

Notes and Comments

INTERSEX EMPLOYMENT DISCRIMINATION: TITLE VII AND ANATOMICAL SEX NONCONFORMITY

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 is the most visible law that protects private employees from discrimination based on sex.¹ Remedial statutes must be construed broadly,² yet it is not clear how broadly “sex” is defined under the statute.³ Everyone agrees that Title VII at the very least protects women from discrimination because they are women and protects men from discrimination because they are men.⁴ But what of the intersex people in the United States whose genetic and biological characteristics do not place them neatly into one of the two common biological sexes? Are they protected from sex discrimination by Title VII⁵ or by state antidiscrimination laws that prohibit discrimination “based on . . . sex”?⁶

Popular culture and current events have periodically piqued public interest in the intersex community.⁷ In the middle of 2009, Caster Semenya, an eighteen-year-old world champion runner from South Africa, captured international attention at the World Athletic Championships in Berlin.⁸ She

¹ 42 U.S.C. § 2000e-2(a)(1) (2006) (“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 . . . because of such individual’s . . . sex . . .”). Many states also have similar statutes that protect other categories. *See, e.g.*, California Fair Employment and Housing Act, CAL. GOV’T CODE § 12940(a) (West Supp. 2011) (prohibiting employment discrimination based on sexual orientation); Illinois Human Rights Act, 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West Supp. 2010) (protecting sexual orientation and gender identity).

² *See, e.g.*, *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.”).

³ The case law, for example, distinguishes sex from sexual orientation, but it does not distinguish sex from gendered behavior. This can lead to absurd results. Heterosexual women can be protected when discriminated against for being insufficiently feminine, *see, e.g.*, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989), but this theory may be unavailable to nonheterosexuals if the discrimination was also motivated by anti-gay animus, *see, e.g.*, *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005).

⁴ *See, e.g.*, *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987).

⁵ 42 U.S.C. § 2000e-2.

⁶ *E.g.*, CAL. GOV’T CODE § 12940; 775 ILL. COMP. STAT. ANN. 5/1-102(A); OHIO REV. CODE ANN. § 4112.02(A) (West Supp. 2010).

⁷ For example, in 2003, Jeffrey Eugenides won the Pulitzer Prize for his novel *Middlesex*. Michelle Pauli, *Middlesex Bags Pulitzer Prize for Fiction*, GUARDIAN.CO.UK (Apr. 8, 2003, 11:18 AM), <http://www.guardian.co.uk/books/2003/apr/08/news.pulitzerprize>. *Middlesex* is a multigenerational story whose narrator has 5-alpha-reductase deficiency and grew up as a girl before adopting a male gender identity at puberty. JEFFREY EUGENIDES, *MIDDLESEX* (2002). The 2007 Argentinian film *XXY* tells a coming-of-age story about an intersex teenager. *XXY* (Historias Cinematograficas 2007); *see also* Rebecca Leffler, *Critics Week Grand Prize to ‘XXY,’* HOLLYWOODREPORTER.COM (May 26, 2007), *available at* http://web.archive.org/web/20070930222336/http://www.hollywoodreporter.com/hr/content_display/awards_festivals/cannes/news/e3id9fddd8a9cc782ed64893105887c4fc (reporting that *XXY* won the International Critics Week Grand Prize at the Cannes International Critics Week).

⁸ *Report: Running Champ a ‘Hermaphrodite,’* CBS NEWS (Sept. 10, 2009, 12:52 PM), <http://www.cbsnews.com/stories/2009/09/10/sportsline/main5301221.shtml>.

shattered the previous world record for the 800-meter dash by almost two and a half seconds,⁹ and officials ordered medical tests to clear suspicions of foul play over Semenya's dramatic performance.¹⁰ The results were unexpected: they indicated that Semenya was an intersex individual.¹¹ The story captured media interest and began broad speculation about the proper role of gender in sports.¹²

Semenya's was not the first story to raise international eyebrows about ambiguous biological sex in sports.¹³ In 1977, Dr. Renee Richards, who was transsexual, sued the United States Tennis Association and eventually vindicated her right to compete in the women's competition of the U.S. Open, even though she did not have the "female" karyotype¹⁴ she needed to pass the sex chromosome test.¹⁵ To avoid the media attention and possible injustice at the Olympics in Athens, the International Olympic Committee (IOC) agreed in 2004 to end sex testing for athletes.¹⁶

Some members of the legal community then began to wonder what would have happened if Semenya had been an American employee instead of a South African athlete.¹⁷ Do our statutes that prohibit sex discrimination protect the intersex? The answer, according to *Wood v. C.G. Studios, Inc.*,

⁹ *Id.*

¹⁰ Stewart MacLean, *Is She Really a HE? Women's 800m Runner Shrugs off Gender Storm to Take Gold*, DAILYMAIL.CO.UK (Aug. 19, 2001, 1:32 PM), <http://www.dailymail.co.uk/news/worldnews/article-1207653>.

¹¹ *Report: Running Champ a 'Hermaphrodite,' supra note 8.*

¹² *See, e.g.,* Tim Dahlberg, *The Shameful Case of Caster Semenya*, FOX NEWS (Nov. 21, 2009), http://www.foxnews.com/printer_friendly_wires/2009Nov21/0,4675,ATHTimDahlberg112109,00.html; *Semenya Tests 'Must Be Annulled,'* BBC NEWS (Oct. 30, 2009, 1:10 PM), <http://news.bbc.co.uk/2/hi/africa/8333840.stm>.

