rosa v. Park West Bank & Trust Co., 214 F.3d 213, 214-15 (1st Cir. 2000) (finding valid a transgender plaintiff's Equal Credit Opportunity Act sex discrimination claims); Lopez, 542 F. Supp. 2d at 660 (finding a transgender plaintiff's employment discrimination claim actionable); see also infra Section III (recounting the history of transgender employees in the courts).

[FN11]. Letter from Dianna B. Johnston, Assistant Legal Council, EEOC (May 25, 2007), available at http://www.eeoc.gov/foia/letters/2007/titlevii_sex_coverage_trans.html (“Whether discrimination against a transgendered individual may constitute discrimination based on sex in violation of Title VII is a factual question ....”). While this informal letter was not written as an agency opinion or interpretation, id., this represents a reversal from the EEOC position expressed in Bell v. Shalala, Appeal No. 01941146, Agency No. SSA 899-93, 1994 EEOPUB LEXIS 1202 (Sept. 9, 1994), that “[t]he Commission has repeatedly held that transsexualism is not recognized as a protected basis under Title VII,” id. at *5.

[FN12]. See Sup. Ct. R. 10 (“Review on a writ of certiorari is not a matter of right, but of judicial discretion.... The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter ....”).

[FN13]. Grossman v. Bernards Twp. Bd. of Educ., No. 74-1904, 1975 WL 302, at *1 (D.N.J. Sept. 10, 1975); see also Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 WL 737215, at *7 (S.D.N.Y. Dec. 24, 1996) (listing a string of cases including Grossman and noting that “[e]very federal court that has considered the question has rejected the application of the Civil Rights Act of 1964 to a transsexual claiming employment discrimination”). In Grossman, a tenured teacher was discharged after her sex-reassignment surgery. Grossman, 1975 WL 302, at *1. The court found in favor of the school district, holding that the firing was caused by a change in sex rather than sex itself, and Title VII was therefore not implicated. Id. at *4.

[FN14]. See, e.g., Etsitty, 502 F.3d at 1222 (“[T]here is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.”); Sommers, 667 F.2d at 750 (“[F]or the purposes of Title VII the plain meaning must be ascribed to the term ‘sex’ in absence of clear congressional intent to do otherwise.
Furthermore, the legislative history does not show any intention to include transsexualism in Title VII."); Holloway, 566 F.2d at 663 (“Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning.”).

[FN15]. See, e.g., Sommers, 667 F.2d at 750 (“[T]he fact that the proposals [to amend Title VII to protect ‘sexual preference’] were defeated indicates that the word ‘sex’ in Title VII is to be given its traditional definition, rather than an expansive interpretation.”); Holloway, 566 F.2d at 662 (“Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind. Later legislative activity makes this narrow definition more evident.”).

[FN16]. See, e.g., Ulane, 742 F.2d at 1085 (“The dearth of legislative history on § 2000e-2(a)(1) strongly reinforces the view that the section means nothing more than its plain language implies.... Had Congress intended more, surely the legislative history would have at least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate.”); Grossman, 1975 WL 302, at *4 (“In the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.”).

[FN17]. See, e.g., Ulane, 742 F.2d at 1087 (“But even if one believes that a woman can be so easily created from what remains of a man, that does not decide this case.”); Holloway, 566 F.2d at 662 n.4 (providing a dictionary definition of “sex”).

[FN18]. See, e.g., Ulane, 742 F.2d at 1087 (“It is clear from the evidence that if [the defendant] did discriminate against [the plaintiff], it was not because she is female, but because [she] is a transsexual ....”); Grossman, 1975 WL 302, at *3 (“[P]laintiff was discharged not because of her status as a female, but rather because of her change in sex from the male to the female gender.”).

[FN19]. See, e.g., Etsitty, 502 F.3d at 1221 (“[D]iscrimination against a transsexual based on the person’s status as a transsexual is not discrimination because of sex under Title VII .... [T]his court recognizes it is the plain language of the statute and not the primary intent of Congress that guides our interpretation of Title VII.”).

[FN20]. Compare Grossman, 1975 WL 302, at *4 (holding in 1975 that “[i]n the absence of any legislative history indicating a congressional intent to include transsexuals within the language of Title VII, the Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning”), with Etsitty, 502 F.3d at 1222 (finding in 2007 that “there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female”).

[FN21]. 502 F.3d 1215.

[FN22]. Id. at 1221-22 (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

[FN23]. Id. at 1221.

[FN24]. Id. at 1221-22.

[FN25]. See infra Part I.B.

[FN26]. See Alex Kozinski, Should Reading Legislative History Be an Impeachable Offense?, 31 Suffolk U. L. Rev. 807, 811 n.11 (1998) (relating an example of the current court’s trend toward textualism). Kozinski described Escobar Ruiz v. INS, 838 F.2d 1020 (9th Cir. 1988), in which a circuit court searched legislative history for support in granting
attorney’s fees when the statutory text itself did not provide this support. Kozinski, supra (citing Escobar Ruiz, 838 F.2d at 1023, 1026). The Supreme Court later rejected this holding, noting that “the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used.” Ardestani v. INS, 502 U.S. 129, 136 (1991).

[FN27]. Etsitty, 502 F.3d at 1221-22 (quoting Oncale, 523 U.S. at 79).

[FN28]. See Kozinski, supra note 26, at 810 (“The practice of consulting legislative history was originally controversial, but starting in the 1960s the Supreme Court threw caution to the wind and embraced legislative history as a concomitant of statutory interpretation .... In Train v. Colorado Public Interest Research Group, the Court went so far as to hold that interpreting the Clean Water Act without looking at its legislative history was reversible error.” (footnote omitted)).

[FN29]. Stephen M. Durden, Plain Language Textualism: Some Personal Predilections Are More Equal than Others, 26 QLR 337, 341 (2008) (“[I]nterpretation that relies on, or purports to rely on, only the words of the ... text. This type of plain language textualism purports to eliminate any reference to any outside source. Plain language textual interpretation proclaims the existence of a ‘plain’ meaning, and then sets forth that relatively specific and singular meaning.”); see also Peter J. Smith, Textualism and Jurisdiction, 108 Colum. L. Rev. 1883, 1886 (2008) (“Textualism posits that courts are bound by a statute’s plain meaning, and that consideration of legislative history, spirit, or purpose is inappropriate in attempting to discern statutory meaning.”); William Michael Treanor, Taking Text Too Seriously: Modern Textualism, Original Meaning, and The Case Of Amar's Bill Of Rights, 106 Mich. L. Rev. 487, 488 (2007) (“Constitutional textualists share a view that the Constitution should be read to reflect the original meaning of its text .... In uncovering constitutional meaning, textualists stress precise word choice, placement of text in the document, and grammar: they compare related parts of the constitutional document and accord weight to subtle similarities and differences.”). See infra Section IV (analyzing each of the nine current Justices, and their likely outlooks on the meaning of sex within Title VII).

[FN30]. See Kozinski, supra note 26, at 807-08 (explaining the tenets of textualism, and mentioning textualist jurists Scalia and Easterbrook).

[FN31]. See Etsitty, 502 F.3d at 1222 (“Nevertheless, there is nothing in the record to support the conclusion that the plain meaning of ‘sex’ encompasses anything more than male and female.”).

[FN32]. Id.

[FN33]. See id. ("Scientific research may someday cause a shift in the plain meaning of the term 'sex' so that it extends beyond the two starkly defined categories of male and female.").

[FN34]. See sources cited supra note 29 (reviewing the history and scope of the textualist school of thought).


[FN38]. L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978) (“It is now well recognized that employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females.”); Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (“As 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.”).

[FN39]. Oncale, 523 U.S. at 78-79 (“We see no justification in the statutory language or our precedents for a categorical rule excluding same-sex harassment claims from the coverage of Title VII .... Our holding that [Title VII’s proscription of sex discrimination] includes sexual harassment must extend to of any kind that meets the statutory requirements.’”).

[FN40]. 378 F.3d 566.

[FN41]. Id. at 575 (“As such, discrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against [the plaintiff] in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman.”).

[FN42]. Rosa, 214 F.3d at 214-15 (“A biological male, [the plaintiff] was dressed in traditionally feminine attire .... [A bank employee] told Rosa that she would not provide him with a loan application until he ‘went home and changed’ [to] more traditionally male attire .... [Looking to Title VII case law], we cannot say at this point that the plaintiff has no viable theory of sex discrimination consistent with the facts alleged.”).


[FN47]. See Creed, 2007 WL 2265360, at *4 (finding actionable a transgender plaintiff's unlawful termination claim under Title VII). The court distinguished Ulane, which had held that claims based exclusively on transgender discrimination did not fall under the purview of Title VII. Id. at *3. The plaintiff in Creed, however, also raised a sex stereotype claim. Id.

[FN48]. See Schroer v. Billington, 577 F. Supp. 2d 293, 308 (D.D.C. 2008) ("[The employer]'s refusal to hire [plaintiff] after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of ... sex.’").


[FN50]. Gender identity is another recent construct referring to one's deeply felt self-identification with male or female gender. Id. at 21.


[FN53]. Id. at 6-7. See generally id. at 11-18 (defining and contrasting intersexed individuals, transvestites, homosexuals and lesbians, drag queens, she-males, female impersonators, gender benders, and transgendered individuals).


[FN55]. See Jillian Todd Weiss, GL vs. BT: The Archaeology of Biphobia and Transphobia Within the U.S. Gay and Lesbian Community, 3 J. of Bisexuality 25, 36 (2004) (discussing the archaic perception that transgender traits were indications of mere transitory behavior as opposed to deeper identity).

[FN56]. “Hermaphrodite” refers to an organism having both male and female reproductive organs. New Oxford American Dictionary 796 (2001). As applied to humans, the term “intersex” is preferred, as the term “hermaphrodite” has become associated with sensationalism. See generally Brown & Rounsley, supra note 49, at 12 (noting that intersex is preferred to hermaphrodite).

[FN57]. See Kennedy, supra note 54, at 105-07 (discussing Ulrich's psychologically hermaphroditic explanation of homosexuality).


[FN60]. Id.

[FN61]. See id. at 32-35 (enumerating many different motivations for crossdressing, including masochism, the idea of metamorphosis into another gender, and love for the clothing of the opposite gender).

[FN62]. See id. at 28-35 (including certain heterosexual and homosexual desires, erotic and non-erotic pleasure, and other reasons as the various motivations behind crossdressing); see also, e.g., Joanne Meyerowitz, How Sex Changed: A History of Transsexuality in the United States 188-89 (2002) (describing how professional female impersonators "performed onstage as glamorous women").

[FN63]. See Meyerowitz, supra note 62, at 18-19 (discussing Hirshfeld's encounters with those who crossdressed because they identified as the other gender and wished for sex reassignment surgery).


[FN65]. The first identifiable sex reassignment surgery took place in 1930, which Hirschfeld supervised. Meyerowitz, supra note 62, at 18-19; see also id. at 15 (discussing early attempts at sex reassignment surgery, some arranged by Magnus Hirschfeld and others attempted by doctors affiliated with Hirschfeld's Institute for Sexual Science). It is clear, however, that Hirschfeld did not consider such surgical intervention critical to the identity. Such surgeries did not become generally available until the late 1960s. See id. at 14-50, 97 (noting that through the 1950s only a few cases of sex reassignment surgery were known and that it gained media attention after the famous transsexual, Christine Jorgensen, was discovered).

[FN66]. Harry Benjamin, The Transsexual Phenomenon 12-14 (1966) (explaining the difference between transvestites and transsexuals and noting that transsexuals feel they belong to the opposite sex and express that feeling outwardly through dress).


[FN69]. Weiss, supra note 55, at 29-30 (identifying other informal groupings, such as Radical Faeries, she-males, gender benders, and others).

[FN70]. See Benjamin, supra note 66, at 12-20 (reporting the findings of years of treating transsexuals and study on transsexuality and explaining common physical and psychological traits among transsexuals, as well as "treatments" for their "diagnosis").
[FN71]. See Christine Jorgensen, A Personal Autobiography 322-25 (1967) (discussing how the term transsexual was gaining recognition through Benjamin's work and her story).


[FN73]. Meyerowitz, supra note 62, at 171.

[FN74]. Jorgensen, supra note 71, at 125.

[FN75]. Id.

[FN76]. See Meyerowitz, supra note 62, at 57 (discussing Jorgensen's denial of his early homosexual encounters).

[FN77]. Id. at 183-84.

[FN78]. Id. at 171.

[FN79]. See id. (discussing the controversy over how to classify transsexuals stemming from the change in Jorgensen's diagnosis).

[FN80]. See Benjamin, supra note 66, at 14 (stating that transsexuals differ from transvestites because they put “all [their] faith into the hands of the doctor, particularly the surgeon”); Meyerowitz, supra note 62, at 59 (discussing how George Jorgensen was distinguishable, under the prevailing views, from a homosexual because he intensely wanted to be a woman and wished for surgery to achieve that end).

[FN81]. See Meyerowitz, supra note 62, at 173 (discussing the school of thought that characterized transsexualism as either a subset of homosexuality or an extreme form of transvestitism).

[FN82]. See Benjamin, supra note 66, at 14 (noting that transsexuals feel they belong to and desire to be a member of the other sex).

[FN83]. See id. at 20 (stating that some transsexuals may desire a member of their new sex).

[FN84]. See Riki Anne Wilchins, Read My Lips: Sexual Subversion and the End of Gender 15 (1997) (noting that the term transgender initially referred to “people who changed their gender but not their genitals”).

[FN85]. See Meyerowitz, supra note 62, at 180-82 (describing crossdressers who were not in favor of sex reassignment surgery).

[FN86]. This distinction can be difficult to grasp. For a popular work that gives insight into transvestite identity, see generally Charlotte von Mahlsdorf, Burkhard Peter & Jean Hollander, I Am My Own Wife: The True Story of Charlotte von Mahlsdorf (Jean Hollander trans., 2004).

[FN87]. Valentine, supra note 51, at 32.