¹³ In fact, her story is far less unusual than one might think. Dr. Arne Ljungqvist, chair of the International Olympic Committee's medical committee, noted that in 1996, before the IOC stopped sex chromatin testing, eight of the 3387 female athletes they tested were found to have disorders of sexual development. Gina Kolata, *Gender Testing Hangs Before the Games as a Muddled and Vexing Mess*, N.Y. TIMES, Jan. 16, 2010, at D2.

¹⁴ A person's karyotype shows the number and appearance of her chromosomes, including the X and Y chromosomes associated with biological sex. *See Talking Glossary: "Karyotype,"* NAT'L HUM. GENOME RES. INST., <http://www.genome.gov/glossary/?id=114> (last visited Oct. 1, 2011) (describing the karyotyping processes and the medical information they can reveal).

¹⁵ Julie Shapiro, *Check Only One: M/F/Other*, 11 CARDOZO WOMEN'S L.J. 587, 587 n.3 (2005); Neil Amdur, *Renee Richards Ruled Eligible for U.S. Open*, N.Y. TIMES, Aug. 17, 1977, at B7. Tennis legend Billie Jean King filed an affidavit in support of Dr. Richards's right to compete as a woman. Neil Amdur, *Dr. Richards Gets Support of Mrs. King*, N.Y. TIMES, Aug. 11, 1977, at D13.

¹⁶ *IOC Approves Consensus with Regard to Athletes Who Have Changed Sex*, OLYMPIC.ORG (May 17, 2004), <http://www.olympic.org/media?articleid=56230>.

¹⁷ *E.g.,* Bennett Capers, *The Meaning of Y*, PRAWFSBLAWG (Aug. 24, 2009, 7:32 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2009/08/the-meaning-of-y.html>; Daniel Schwartz, *The Curious Case of Caster Semenya—What Would an Employer Do?*, CONN. EMP. L. BLOG (Sept. 11, 2009), <http://www.ctemploymentlawblog.com/2009/09/articles/hr-issues/the-curious-case-of-caster-semenya-what-would-an-employer-do>.

is no.¹⁸ As a matter of statutory interpretation, the court held that discrimination against the intersex is not discrimination based on sex.¹⁹ Decided by the federal district court in the Eastern District of Pennsylvania in 1987, *Wood* is the only reported authority on this question.

Much has changed in the law since the *Wood* decision was handed down, however, and it can no longer be considered good law. In *Price Waterhouse v. Hopkins*, the Supreme Court held that a plaintiff had stated a valid cause of action when she alleged that her nonconformance to gender stereotypes resulted in adverse outcomes.²⁰ Thus, a wealth of case law now supports protection from discrimination based on gender nonconformity.²¹ In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court reasoned that Title VII prohibits all discrimination based on sex, even if Congress had not considered certain forms of sex discrimination when it passed the Civil Rights Act.²²

Some courts, though, have been reluctant to extend the reasoning in *Price Waterhouse* and *Oncale* to protect transsexuals and other sexual minorities.²³ They fear that plaintiffs will use the protections from gender-nonconformity cases to “bootstrap” new protections into the statute, especially protections against discrimination based on sexual orientation or gender identity.²⁴ As such, those jurisdictions are left with what I refer to as “Goldilocks case law.” First, the *Price Waterhouse* porridge is too cold for a person whose mannerisms or behavior conform to gender expectations; a plaintiff cannot show that she suffered discrimination based on gender nonconformity if she conforms to expectations of her gender. Conversely, *Wood* makes the porridge too hot for a person whose manner diverges widely from social expectations; a transgender person has no cause of ac-

¹⁸ 660 F. Supp. 176, 177 (E.D. Pa. 1987).

¹⁹ *Id.*

²⁰ 490 U.S. 228, 251 (1989).

²¹ Although the Supreme Court does not distinguish between sex and gender in its opinions, to keep my terminology in line with the distinction between sex and gender, I use the term “gender nonconformity” to describe what others may call “sex stereotyping.”

²² 523 U.S. 75, 79 (1998) (“[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.”).

²³ See, e.g., *Etsitty v. Utah Transit Auth. (Etsitty II)*, 502 F.3d 1215, 1224 (10th Cir. 2007) (declining to hold that discrimination against transsexuals is prohibited by Title VII); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005) (holding that Title VII does not protect the gay plaintiff because sexual orientation is not sex); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086 (7th Cir. 2000) (“Title VII . . . does not prohibit harassment in general or of one’s homosexuality in particular.”); see also *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984) (holding that Title VII does not protect transsexuals because, according to the court, discrimination on the basis of having a “sexual identity disorder” is not discrimination on the basis of sex).

²⁴ See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 330 (9th Cir. 1979) (“Appellants now ask us to employ the disproportionate impact decisions as an artifice to ‘bootstrap’ Title VII protection for homosexuals under the guise of protecting men generally.”).

tion. Thus, only the middle is “just right”—individuals whose gender performance diverges just slightly from the gender norm (but not too much!)²⁵ comprise the only protected class.