[FN88]. See, e.g., Brown & Rounsley, supra note 49, at 17-18 (explaining why the authors use the term transgender to referring to cross-gender people generally).

[FN89]. See, e.g., Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in

[FN90] See Wilchins, supra note 84, at 16 (stating that the term transgender evolved to embrace diverse cross gender groups).

[FN91] See Valentine, supra note 51, at 87 (discussing the emergence in the transgender community of heterosexual men who crossdress).

[FN92] See id. at 87-88 (discussing the psychiatric profile of heterosexual males who crossdress for erotic pleasure).

[FN93] See generally id. at 71-104 (discussing the creation of the transgender community to include a spectrum of people who fit different identity descriptors, from crossdressers to transsexuals).

[FN94] See Meyerowitz, supra note 62, at 170-89 (discussing the initial tensions between the Western European and American schools of thought on the topic of transsexuality and the resulting tensions within the gay and trans communities).

[FN95] See, e.g., Brown & Rounsley, supra note 49, at 26 (discussing the terminology used in Central and South Asia, Australia, and India). Indeed, Valentine claims rightly that the very meanings of gender and sex as categories are transformed in the international context. Valentine, supra note 51, at 165.

[FN96] Id. at 17.

[FN97] I refer to “male” and “female” gender attributes in quotes, as these attributes are not intrinsically male or female, but are typically found in biological males or biological females.

[FN98] See, e.g., M.T. v. J.T., 355 A.2d 204, 210 (N.J. Super. Ct. App. Div. 1976) (“A transsexual in a proper case can be treated medically by certain supportive measures and through surgery to remove and replace existing genitalia with sex organs which will coincide with the person's gender.”).


[FN100] This logical position may not reflect the practical point of view of a practicing lawyer with a transsexual client. In attempting to establish the connection with Title VII sex, it is in the client's interest for purposes of winning the case to emphasize that transsexuality involves one's sex, by contrast with transvestitism, in which physical sex is not at issue. This is, however, a false dichotomy. See Franke, supra note 89, at 1-3 (describing how laws that focus on biological anatomy will not effectively eradicate sex discrimination).

[FN101] See Meyerowitz, supra note 62, at 180-82 (discussing the phenomenon of certain transvestites receiving different medical and surgical feminization treatments).

[FN102] See Benjamin, supra note 66, at 14 (noting that transsexuals feel they belong to the other sex, whether or not they have made the transition); see also Meyerowitz, supra note 62, at 284 (discussing the modern prevailing view that
transsexuals need not be defined by the sex they were born with or given by their doctor).

[FN103]. See Sommers, 667 F.2d at 748 (stating that the plaintiff in that case, a male-to-female transsexual, was hired as a woman and fired when it was discovered that she was a transsexual for misrepresenting her sex when she applied for the position); Powell, 436 F. Supp. at 370 (stating that the plaintiff was hired as a woman waitress and alleged that she was fired only after her employer learned that she was a transsexual).

[FN104]. See Sommers, 667 F.2d at 748 (stating that the plaintiff was presumed a woman and fired when it was discovered that she was a transsexual and the presumption was wrong); Powell, 436 F. Supp. at 370 (stating that the plaintiff was allegedly fired because the presumption about her anatomical sex turned out to be wrong).


[FN106]. See Meyerowitz, supra note 62, at 3 (stating that gender is expressed by masculinity and femininity and the behaviors associated with them).

[FN107]. It should be noted that the term sexual preference is no longer used by gays and lesbians, as it implies that sexual attraction is a matter of conscious choice. The term sexual orientation is preferred because it implies that gay and lesbian sexual attraction is a fixed characteristic, though there is considerable dispute as to whether this is a result of biology or psychology. See generally Weiss, supra note 55, at 33 (discussing this dispute over the causes of homosexuality as choice or innate orientation). Some bisexuals still use the term “sexual preference,” and its use is generally attended by controversy. Id. at 33-35.


[FN109]. Section 207.05(a)(5) of the New York City Health Code requires transgender individuals to undergo “convertive” surgery in order to change the gender designation on their birth certificates. N.Y., N.Y., New York City Health Code Title V, art. 207, § 207(a)(5).


[FN113]. In re Gardiner, 42 P.3d at 120.
[FN114]. Id. at 122 (quoting In re Estate of Gardiner, 22 P.3d 1086, 1091-92 (Kan. App. 2001)).

[FN115]. See id. (quoting In re Gardiner, 22 P.3d at 1091-92) (“J’Noel consulted with a psychiatrist, who opined that J’Noel’s life history was consistent with a diagnosis of transsexualism.”).

[FN116]. See id. at 122-23 (quoting In re Gardiner, 22 P.3d at 1091-92) (describing J’Noel’s sex change procedures and the legal actions taken to reflect such changes).

[FN117]. Id. at 123 (quoting In re Gardiner, 22 P.3d at 1092).

[FN118]. Id. See Petition for Partial Distribution, In re Estate of Gardiner, 2000 WL 35489044, at *1 (No. 9908 PE 00119), 1999 WL 33972501, at *1 (“The Special Administrator has confirmed assets of the estate in the approximate amount of $2.3 Million consisting of approximately $300,000.00 in real property and $2 Million in cash, stock and cash equivalents.”); see also Kan. Stat. Ann. § 59-505 (2008) (“[T]he surviving spouse shall be entitled to receive one-half of all real estate of which the decedent at any time during the marriage was seized or possessed ....”).

[FN119]. In re Gardiner, 42 P.3d at 123.

[FN120]. See id. at 137 (ruling that a male-to-female transsexual is still considered male under the Kansas marriage statute); In re Gardiner, 22 P.3d at 1110 (finding that chromosomes are not themselves determinative of sex, but that medical and legal procedures may also be considered); In re Gardiner, 2000 WL 35489044, at *1 (holding that a person's sex cannot be changed through medical and surgical procedures for the purposes of valid marriage under Kansas law).


[FN122]. In re Gardiner, 42 P.3d at 123 (quoting In re Gardiner, 22 P.3d at 1092).


[FN124]. In re Gardiner, 22 P.3d at 1090.

[FN125]. Id. at 1110.

[FN126]. See id. (“[A] trial court must consider and decide whether an individual was male or female at the time the individual’s marriage license was issued and the individual was married, not simply what the individual’s chromosomes were or were not at the moment of birth.”).

[FN127]. Id.

[FN128]. In re Gardiner, 42 P.3d at 122.

[FN129]. Id. at 135 (quoting Webster’s New World College Dictionary 521 (Michael Agnes ed., 4th ed. 2006).

[FN130]. Id.

[FN131]. See id. at 135-36 (reasoning that the Kansas legislature had enacted the state’s marriage statute, allowing marriage only between members of the opposite sex, with traditional notions of sex in mind).

[FN132]. See id. at 137 (“J’Noel remains a transsexual, and a male for purposes of marriage under [the Kansas statute].”).
[FN133]. In re Gardiner, 22 P.3d at 1110 (holding that medical and legal procedures can be considered to determine a person's sex).

[FN134]. See id. at 1094 (“If one concludes that chromosomes are all that matter and that a person born with ‘male’ chromosomes is and evermore shall be male, then one must confront every situation which does not conform with such a rigid framework of thought.”).

[FN135]. Id. at 1093 (citing Frank P. M. Kruijver et al., Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus, 85 J. Clinical Endocrinology & Metabolism 2034, 2034 (2000)).


[FN137]. In re Gardiner, 22 P.3d at 1094 (quoting Julie A. Greenberg, Defining Male and Female: Intersexuality and the Collision Between Law and Biology, 41 Ariz. L. Rev. 265, 278-79 (1999)).

[FN138]. Id. at 1096.

[FN139]. See id. at 1094 (“There are situations of ambiguity in which certain individuals have chromosomes that differ from the typical pattern. The questions which must be asked, if not answered, are: ‘Are these people male or female?’ and, ‘Should they be allowed to get married?’”).

[FN140]. In re Gardiner, 42 P.3d at 135.

[FN141]. Id. at 124.

[FN142]. See id. at 135 (“A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to ‘produce ova and bear offspring’ does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes.”).

[FN143]. Id. (emphasis added).

[FN144]. Compare In re Gardiner, 22 P.3d at 1110 (holding that medical and legal procedures can be considered to determine a person's sex), with In re Gardiner, 42 P.3d at 136-37 (ruling that a male-to-female transsexual is still considered male under the Kansas marriage statute).

[FN145]. See In re Gardiner, 22 P.3d at 1094 (“If one concludes that chromosomes are all that matter and that a person born with ‘male’ chromosomes is and evermore shall be male, then one must confront every situation which does not conform with such a rigid framework of thought.”).

[FN146]. In re Gardiner, 42 P.3d at 135.

[FN147]. See Kantaras, 884 So. 2d at 161 (“The controlling issue in this case is whether, as a matter of law, the Florida statutes governing marriage authorize a postoperative transsexual to marry in the reassigned sex. We conclude they do not.”); Littleton, 9 S.W.3d at 230 (“The male chromosomes do not change with either hormonal treatment or sex reassignment surgery. Biologically a post-operative female transsexual is still a male.”).

[FN148]. See Kantaras, 884 So. 2d at 161 (“Until the Florida legislature recognizes sex-reassignment procedures and amends the marriage statutes to clarify the marital rights of a postoperative transsexual person, we must ... invalidate any marriage that is not between persons of the opposite sex determined by their biological sex at birth.”); Gardiner, 42 P.3d
at 136 ("The legislature has declared that the public policy of this state is to recognize only the traditional marriage between ‘two parties who are of the opposite sex’... We cannot ignore what the legislature has declared to be the public policy of this state."); Littleton, 9 S.W.3d at 230 ("In our system of government it is for the legislature, should it choose to do so, to determine what guidelines should govern the recognition of marriages involving transsexuals.").


[FN151]. See, e.g., Haw. Rev. Stat. Ann. § 515-2 (LexisNexis 2006) ("‘Gender identity or expression’ includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self-image, gender-related appearance, or gender-related expression ..."); N.M. Stat. Ann. § 28-1-2(Q) (LexisNexis 2003) ("‘Gender identity’ means a person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the persons appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth."); R.I. Gen. Laws § 11-24-2.1(l) (2008) ("‘Gender identity or expression’ includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth."); Wash. Rev. Code Ann. § 49.60.040(15) (West 2006) ("‘Gender expression or identity’ means having or being perceived as having a gender identity, self-image, behavior, appearance, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."). A federal court has upheld these terms against constitutional vagueness challenges. Hyman v. City of Louisville, 132 F. Supp. 2d 528, 545 (W.D. Ky. 2001), vacated for lack of standing, 53 F. App'x 740, 744 (6th Cir. 2002).

[FN152]. See sources cited supra note 151 (citing state statutes that have used the terms gender identity and gender expression in an attempt to more clearly demarcate the scope of their non-discrimination statutes).


[FN155]. See, e.g., 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[FN156]. See, e.g., R.I. Gen. Laws § 11-24-2.1(l) ("‘Gender identity or expression’ includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression, whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.” (emphasis added)).

[FN157]. 635 N.W.2d 717 (Minn. 2001).

[FN158]. Id. at 721.

[FN160]. Id. (quoting Minn. Stat. § 363.01, subdiv. 41a (2000) (current version at Minn. Stat. §363A.03 (2008))).

[FN161]. See id. at 725 (“Goins must establish that she was eligible to use the restrooms that West designated for use according to biological gender. On the record before us, she has not done so.”).

[FN162]. Id. at 723.

[FN163]. Goins, 635 N.W.2d at 723.

[FN164]. See Hispanic Aids Forum v. Estate of Bruno, 792 N.Y.S.2d 43, 47 (N.Y. App. Div. 2005) (“[T]he complaint ... alleges not that the transgender individuals were selectively excluded from the bathrooms ... but that they were excluded on the same basis as all biological males and/or females are excluded from certain bathrooms-their biological sexual assignment. In this vein, we find ... Goins ... to be instructive.”).


[FN166]. See Henry Rubin, Self-Made Men: Identity and Embodiment Among Transsexual Men 42 (2003) (“The discovery of hormones discredited the dualistic model of sex that viewed male and female as exclusive categories. It challenged the notion that there was any ascertainable site of male and female essences.”).

[FN167]. See id. at 42-43 (noting that sex is a term sometimes used to refer to both masculine and feminine qualities such as weakness, gentleness, softness, fairness, and sternness).

[FN168]. See, e.g., Bradwell v. Illinois, 83 U.S. 130, 141-42 (1872) (Bradley, J., concurring) (“The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”).

[FN169]. See Ann Oakley, Sex, Gender, and Society 189-90 (1972) (“[M]ost people believe that there are inborn differences between the sexes .... Throughout the centuries this belief has accounted for much of the passion in the debate about sex differences ....”).

[FN170]. See id. at 158 (“[W]ith few exceptions, there are two sexes, males and female. To determine sex one must assay the following physical conditions: chromosomes, external genitalia, internal genitalia, gonads, hormonal states, and secondary sex characteristics ....”).

[FN171]. See 15 Oxford English Dictionary 107 (2d ed. 1989) (explaining that sex is derived from the Latin word sexus, meaning a division or grouping).

[FN172]. See id. (noting that sex is a term sometimes used to refer to masculine and feminine qualities such as weakness, gentleness, softness, fairness, and sternness).

[FN173]. Id.


[FN177]. 83 U.S. 130. The Court in Bradwell denied Myra Bradwell admission to the Illinois bar because she was a woman. Id. at 142.

[FN178]. Id. at 141-42 (Bradley, J., concurring).

[FN179]. Id. at 141.

[FN180]. Id. at 142.

[FN181]. Id.

[FN182]. See 9 Oxford English Dictionary 322 (2d ed. 1989) ("Manly: Possessing the virtues proper to a man as distinguished from a woman or child; chiefly, courageous, independent in spirit, frank, upright.").

[FN183]. See 20 Oxford English Dictionary 488 (2d ed. 1989) ("Womanish: Characteristic of or proper to a woman or women ").