There is ample room to criticize the policy wisdom, logical coherence, and line-drawing problems of this case law.²⁶ Even under the case law’s Goldilocks logic, though, Title VII protects the intersex from employment discrimination. Because anatomy is as much a part of human sex as is the social performance of gender roles, the intersex occupy the “just right” middle ground of a Goldilocks spectrum of anatomical sex nonconformity. An individual whose anatomy matches her apparent gender is not legally harmed by the expectation that her gender and anatomy match. At the other end of the spectrum, an individual whose anatomy and gender are completely at odds—a transsexual person—is unprotected for fear of “bootstrapping.”

This Comment argues that the law, when properly construed, provides employment protections for intersex persons whose anatomy occupies the middle ground, differing only somewhat from the anatomy expected to accompany their gender. Just as the law protects individuals whose gender expression does not conform to the behaviors that society expects of persons of their biological sex, it also protects those whose sexual anatomy does not conform to what society expects of persons of their gender. The reasoning behind *Wood v. C.G. Studios, Inc.*²⁷ is out of touch with the current law and is ripe for challenge. Part I of this Comment contains a quick background on sexual minorities, details the range of people who are classified as intersex, and discusses some of the legal and social challenges they face. Part II shows how the United States came to have its current Goldilocks case law on gender nonconformity and protections for sexual minorities. Part III argues that the most sensible interpretation of Title VII discrimination “because of . . . sex” includes discrimination because of intersex status.

²⁵ I do not mean to imply as a theoretical matter that gender expression is a mere spectrum from “female behavior” to “male behavior”; there are countless ways to differ from some behavioral expectations. Think of it, instead, as a spectrum between “gender conforming in every way” to “gender conforming in no way whatsoever.”

²⁶ Such a critique is, however, beyond the scope of this Comment. For example, though, pleading legitimate gender-nonconformity claims becomes difficult for a transgender plaintiff. See *Schroer v. Billington*, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (“What makes [the transgender plaintiff’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 . . .”). For a discussion of how the judicial process forces gay, lesbian, and transgender plaintiffs into a difficult situation in drafting their pleadings, see Joel Wm. Friedman, *Gender Nonconformity and the Unfulfilled Promise of Price Waterhouse v. Hopkins*, 14 DUKE J. GENDER L. & POL’Y 205, 218–20 (2007).

²⁷ 660 F. Supp. 176 (E.D. Pa. 1987).

I. WHO ARE THE INTERSEX?

Intersex people have a condition that causes their biological sex traits to be ambiguous or mismatched, what doctors call a difference, or sometimes disorder, of sexual development (DSD).²⁸ Yet they all inhabit a common middle ground within the social understanding of sex. In section A, I describe the common distinction between biological sex and cultural gender and how that distinction is useful for classifying sexual minorities but misleading because it is tempting to analogize it to the distinction between nature and nurture. In section B, I go over what it means to be intersex, the challenges and experiences intersex people share, and how their interests differ from those of other sexual minorities.

A. *Sex Is Not Gender*

It has become an academic norm to use the term “sex” to refer to gonadal, chromosomal, or genital anatomy and to use the term “gender” to refer to the socially expected behaviors and preferences commonly ascribed to each sex.²⁹ For example, testicles, testosterone, and XY sex chromosomes are part of a person’s sex. Her preference for wearing dresses, playing with dolls, adopting a caregiver role, or performing nonaggressive mannerisms, as well as an inborn sense of being female, are all parts of that person’s gender. As the saying goes, “[S]ex is between your legs; gender is between your ears.”³⁰ A person’s physiological sex is thus differentiated from her gender, which instead refers to the “internal, deeply felt sense of being either male or female, or something other or in between.”³¹

The distinction between sex and gender is not currently part of American employment law.³² Although courts use the two terms interchangeably

²⁸ 7 OXFORD ENGLISH DICTIONARY 1138 (2d ed. 1989) (defining the word “intersex” as a biological term denoting, “[i]n a dioecious species, an abnormal form or individual having characteristics of both sexes[or] the condition of being of this type”); see also Thomas F. Kolon, *Disorders of Sex Development*, in FUNDAMENTALS OF PEDIATRIC SURGERY 693, 693, 699 (Peter Mattei ed., 2011) (noting that, at least in medical literature, the term “intersex” has been replaced by “DSD”).

²⁹ See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10–11 (1995); Jayde Pryzgodna & Joan C. Chrisler, *Definitions of Gender and Sex: The Subtleties of Meaning*, 43 SEX ROLES 553, 554 (2000).

³⁰ The origins of this bon mot are unclear, but it occurs quite often in discussions of gender and sexual diversity, from sensitivity training to academic papers and prime-time television. See, e.g., Jillian Todd Weiss, *Transgender Identity, Textualism, and the Supreme Court: What is the “Plain Meaning” of “Sex” in Title VII of the Civil Rights Act of 1964?*, 18 TEMP. POL. & CIV. RTS. L. REV. 573, 615 & n.250 (2009); *Larry King Live* (CNN television broadcast Aug. 10, 2007) (transcript at <http://transcripts.cnn.com/TRANSCRIPTS/0708/10/lkl.01.html>).

³¹ Jamison Green, *Introduction* to PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* 1, 3 (2000), available at <http://www.thetaskforce.org/downloads/reports/reports/TransgenderEquality.pdf>.