[FN186]. See Principles of Gender-Specific Medicine, supra note 174, at 499 (discussing how “frail feminine sex” does not refer to the biological characteristics of women).

[FN187]. Rubin, supra note 166, at 42.

[FN188]. U.S. Const. amend. XIX.

[FN189]. Martin Slattery, Key Ideas in Sociology 5 (2d ed. 2003) (1991); see, e.g., Sigmund Freud, The Dissolution of the Oedipus Complex, in The Complete Psychological Works of Sigmund Freud 178 (The Hogarth Press 1961) (1924) ("[A female's] two wishes--to possess a penis and a child--remain strongly cathexed in the unconscious and help to prepare the female creature for her later sexual role."); Talcott Parsons, Sex Roles in the American Kinship System, Essays in Sociological Theory (rev. ed. 1954) (1943), reprinted in Scott Appelrouth & Laura Desfor Edles, Sociological Theory in the Contemporary Era, at 52 (2007) (explaining that the reason why women may adopt the primary role of wife and mother is to minimize competition for status between husband and wife and to make the family status clear to the community); Claude Lévi Strauss, The Elementary Structures of Kinship 136 (John Richard von Sturmer & Rodney Needham eds., James Harle Bell trans., Beacon Press 1969) (1949) ("[I]f ... it is true that the transition from nature to culture is determined by man's ability to think of biological relationships as systems of oppositions ... then no doubt it could be said that: ‘Human societies tend automatically and unconsciously to disintegrate, along rigid mathematical lines into exactly symmetrical units.’").

[FN190]. See, e.g., Freud, supra note 189, at 178 (noting that feminist demands for equal rights did not go very far, due

to physical distinctions and their expression in differences of psychical development).

[FN191]. Id.

[FN192]. Id.

[FN193]. See, e.g., Gayle Rubin, The Traffic in Women: Notes on the Political Economy of Sex, in Toward an Anthropology of Women 157, 200 (Rayna R. Reiter ed., 1975) (noting the intellectual tradition of sexism written within by Freud and Lévi-Strauss and that challenging such a tradition was highly difficult).

[FN194]. Freud, supra note 189, at 177-79.

[FN195]. Strauss, supra note 189, at 478-79.

[FN196]. Id. at 489-90.

[FN197]. Id. at 136.

[FN198]. Parsons, supra note 189, at 54.


[FN201]. Id.

[FN202]. Freud, supra note 189, at 178.

[FN203]. Rubin, supra note 193, at 187, 196-200.


[FN206]. Margaret Mead, Male and Female 4-7 (1949).

[FN207]. Id. at 7-8.

[FN208]. Id.


[FN211]. Id.

[FN212]. See, e.g., infra note 226 and accompanying text ("Traditionally, gender has been used primarily to refer to the
grammatical categories of “masculine,” “feminine,” and “neuter ....”.


[FN214]. Oakley, supra note 169, at 16.

[FN215]. Id. at 189.

[FN216]. Rubin, supra note 193, at 157, 159.

[FN217]. Id. at 159.

[FN218]. Id. (defining the sex/gender system as the set of arrangements that brings human activity into biological sexuality).

[FN219]. Id. at 158-59.

[FN220]. Id. at 179-80.

[FN221]. Id. at 199-200, 204.


[FN223]. Id.


[FN225]. Id. at 107-08.


[FN227]. Whittle, supra note 3, at 194, 199.


[FN229]. Id.

[FN230]. See, e.g., Durham Life Ins. Co. v. Evans, 166 F.3d 139, 148 (3d Cir. 1999) (“‘Gender’ has often been used to distinguish socially- or culturally-based differences between men and women from biologically-based sex differences, but we have not considered ‘sex’ and ‘gender’ to be distinct concepts for Title VII purposes.... Therefore, we will treat the sexual misconduct and the gender-based mistreatment in this case as sex discrimination.” (citations omitted)); Hopkins v. Balt. Gas & Elec. Co., 77 F.3d 745, 749 (4th Cir. 1996) (“Since Title VII's enactment, the meaning of the term ‘sex’ as used in the Act has become the subject of judicial and academic debate. Viewed in the abstract, a prohibition of discrimination based on ‘sex’ is broad and perhaps even indefinable. Arguably, such a prohibition might be read to preclude discrimination based on human psychological and physiological characteristics or on sexual orientation. It might also be read to prohibit all workplace sexual behavior or words and deeds having sexual content.”).

[FN232]. Id. at 21.
[FN233]. Id. at 27.
[FN234]. Id. at 36.
[FN235]. Id.
[FN236]. Butler, supra note 3, at 1-2.
[FN237]. Id. at 2-3.
[FN238]. Wilchins, supra note 84, at 51.
[FN240]. Franke, supra note 89, at 1-3 (citations omitted).
[FN241]. 490 U.S. 228.
[FN242]. Id. at 251 (quoting Manhard, 435 U.S. at 707 n.13).
[FN243]. 444 F.3d 1104 (9th Cir. 2006).
[FN244]. Id. at 1113.
[FN245]. Id.
[FN246]. Id. at 1109.
[FN247]. Id. at 1113.
[FN248]. See supra notes 157-163 and accompanying text.
[FN249]. Goins, 635 N.W.2d at 723.
[FN250]. See Whittle, supra note 3, at 194, 199 (“[I]f you can acknowledge in yourself that what makes a person is what takes place between the ears and not between the legs, then a trans person is in a privileged position to know that sexuality is a movable and mutable force within us all.”).
[FN251]. See, e.g., Adele E. Clarke, Disciplining Reproduction: Modernity, American Life Sciences, and “the Problems of Sex” 22 (1998) (calling earlier distinctions between sex as biological or natural and gender as cultural exploded and outmoded).
[FN252]. See supra note 111 and accompanying text (changing one's sex on a birth certificate has not been recognized as a change of sex for purposes of marriage or the rights accruing to married persons).
[FN253]. See, e.g., Leslie Feinberg, Transgender Warriors: Making History From Joan of Arc to Dennis Rodman 22


[FN255]. Id. at *1, 5. The facts of the case stem from 1971, but it was four years until it was decided by the U.S. District Court. Id. at *1.

[FN256]. See supra notes 4-10 and accompanying text (citing to the current circuit and district court splits on whether transgender identity falls outside Title VII's prohibition against sex discrimination).


[FN258]. See, e.g., Ulane, 742 F.2d at 1087 (deciding that a fired pilot did not have a cause of action under Title VII because Title VII did not prohibit discrimination against transsexuals).


[FN260]. Id. at *3-4.

[FN261]. Id. at *4.

[FN262]. Id.

[FN263]. Id.

[FN264]. 742 F.2d 1081.

[FN265]. Id. at 1084-87.


[FN267]. Id.

[FN268]. Id.

[FN269]. See supra notes 165-201 and accompanying text (tracing the historical development of how the terms “male” and “female” became inextricably tied to certain social, psychological, and behavioral characteristics).

[FN270]. See supra notes 202-230 and accompanying text (tracing the post World War II development of how the generally accepted link between sex and character developed and existed well into the twentieth century).