³² Some scholars have proposed that, in practice, any policy that discriminates impermissibly on sex is actually based on assumptions based on gender. See Katherine M. Franke, *The Central Mistake of Sex*

in Title VII jurisprudence,³³ I differentiate them in this Comment to simplify the discussion of the diversity of sexual minorities. Interestingly, the person most responsible for this synonymy is Justice Ruth Bader Ginsburg. When she was the premier litigator of sex discrimination cases, Justice Ginsburg chose to use the phrase “gender discrimination” to avoid the prurient associations of the word “sex.”³⁴

The usage distinction between sex and gender began in the mid-twentieth century and has grown in popularity. When it first appeared in English, “gender” referred only to the linguistic feature of nouns and pronouns familiar to students of most European languages.³⁵ After five decades in use as a social classification,³⁶ though, the distinction between gender and sex is now well established. The *Oxford English Dictionary* now defines sex and gender differently—sex is biological and gender is social³⁷—and the *American Heritage Dictionary* includes a usage note distinguishing between biological sex and social gender.³⁸

Discrimination Law: The Disaggregation of Sex from Gender, 144 U. PA. L. REV. 1, 36–40 (1995) (arguing that, in sexual discrimination laws, biology and genitals act as false proxies for gender attribution); Iona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561, 563–65 (2007) (“[A]ll ‘sex’ discrimination is really ‘gender’ discrimination.”). See generally JUDITH BUTLER, *BODIES THAT MATTER* (1993) (arguing that it is culture and the act of performing gender that makes sex have meaning).

³³ See, e.g., *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 n.1 (4th Cir. 1996) (“[T]here is no need to distinguish between the terms ‘sex’ and ‘gender’ in Title VII cases. Consequently, courts, speaking in the context of Title VII, have used the term[s] ‘sex’ and ‘gender’ interchangeably to refer simply to the fact that an employee is male or female. . . . While it may be useful to disaggregate the definition of ‘gender’ from ‘sex’ for some purposes, in this opinion we make no such effort . . .”). But see, e.g., *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting) (“The word ‘gender’ has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine to male.”).

³⁴ Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1. She later told an audience at Columbia University that she made that choice because of a secretary who noted:

I’m typing all these briefs and articles for you and the word sex, sex, sex is on every page. . . . Don’t you know that those nine men . . . hear that word and their first association is not the way you want them to be thinking? Why don’t you use the word gender? It is a grammatical term and it will ward off distracting associations.

Catherine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. TIMES, Nov. 21, 1993, at A28 (internal quotation marks omitted), available at http://articles.latimes.com/1993-11-21/news/mn-59217_1_supreme-court.

³⁵ 6 OXFORD ENGLISH DICTIONARY, *supra* note 28, at 428. Weiss, *supra* note 30, at 605, 608.

³⁶ The first person to use the term to distinguish biological sex from social cues was John Money, a sex researcher at John Hopkins University, writing in 1955. Weiss, *supra* note 30, at 605.

³⁷ Compare 6 OXFORD ENGLISH DICTIONARY, *supra* note 28, at 428 (defining the word “gender” as “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”), with 15 OXFORD ENGLISH DICTIONARY, *supra* note 28, at 107–08 (defining the word “sex” as “[t]he distinction between male and female in general. In recent use often with more explicit notion: The sum of the 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

There are many ways to characterize a person within the categories of gender and sex. Gender expectations have changed over time, and they differ among cultures.³⁹ Likewise, different tests have been used in different contexts for classifying individuals by biological sex. The most common and legally significant of these tests is the appearance of external genitalia at birth, which most often determines the sex marked on the newborn's birth certificate.⁴⁰ Even so, many DSDs result in children being born with ambiguous or misleading external genitalia, leaving a "glance between the legs" check inconclusive.⁴¹ Even chromosome tests, which have been used in some sporting competitions to assure that men were not competing as women,⁴² have blind spots.⁴³ Maria Patiño, a Spanish hurdler, was disqualified from the 1985 World University Games after failing a sex chromatin test.⁴⁴ Patiño had had no reason to suspect she would fail the test; her genitalia, appearance, and self-identity had always seemed to be that of a normal female.⁴⁵ What she did not know was that she had congenital androgen insensitivity syndrome—a condition that may actually have put her at a competitive disadvantage because of her inability to process testosterone.⁴⁶

other physiological differences consequent on these; the class of phenomena with which these differences are concerned").

³⁸ AMERICAN HERITAGE DICTIONARY 731 (4th ed. 2000) (giving usage note differentiating the terms "sex" and "gender"); see also Weiss, *supra* note 30, at 608 & n.226.

³⁹ See YORK W. BRADSHAW, JOSEPH F. HEALEY & REBECCA SMITH, *SOCIOLOGY FOR A NEW CENTURY* 243–51 (2001) (describing how social roles based on sex differ between societies and how expectations for men and women have changed even within the twentieth century).

⁴⁰ Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 271 (1999).

⁴¹ Genetically male children born with 5-alpha-reductase deficiency, a DSD that inhibits the body's ability to process testosterone before puberty, can appear female at a cursory glance but develop a more male sexual anatomy at puberty. *Id.* at 287–88; see also EUGENIDES, *supra* note 7 (fictional work whose protagonist has 5-alpha-reductase deficiency, is raised as a girl until puberty, and lives thereafter as a man).

⁴² Kolata, *supra* note 13 (discussing chromosome testing in the Olympics in the context of the Semenya controversy); Joe Leigh Simpson et al., *Gender Verification in the Olympics*, 284 JAMA 1568, 1569 (2000) (noting that the goal of gender testing Olympic athletes was not to differentiate between sexes or to detect male pseudo-hermaphrodites but to "prevent male imposters from participating in female competitions" (quoting Arne Ljungqvist, *Women in Sport*, in 8 OLYMPIC ENCYCLOPEDIA 183, 183–93 (BL Drinkwater ed., 2000)) (internal quotation mark omitted)).

⁴³ Conditions like congenital androgen insensitivity syndrome can cause a person with a 46,XY karyotype, that of a typical male, to develop many typically female sex characteristics. See Greenberg, *supra* note 40, at 286–87. Because fetal sexual development is governed by the presence or absence of male hormones, an individual with an androgen insensitivity (i.e., one whose body does not process testosterone normally) can develop a female phenotype. *Id.* at 279–81.

⁴⁴ *Id.* at 273.

⁴⁵ *Id.*

⁴⁶ *Id.*

Even so, her male karyotype disqualified her from participating in the women's competition.⁴⁷

When determining a child's sex, physicians sometimes rely on assumptions about "proper" sexual function. When an ambiguously sexed newborn's phallus is found to be "inadequate" or its clitoris "too large," doctors may call the child a female and surgically reduce the size of the organ: a genetic male undergoes surgery and is assigned a female sex if its phallus is "inadequate," and a genetic female with a "too large" clitoris undergoes surgery and is assigned female if it is likely to be able to reproduce.⁴⁸ In this context, maleness is defined by the size of the child's phallus (and thus its future ability to penetrate a sexual partner), and femaleness by the child's future ability to bear children.⁴⁹ This functional test of biological sex relies on societal preconceptions of proper sexual relations and places a higher value on the size of a phallus than an individual's sexual enjoyment or humanity's natural sexual diversity.⁵⁰

In light of the clear shortcomings of any one test for determining sex, medical professionals have identified a number of biological characteristics that are indicative of sex.⁵¹ Although some factors could be subdivided into further factors, typical criteria include:

- Genetic or chromosomal sex—XY or XX;
- Gonadal sex (reproductive sex glands)—testes or ovaries;
- Internal morphologic sex (determined after three months' gestation)—seminal vesicles/prostate or vagina/uterus/fallopian tubes;
- External morphologic sex (genitalia)—penis/scrotum or clitoris/labia;
- Hormonal sex—androgens or estrogens;
- Phenotypic sex (secondary sexual features)—facial and chest hair or breasts;
- Assigned sex and gender of rearing; and
- Sexual identity.⁵²

Many of these signals have a great deal of ambiguity.⁵³ Some of these signals that define biological sex are plainly cultural, like "gender of rearing"

⁴⁷ *Id.*

⁴⁸ Julie A. Greenberg, *Intersex and Intrasex Debates: Building Alliances to Challenge Sex Discrimination*, 12 *CARDOZO J.L. & GENDER* 99, 104–05 (2005). Genetic males who undergo such procedures can permanently lose the ability to procreate or experience sexual pleasure. Genetic females can lose their ability to experience sexual pleasure, although their ability to reproduce is given greater value than the integrity or appearance of their genitalia. *Id.*; see also Greenberg, *supra* note 40, at 271–72.

⁴⁹ Greenberg, *supra* note 40, at 272; Greenberg, *supra* note 48, at 105.

⁵⁰ Greenberg, *supra* note 40, at 272.

⁵¹ *Id.* at 278.

⁵² *Id.* (citing JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES* 4 (2d ed. 1994)).

and “sexual identity.” And although for most people these eight factors align with each other, for many people the eight signals are not congruent.

Although most of these tests for sex are determined by one’s biology and the gender roles assigned to each sex are essentially sociological, the disaggregation of sex from gender should not be associated with popular nature versus nurture debates. Although many people may be tempted to think of sex as nature and gender as nurture, there are many ways in which sex is not determined by nature or gender by nurture.⁵⁴ The experiences of transsexual and transgender people provide compelling evidence that gender identity is as biologically deep-seated as sexual identity.⁵⁵ As one famous case demonstrates, early association of gender with nurture can lead to tragic results. In 1965, David Reimer and his identical twin brother were both circumcised at around eight months of age, but David’s circumcision went awry. The doctor burned off almost all of David’s penis.⁵⁶ On the advice of Dr. John Money, a nationally renowned sex researcher, David underwent genital reassignment surgeries before the age of two, and he was raised after that point as a girl under the name Brenda.⁵⁷ For many years, Dr. Money reported that David (known as “Joan/John” in medical literature) was living as a happy little girl with a suitably feminine gender identity.⁵⁸ But this was not the case. David later reported that he had never felt comfortable as a girl, and he dreaded the repeated trips to visit Dr. Money

⁵³ For example, chromosome tests do not support a binary definition of sex: some people can be born with only one X chromosome. *Id.* at 284. Ambiguities also occur in external morphology, *id.* at 285–86, and some people’s hormone levels inhabit an ambiguous range somewhere between male and female norms, *id.* at 286–89.

⁵⁴ Some writers conclude that because we attach meaning to only some differences in biology, sex is as much of a social construct as gender. See Noa Ben-Asher, *The Necessity of Sex Change: A Struggle for Intersex and Transsex Liberties*, 29 HARV. J.L. & GENDER 51, 53 (2006) (noting that sex, like gender, is a “human-made process”).