[FN272]. Id.

[FN273]. Id.

[FN274]. Id.

[FN275]. Ulane, 742 F.2d at 1084-87.
[FN276]. See supra notes 40-41, 44-48 and accompanying text (citing circuit and district court cases that rejected the reasoning that Judge Barlow relied upon in his decision).

[FN277]. See supra notes 189-193 and accompanying text (attributing this maxim to Freud and noting that all informed discussions of sex differences during the ensuing three decades incorporated this understanding).

[FN278]. See supra notes 165-201 and accompanying text (discussing how the terms “male” and “female” became inextricably tied to certain social, psychological, and behavioral characteristics).

[FN279]. See supra notes 165-184 and accompanying text (tracing how the category of “woman” came to imply such social locations, physical characteristics, emotional qualities, and behavioral characteristics).

[FN280]. See generally supra notes 204-205 and accompanying text (discussing how scientific positivism brought changes to the scientific study of sex and challenged to the old view of sex as a fixed set of physical, psychological, and social structures with corresponding functions).

[FN281]. See supra notes 206-208 and accompanying text (discussing modern conceptions of sex and gender in the scientific community).


[FN283]. See Smith, 378 F.3d at 575 (“[D]iscrimination against a plaintiff who is a transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman.” (citing Price Waterhouse, 490 U.S. at 235)); Doe v. United Consumer Fin. Servs., No. 1:01 CV 1112, 2001 WL 34350174, at *5 (N.D. Ohio Nov. 9, 2001) (concluding that it would be a violation of Title VII to discriminate against any employee, whether transgender or non-transgender, because that employee failed to conform to stereotypes about how males or females should look and act).

[FN284]. In both Smith and Doe, plaintiffs were discriminated against because they did not act in conformity with stereotypical conceptions about how individuals born as males should act. Smith, 378 F.3d at 572; Doe, 2001 WL 34350174, at *3.


[FN286]. Id. at *2.

[FN287]. See Oncale, 523 U.S. at 78-79 (concluding that Title VII sex not only included discrimination against men, but also same-sex sexual harassment).

[FN288]. Id.


[FN291]. See cases cited supra note 10, 283 (citing cases that discrimination against transgended individuals based on sex stereotypes falls under Title VII protection).

[FN293]. See Ulane, 742 F.2d at 1086 (acknowledging the well-recognized legal principle that remedial statutes should be liberally construed).

[FN294]. See id. (acknowledging that Title VII is a remedial statute).


[FN296]. See Ulane, 742 F.2d at 1086 (noting that “the maxim that remedial statutes should be liberally construed is well recognized”).

[FN297]. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 348 (1977) (“The primary purpose of Title VII was 'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially stratified job environments to the disadvantage of minority citizens.'” (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973))).


[FN300]. Sommers, 667 F.2d at 749-50 (following Judge Barlow’s reasoning, but adding the idea that the primary purpose of the statute is to provide equal opportunities for women).

[FN301]. Holloway, 566 F.2d at 662-64.

[FN302]. Powell, 436 F. Supp. at 370-71 (citing to the district court ruling in Grossman as support for the decision that discrimination against a transsexual is not covered by Title VII).


[FN305]. Id.


The Complaint is utterly devoid of any reference to the Plaintiff’s sexual orientation, much less any discriminatory conduct on behalf of the Defendant discriminating against the Plaintiff's real or perceived preference or practice of sexuality. A conclusory statement that she was discharged on the basis of transsexuality ... does not constitute a claim for relief on the basis of being discharged for “sexual orientation.”

Id.

[FN310]. Id. ("[T]his record satisfies me that the term, ‘sex,’ as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."); id. at 823-27 (staking out the scientific evidence considered in reaching this decision).

[FN311]. Id. at 823.

[FN312]. Id.

[FN313]. Id.

[FN314]. Id.


[FN316]. See Grossman, 1975 WL 302, at *4 ("[T]he Court is reluctant to ascribe any import to the term ‘sex’ other than its plain meaning.").


[FN318]. See supra notes 216-240 and accompanying text (analyzing the arguments of Gayle Rubin, Judith Butler, Riki Ann Wilchins, and Katherine M. Franke furthering the notion that sex references psycho-social facts in addition to physical facts).


[FN320]. See id. ("Homosexuals and transvestites ... are content with the sex into which they were born. Transsexuals, on the other hand, are persons with a problem relating to their very sexual identity as a man or a woman. I believe on that basis the situation of a transsexual is distinguishable.").

[FN321]. Id. at 839.

[FN322]. Id. at 825.

[FN323]. Id. at 823-24.

[FN324]. Id. at 824.


[FN326]. Id. at 1084-85.

85 C 8165, 1987 WL 19165, at *1, 3 (N.D. Ill. Oct. 27, 1987) (dismissing plaintiff's state claims after originally dismissing her federal Title VII claims for harassment in the workplace because the court did not have Title VII jurisdiction over discrimination of a transsexual); Doe v. U.S. Postal Serv., No. 84-3296, 1985 WL 9446, at *2 (D.D.C. June 12, 1985) (granting the defendant's motion to dismiss Title VII claims after plaintiff sued defendant for withdrawing a job offer after plaintiff disclosed an intention to undergo gender reassignment surgery).


[FN330]. See id. at *4 (“[I]t is ... conceivable that her transgendered status was not the sole issue, and that her termination may have been based, at least in part, on the fact that her appearance and behavior did not meet [defendant's] gender expectations .... If this is the case, [defendant] may be liable for its actions ....”).

[FN331]. Id. at *2-3.


[FN333]. See Doe, 2001 WL 34350174, at *3 (“[P]laintiff is not alleging discrimination based on transsexuality per se; rather, she asserts that [defendant] engaged in 'sexual stereotyping' prohibited by Price Waterhouse ....”).

[FN334]. 523 U.S. 75.

[FN335]. Id. at 79-80.

[FN336]. See Rosa, 214 F.3d at 214, 216 (reversing the dismissal of a transgender plaintiff’s claim under the Equal Credit Opportunity Act); Schwenk, 204 F.3d at 1202 (finding for a transgender plaintiff under the Gender-Motivated Violence Act); Broadus v. State Farm Ins. Co., No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (“It is unclear, however, whether a transsexual is protected from sex discrimination and sexual harassment under Title VII.”).


[FN338]. Id.

[FN339]. Id. at *3 n.7 (quoting Oncale, 523 U.S. at 79) (citation omitted). The full Oncale quote reads as follows:

[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits “discriminat[ion] ... because of ... sex” in the “terms” or “conditions” of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.

Oncale, 523 U.S. at 79-80.

Id. at *3.

See Price Waterhouse, 490 U.S. at 239, 251 (noting congressional intent).

See generally supra Part II.E.

204 F.3d 1187.

Doe, 2001 WL 34350174, at *3 (citing Schwenk, 204 F.3d at 1201).

214 F.3d 213.

Id. at 214-15.


Id.

Id.

See id. (“[I]t is ... conceivable that her transgendered status was not the sole issue, and that her termination may have been based, at least in part, on the fact that her appearance and behavior did not meet [defendant's] gender expectations ....”).

Smith, 378 F.3d at 573, 575.

See Sweet v. Mulberry Lutheran Home, No. IP02-0320-C-H/K, 2003 WL 21525058, at *2 (S.D. Ind. June 17, 2003) (“[D]iscrimination on the basis of sex means discrimination on the basis of the plaintiff's biological sex, not sexual orientation or sexual identity, including an intention to change sex.”).

See Oiler, 2002 WL 31098541, at *3 (“[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition based on an individual's sexual identity disorder or discontent with the sex into which they [sic] were born.” (citing Ulane, 742 F.2d at 1085)).

See Etsitty, 502 F.3d at 1221 (“This court agrees with Ulane and the vast majority of federal courts to have addressed this issue and concludes discrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII.”).


See id. at *3 (agreeing with the Ulane court's conclusion that the Title VII prohibition against sex discrimination does not encompass discrimination based on sexual identity issues).

Id. at *1.

Id. at *2.
This is not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of a person of one sex assuming the role of a person of the opposite sex .... While Title VII's prohibition of discrimination on the basis of sex includes sexual stereotypes, the phrase “sex” has not been interpreted to include sexual identity or gender identity disorders.

Id.
Compare Schroer, 424 F. Supp. 2d at 205 ("Plaintiff's allegations of sex stereotyping [sic] do not state a claim under Title VII, but ... discrimination against a transsexual may nevertheless violate [Title VII] ..."), with Schroer, 577 F. Supp. 2d at 308 ("In refusing to hire Diane Schroer because her appearance and background did not comport with the decisionmaker's sex stereotypes ... the [defendant] violated Title VII's prohibition on sex discrimination.").

See Schroer, 577 F. Supp. 2d at 304 (ruling that discrimination based on failure to conform to traditional sex stereotypes includes discrimination based on non-conforming gender identity when that discrimination is directly because of a person's transgender identity).

Id.

Id. at 302.

Id. at 307-08.

Id. at 303-04.

See id. at 304 ("[D]iscrimination against a plaintiff who is transsexual--and therefore fails to act and/or identify with his or her gender--is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman." (quoting Smith, 378 F.3d at 574-75)).

Schroer, 577 F. Supp. 2d at 306-08.

Id. at 302.

Id. at 300-02.

Id.

Id. at 302.

Id.

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

Id. (citing Williams v. Trans World Airlines, Inc., 660 F.2d 1267, 1270 (8th Cir. 1981)) (firing employee in response to racially charged, unverified customer complaint is direct evidence of racial discrimination by employer). Cf. Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276 (9th Cir. 1981) (noting "stereotypic impressions of male and female roles do not qualify gender as a [bona fide occupational qualification]"); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (holding that because being female is not a bona fide qualification for the job of being a flight attendant, the refusal to hire men because of their sex violates the 1964 Civil Rights Act).

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

See id. at 306 ("The [potential employer] revoked the [job] offer when it learned that a man named David intended to become, legally, culturally, and physically, a woman named Diane. This was discrimination ‘because of ... sex.’"). The Schroer court explicitly declined to decide the question of whether gender identity is part of sex or sexuality. Id.
[FN399]. See Schroer, 424 F. Supp. 2d at 211, 213 (stating his difficulties in finding that sexual stereotyping could exist simply because a person is transsexual rather than “fail[ing] to act or appear masculine or feminine enough,” and opting for the conclusion that Title VII is satisfied because discrimination based on changing one’s sex or having an intersexed condition is discrimination because of sex).

[FN400]. Id. at 205.

[FN401]. Id. at 211.

[FN402]. Schroer, 577 F. Supp. 2d at 308 (“Even if the decisions that define the word ‘sex’ in Title VII as referring only to anatomical or chromosomal sex are still good law ... the Library’s refusal to hire Schroer after being advised that she planned to change her anatomical sex by undergoing sex reassignment surgery was literally discrimination ‘because of ... sex.’” (quoting Smith, 378 F.3d at 573)).


[FN405]. Schroer, 577 F. Supp. 2d at 304.

[FN406]. See supra text accompanying notes 243-247 (describing the sex-differentiated grooming requirements instituted by the employer in Jespersen).

[FN407]. Jespersen, 444 F.3d at 1106-07.

[FN408]. Schroer, 577 F. Supp. 2d at 304-05.


[FN410]. Schroer, 577 F. Supp. 2d at 305.

[FN411]. Id.

[FN412]. Id.

[FN413]. Id. at 306.


[FN415]. Ulane, 742 F.2d at 1084.


[FN417]. Id. at 306-07.

[FN418]. Id.
[FN419]. Id. at 306.

[FN420]. Id. at 307 n.8.

[FN421]. Id. at 306-07.


[FN423]. 742 F.2d at 1085-86.


[FN425]. Id. at 308.


[FN427]. See Grossman, 1975 WL 302, at *4 (finding that the legislative history does not indicate that there was an intent to include anything other than the plain meaning of sex, excluding transsexuals from the those protected under the statute).

[FN428]. See Ulane, 742 F.2d at 1085 (“The total lack of legislative history supporting the sex amendment ... clearly indicates that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex.”); Holloway, 566 F.2d at 663 (“Giving the statute its plain meaning, this court concludes that Congress had only the traditional notions of ‘sex’ in mind.”).


[FN431]. Id. at *4.

[FN432]. Smith, 378 F.3d at 575.


[FN435]. See discussion supra Part II.E (discussing how the term sex must include gender).

[FN436]. See Ulane, 742 F.2d at 1085 (holding that the lack of legislative history indicates that confers did not intent sex to include anything other than the traditional meaning); Holloway, 566 F.2d at 663 (holding that Congress could only have had the traditional meaning of sex in mind when the statute was enacted).

[FN437]. See infra text accompanying notes 439-445 (explaining the tendency of certain Justices to refuse to read into a silent statute).

[FN438]. Michael A. Fletcher, Post Politics: Replacements for Souter, Biden and Swine Flu, More, Wash. Post, May 1,

[FN439]. See Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 73-74 (2004) (Scalia, J., dissenting) (“The Canon of Canine Silence that the Court invokes today introduces a reverse--and at least equally dangerous--phenomenon, under which courts may refuse to believe Congress's own words unless they can see the lips of others moving in unison.”); Chi-som v. Romer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (“[W]e have forcefully and explicitly rejected the Conan Doyle approach to statutory construction in the past.”).


[FN444]. Id. at 398-99.

[FN445]. Id. at 399.

[FN446]. Ulane, 742 F.2d at 1084-85.

[FN447]. Holloway, 566 F.2d at 663.

[FN448]. Chisom, 501 U.S. at 406 (Scalia, J., dissenting) (citations omitted).

[FN449]. Id.