⁵⁵ Krystal Etsitty, for instance, explained in her employment discrimination lawsuit that from the time she was a child she felt that she was a girl, and she always believed she had been born with the wrong sex organs. *Etsitty II*, 502 F.3d 1215, 1218 (10th Cir. 2007). Recent neuroscience studies have also hinted at a biological basis for one’s sexual identity separate from indicators for sexual orientation and indicia of biological sex. See, e.g., Alicia Garcia-Falgueras & Dick F. Swaab, *A Sex Difference in the Hypothalamic Uncinate Nucleus: Relationship to Gender Identity*, 131 BRAIN 3132, 3141–46 (2008); Frank P.M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM 2034, 2037–41 (2000); Eileen Luders et al., *Regional Gray Matter Variation in Male-to-Female Transsexualism*, 46 NEUROIMAGE 904, 905–07 (2009).

⁵⁶ John Colapinto, *The True Story of John/Joan*, ROLLING STONE, Dec. 11, 1997, at 54, 58 (noting also that the burn was caused by the malfunction or misuse of an electrocautery needle, a heated device used in surgeries to cauterize blood vessels as it cuts); *Who Was David Reimer (Also, Sadly, Known as “John/Joan”)?*, INTERSEX SOC’Y N. AM., <http://www.isna.org/faq/reimer> (last visited Oct. 2, 2011) [hereinafter *David Reimer*].

⁵⁷ Colapinto, *supra* note 56, at 64; *David Reimer*, *supra* note 56.

⁵⁸ Colapinto, *supra* note 56, at 70; *David Reimer*, *supra* note 56.

in Baltimore.⁵⁹ When he was twelve, he convinced his parents to stop taking him to see Dr. Money.⁶⁰ Nearly two years later, when David was almost fifteen, he was finally told of the botched circumcision and his biological sex at birth.⁶¹ David reassumed a male gender identity, which he maintained for the rest of his life.⁶² But even though he was happier living as a man, David still suffered from depression, and social anxieties contributed to two suicide attempts early in his twenties.⁶³ He eventually married and adopted three children with his wife, but he continued to suffer psychologically and committed suicide in 2004 at the age of thirty-eight.⁶⁴ David is gone, but his story stands as a warning of the tragedies that can result when social actors conflate gender with nurture.

B. *The Intersex and the Challenges They Face*

Intersex people are a diverse group, but they share one of any number of congenital conditions that result in conflicting or ambiguous indicia of biological sex. Estimates vary, but approximately one out of every 1500 to 2000 people is born with an intersex condition.⁶⁵ Such an estimate is difficult to nail down because of discrepancies over what conditions the researchers call “intersex.”⁶⁶ Nevertheless, this statistic suggests that intersex conditions as a whole are about as common as cystic fibrosis and Down’s Syndrome.⁶⁷

Intersex people are one part of a larger class of sexual minorities, but being intersex is unrelated to one’s gender identity or sexual orientation. Indeed, the majority of intersex people are “cisgender,”⁶⁸ meaning that they

⁵⁹ Colapinto, *supra* note 56, at 70–71.

⁶⁰ *Id.* at 71.

⁶¹ Colapinto, *supra* note 56, at 92; David Reimer, *supra* note 56.

⁶² Colapinto, *supra* note 56, at 92; David Reimer, *supra* note 56.

⁶³ See Colapinto, *supra* note 56, at 92; John Colapinto, *Gender Gap: What Were the Real Reasons Behind David Reimer’s Suicide?*, SLATE (June 3, 2004, 3:58 PM), <http://www.slate.com/id/2101678>.

⁶⁴ Colapinto, *supra* note 63.

⁶⁵ Chai R. Feldblum, *The Right to Define One’s Own Concept of Existence: What Lawrence Can Mean for Intersex and Transgender People*, 7 GEO. J. GENDER & L. 115, 131 (2006). Based on this ratio, one can estimate that there are around 200,000 intersex people living in the United States. *But see* P.-L. Chau & Jonathan Herring, *Defining, Assigning and Designing Sex*, 16 INT’L J.L. POL’Y & FAM. 327, 332–33 (2002) (citing various estimates of intersex birth rates, including estimates of 17 per 1000 (1.7%), 1 per 1500 (0.07%), and 4%); Greenberg, *supra* note 40, at 267 & n.7 (noting that some estimates go as high as 4% of the population, which would mean there are over ten million intersex people living in the United States).

⁶⁶ *How Common Is Intersex?*, INTERSEX SOC’Y N. AM., <http://www.isna.org/faq/frequency> (last visited Oct. 2, 2011).

⁶⁷ Greenberg, *supra* note 40, at 267 n.7.

⁶⁸ Intersex people are distinct from transsexual and transgender people. The prefix “trans” refers to persons whose sexual or gender identity is the “opposite” of their assigned gender or sex. The prefix “inter” refers to persons whose sexual or gender identity is somewhere between two extremes. These two prefixes are attached to the terms “gender” and “sexual” to describe the ways in which sexual mi-

present and act as society expects them to.⁶⁹ For example, Caster Semenya, the champion runner from South Africa,⁷⁰ identifies herself as a woman and maintains a feminine appearance and identity.⁷¹ In spite of her self-identity as a woman, some academics and activists consider her transgender; these individuals include the intersex under the label “transgender,” defining the term to refer to all people whose gender expression does not completely comport with society’s expectations for them based on their biological sex.⁷² This categorization troubles many intersex activists because the interests of transgender and intersex people are not always aligned.⁷³