[FN450]. See Bates v. Dow Agrosciences LLC, 544 U.S. 431, 457 (2005) (Thomas, J., concurring) (rejecting majority's presumption against pre-emption); Small v. United States, 544 U.S. 385, 399, 404 (2005) (Thomas, J., dissenting) (rejecting majority's assumption that statutes are domestically oriented, and suggesting that the Court only use a canon of statutory construction when the result of the plain language would lead to an absurd result); Nigh, 543 U.S. at 67-8 (Thomas, J., concurring) (agreeing with the holding, but suggesting that the Court not infer anything from “silence in the legislative history,” when the statutory history provides guidance); BedRoc Ltd., LLC v. United States, 541 U.S. 176, 188-89 (2004) (Thomas J., concurring) (stating that sand and gravel should not be considered “valuable minerals” now because they were not considered as such at the time of passage); Alexander v. Sandoval, 532 U.S. 275, 285, 287 (2001) (holding that Congress did not imply a private right of action for disparate-impact Title VI regulations, as opposed to intentional discrimination, refusing to imply a cause of action where Congress did not create one); Solid Waste Agency of N. Cook County v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 172-73 (2001) (holding that where an administrative interpretation of a statute leads to potentially unconstitutional congressional power over the states, the Court will construe the statute to avoid that problem, unless there is clear congressional intent to do otherwise); Carter v. United States, 530 U.S. 255, 265 (2000) (rejecting the canon of statutory construct, “cluster of ideas,” and holding that it was not a “common-law term” that Congress used, rather a “common-law crime,” and thus common law ideas need not be imported into the statutory text); Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 187 (2004) (holding that congressional inaction is not persuasive, because it can lead to too many equally tenable inferences).

[FN452]. See Boumediene v. Bush, 128 S. Ct. 2229, 2243 (2008) (explaining that if the Court has invoked a clear statement rule in statutory interpretation, and Congress subsequently amends the statute, congressional intent must be respected).

[FN453]. Id. (“Congress should ‘not be presumed to have effected such denial [of habeas relief] absent an unmistakably clear statement to the contrary.’” (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 575 (2006))).

[FN454]. Oncale, 523 U.S. at 79.


[FN459]. Id. (quoting PGA Tour, Inc. v. Martin, 532 U.S. 661, 689 (2001)).


[FN461]. Id. at 490-91.

[FN462]. Totten, 380 F.3d at 494 (citation omitted).


[FN464]. 410 F.3d 722.

[FN465]. Id. at 732-33.

[FN466]. Id. at 726-27.

[FN467]. Id. at 732-33.

[FN468]. Id. at 733 (citing 28 U.S.C. § 2415(i) (2006)).

[FN469]. Id.

[FN470]. Amoco, 410 F.3d at 734 (citations omitted).


[FN472]. Id. at 2016 & n.8.
[FN473]. Supreme Court of the U.S., supra note 456.

[FN474]. Elliott M. Davies, Note, The Newer Textualism: Justice Alito's Statutory Interpretation, 30 Harv. J.L. & Pub. Pol'y 983, 984 (2007) (“For [Justice Alito] the text of the statute still reigns supreme, but legislative history can be used to establish the context in which the statute should be read.”); see also, e.g., Pa. Office of the Budget v. Dep't of Health & Human Servs., 996 F.2d 1505, 1509 (3d Cir. 1993) (“When statutory language is unambiguous, we must of course heed it except in those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."” (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982))); Cruz v. Chesapeake Shipping, Inc., 932 F.2d 218, 235 (3d Cir. 1991) (Alito, J., dissenting) (“If statutory language is unambiguous, it must be followed absent exceptional circumstances.”).

[FN475]. See Davies, supra note 474, at 984 (distinguishing Justice Alito's newer textualism approach from Justice Scalia's new textualism view that legislative history is irrelevant if the Court can ascertain a statute's plain meaning).

[FN476]. Id. at 984 (noting that Justice Alito has used legislative history to confirm his interpretation of unambiguous statutory text).


[FN478]. Zedner, 547 U.S. at 501 (citations omitted).

[FN479]. Murphy, 548 U.S. at 304.

[FN480]. Id. at 304.

[FN481]. See Berg Chilling Sys., Inc. v. Hull Corp., 435 F.3d 455, 471 (3d Cir. 2006) (“[B]oth statutes were intended to apply to construction contracts .... Legislative history confirms the District Court's interpretation ....”); Chen v. Ashcroft, 381 F.3d 221, 233 (3rd Cir. 2004) (“An examination of the relevant legislative history only confirms our understanding of Congress's intent.”); Khodara Envt'l., Inc. v. Blakey, 376 F.3d 187, 199 (3rd Cir. 2004) (“Here, we agree with the District Court that the grandfather clause is ambiguous.... Eagle's argument that this language is clear has surface appeal because the relevant terms ... are common and, in many contexts, their meaning is entirely plain. As used in the grandfather clause, however, the meaning of these terms is ambiguous.”); Acosta v. Ashcroft, 341 F.3d 218, 225 (3d Cir. 2003) (“[W]e see no basis for such an interpretation. First, it is inconsistent with the statutory language. Second, we find no evidence in the legislative history that would so confine the meaning of Section 101(a)(48)(A).”; In re Hechinger Inv. Co. of Del., Inc., 335 F.3d 243, 254 n.5 (3d Cir. 2003) (“[T]he dissent does not provide a scintilla of evidence from the legislative history that supports this reading. Instead, the dissent merely quotes the view of a Bankruptcy Court that our interpretation would frustrate reorganization in a large number of cases. However, our interpretation was adopted in 1999 by the Fourth Circuit, and we see no indication that the Fourth Circuit's decision has had dire effects.” (citations omitted)).


[FN483]. Id. at 196-97.

[FN484]. Id. at 199-202.

[FN486]. Infra notes 490-495 and accompanying text.


[FN488]. Id. at 2031 (Stevens, J., concurring).

[FN489]. Santos, 128 S. Ct. at 2031 (majority opinion) (internal cross-reference and citation omitted).


[FN491]. See Samuel R. Bagenstos, The Supreme Court, the Americans with Disabilities Act, and Rational Discrimination, 55 Ala. L. Rev. 923, 945 (2004) (“Four justices (Justices Stevens, Souter, Ginsburg, and Breyer) have generally dissented from the Court's narrowing rulings in [the] area [of civil rights].” (citation omitted)).

[FN492]. See, e.g., Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 596 (2004) (noting that language in statutes must be read in context, and that “social history emphatically reveals an understanding of age discrimination as aimed against the old”).

[FN493]. See, e.g., Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 183 (2005) (holding that retaliation against male coach because of a sex discrimination claim is discrimination because of sex); Tuan Anh Nguyen v. INS, 533 U.S. 53, 80-82, 97 (2001) (O'Connor, J., dissenting) (joining in the dissent, Justices Souter, Ginsburg, and Breyer agreed that the majority's extension of the right of automatic naturalization to children of unmarried citizen mothers, but not children of unmarried citizen fathers, was unequal treatment based on sex).

[FN494]. 530 U.S. 640, 700 (2000) (Stevens, J., dissenting) (arguing that the plaintiff should not have been dismissed from his troop leader position and noting that "prejudices [based on sexual preference] are still prevalent and ... they have caused serious and tangible harm to countless members of the class [the state] seeks to protect").

[FN495]. Oncale, 523 U.S. at 76.

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