Intersex people can face a number of challenges in their lifetimes, especially in their interactions with medical care providers. Intersex children are often forced to undergo several genital surgeries during their developing years.⁷⁴ They can be left with permanent physical and psychological scars from the experience of having their genitals repeatedly examined by doctors and medical students.⁷⁵ Some intersex people live for decades without be-

norities differ from the expected norms. The prefix “cis” is the analogous counterpart that refers to persons whose sexual or gender identity is in line with their assigned gender or sex. For example, a person whose gender expression is feminine when society expects masculine expression is transgender, and a person whose female sexual identity is in harmony with the signifiers of biological sex is cisgender. *See* EVE SHAPIRO, *GENDER CIRCUITS: BODIES AND IDENTITIES IN A TECHNOLOGICAL AGE* 58 (2010) (discussing the meaning of “cisgender”). Contrast this with the intersex: people whose biological sex puts them somewhere between the expected sexual categories of male and female.

⁶⁹ Intersex people usually express a gender that accords with their legally recognized sex. *What’s the Difference Between Being Transgender or Transsexual and Having an Intersex Condition?*, INTERSEX SOC’Y N. AM., <http://www.isna.org/faq/transgender> (last visited Oct. 2, 2011) [hereinafter *Difference*].

⁷⁰ *See supra* notes 9–12 and accompanying text.

⁷¹ Semenya was the cover model for the popular South African glossy *You* and was featured wearing makeup and traditionally feminine clothes and jewelry with the exclamation “Wow, Look at Caster Now!” *YOU*, Sept. 10, 2009, at cover; *see* Oren Yaniv, *Athlete Caster Semenya, Forced to Take Gender Test to Confirm Sex—Appears as Girly Mag Cover Model*, N.Y. DAILY NEWS (Sept. 9, 2009), http://articles.nydailynews.com/2009-09-09/news/17933691_1. The photo shoot was aimed at reinforcing perceptions of Semenya’s femininity—and by association her femaleness—to a world audience, and it was met with mixed results. *See, e.g.*, Owen Slot, *World in Motion: Caster Semenya Photoshoot Brings Sex Back to Top of Agenda*, TIMES ONLINE (London) (Sept. 8, 2009), http://www.timesonline.co.uk/tol/sport/columnists/owen_slot/article6825732.ece (arguing that Semenya’s photo shoot distracts from the real issue of her supposedly scientifically verifiable sex).

⁷² *See, e.g.*, Feldblum, *supra* note 65, at 116 n.3; Greenberg, *supra* note 40, at 267 n.6.

⁷³ *See* Mairi MacDonald, *Intersex and Gender Identity*, U.K. INTERSEX ASS’N, http://www.ukia.co.uk/voices/is_gi.htm (last visited Oct. 2, 2011). One primary difference is that intersex people typically have normal gender expression. *Difference, supra* note 69. The conflict between transsexuals and the intersex is especially visible in the debate on the necessity of genital surgery. *See* Ben-Asher, *supra* note 54, at 55–72.

⁷⁴ *See, e.g.*, CATHERINE HARPER, INTERSEX 109–10 (2007) (describing as common the experience of a woman with complete androgen insensitivity who had her gonads surgically removed in infancy).

⁷⁵ *See, e.g., id.* at 111–12 (describing the same woman being “humiliated by memories of having been examined by medical students and a range of doctors” who misled her about her condition and the painful process of vaginal dilation that she underwent in hopes of being more sexually normal).

ing told the name or nature of the condition that sent them to operating rooms or rendered them infertile.⁷⁶

And mistreatment by medical professionals is not a thing of the past. There was a significant public outcry in 2010 after it was revealed that a pediatric urologist had been conducting tests of sexual sensation on conscious six-year-old girls with surgically reduced clitorises.⁷⁷ In these tests, as their parents watched, he would use a “vibratory device” to stimulate their clitorises, labia, and the introitus of their vaginas, asking them questions about the sensations.⁷⁸ Although some DSDs can cause serious health complications,⁷⁹ many intersex people can lead healthy lives without invasive medical intervention.⁸⁰

Many intersex people are subjected to surgeries in their infancy that attempt to “normalize” their atypical genitalia. This very fact is discomforting to many people,⁸¹ and intersex activists are universally arrayed against the practice.⁸² Some intersex children are placed on hormone regimens to prevent the onset of male puberty.⁸³

Intersex people also face some difficulties dealing with the legal system. Their foremost difficulty is the issue of informed consent to medical treatment: infants cannot consent to genital surgery, and parents may be pressured to consent on their behalf without a full understanding of the risks

⁷⁶ See INTERSEX SOC’Y N. AM., CLINICAL GUIDELINES FOR THE MANAGEMENT OF DISORDERS OF SEX DEVELOPMENT IN CHILDHOOD 34 (2006), available at <http://www.dsdguidelines.org/files/clinical.pdf>; Nina Williams, *The Imposition of Gender: Psychoanalytic Encounters with Genital Atypicality*, 19 PSYCHOANALYTIC PSYCHOL. 455, 460 (2002) (relating the case of an adult woman whose parents and doctors had never told her the nature of her condition); see also, e.g., HARPER, *supra* note 74, at 109–11 (describing how a twenty-six-year-old woman was lied to her entire life about the gonadectomy she received as an infant).

⁷⁷ Alice Dreger & Ellen K. Feder, *Bad Vibrations*, BIOETHICS F. (June 16, 2010), <http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=4730>.

⁷⁸ *Id.*

⁷⁹ Congenital adrenal hyperplasia, for example, can lead to serious complications early in life and a greater risk of cancer in adulthood. See *Congenital Adrenal Hyperplasia*, GOOGLE HEALTH, <https://health.google.com/health/ref/Congenital+adrenal+hyperplasia> (last visited Oct. 2, 2011).

⁸⁰ Only some intersex conditions require medical intervention. For example, congenital adrenal hyperplasia can cause serious health complications. See *id.*

⁸¹ Alice Domurat Dreger, *Intersex and Human Rights: The Long View*, in ETHICS & INTERSEX 73, 80 (Sharon E. Sytsma ed., 2006) (“But to treat a psycho-social challenge with irreversible surgery cannot be seen as practicing reduction of risk of harm by any stretch of the imagination. There’s a *reason* people cross their legs and wince when you tell them about infant genital cosmetic surgeries. And there’s a *reason* they don’t have the same reaction when you talk about psychological services and social workers.”).

⁸² *Id.* (“After more than 12 years of loud activism, after hundreds of investigations by national and international journalists, not a single person with intersex has come forward publicly to say she or he thinks her or his infant genital surgeries were a good idea.” (emphasis omitted)).

⁸³ Greenberg, *supra* note 40, at 287–88.

or benefits.⁸⁴ Moreover, because tests of an infant's sex can produce ambiguous results,⁸⁵ there is reason to believe that the rate of mistaken sex assignment (e.g., assigning a female identity to a person who will grow up feeling she is a man) may be higher among the intersex. The process required to change one's legally recognized sex varies by state and can often be difficult or impossible.⁸⁶

Yet with an unknown number⁸⁷ of intersex people living in the United States and facing daily the challenges of their atypical physicality, it seems both cruel and out of place that the law would provide no remedy to people discharged, denied promotion, or harassed because of their DSDs.

II. GENDER NONCONFORMITY, DISCRIMINATION, AND THE INTERSEX

There is a growing body of case law backing the proposition that discrimination "because of . . . sex"⁸⁸ includes discrimination against a person because she does not fit social expectations of appearance or behavior.⁸⁹ But many jurisdictions are unwilling to apply this reasoning to cases involving sexual minorities. In section A, I discuss the early jurisprudence that excluded trans⁹⁰ people from the protections of Title VII. In section B, I move on to *Wood v. C.G. Studios, Inc.*,⁹¹ which applied the same reasoning to exclude the intersex from the protections of Title VII. Then, in section C, I discuss the shifts that occurred in gender discrimination law with the Supreme Court decisions in *Price Waterhouse*, which recognized a cause of action for gender-nonconformity discrimination,⁹² and *Oncale*, in which a

⁸⁴ The Colombian Constitutional Court, for example, has ruled that parental consent cannot be given for infant genital surgery unless parents consent in writing several times over a reasonable period of time after being given very detailed information on the condition and the nature of the surgery. See Julie Greenberg, *Legal Aspects of Gender Assignment*, 13 ENDOCRINOLOGIST 277, 279 (2003).

⁸⁵ See *supra* Part I.A.

⁸⁶ See Alice Newlin, *Should a Trip from Illinois to Tennessee Change a Woman into a Man?: Proposal for a Uniform Interstate Sex Reassignment Recognition Act*, 17 COLUM. J. GENDER & L. 461, 479–83 (2008) (discussing the system of state regulation and the many, sometimes insurmountable legal barriers to legal change of sex).

⁸⁷ Depending on what conditions are included in the count, the total figure may well be in the millions. See Greenberg, *supra* note 40, at 267 n.7.

⁸⁸ 42 U.S.C. § 2000e-2(a) (2006).

⁸⁹ See, e.g., *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (holding Title VII prohibits hostile-environment harassment for failure to conform to gendered behavioral stereotypes).

⁹⁰ I use the term "trans" to refer to the collective group of transgender and transsexual people—those who feel their gender is at odds with their sex. See Lynne Carroll et al., *Counseling Transgendered, Transsexual, and Gender-Variant Clients*, 80 J. COUNSELING & DEV. 131, 139 (2002) (defining "trans" as "[a]n umbrella term that refers to cross-dressers, transgenderists, transsexuals and others who permanently or periodically dis-identify with the sex they were assigned at birth. Trans is preferable to 'transgender' to some in the community because it does not minimize the experiential specificities of transsexuals").

⁹¹ 660 F. Supp. 176 (E.D. Pa. 1987).

⁹² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

unanimous Court broadly construed the “because of . . . sex” language in Title VII.⁹³ In section D, I explore how the law is changing for trans plaintiffs: the Sixth Circuit and other jurisdictions have either applied the *Price Waterhouse* cause of action to protect trans plaintiffs or have held that discrimination based on trans identity is discrimination based on sex. Nonetheless, the trans exception is alive and kicking in several jurisdictions, and I delve into their post-*Oncale*⁹⁴ jurisprudence on the issue in section E. Finally, in section F, I discuss how courts continue to apply a categorical Goldilocks jurisprudence, forcing plaintiffs to exhibit “just right” gender nonconformity to receive protection.

A. Early Jurisprudence and the Transsexual Exception

The exclusion of trans people from employment discrimination protections under Title VII began long before *Price Waterhouse*. The logic of this position is that transgender is a gender identity and that discrimination against transgender people is therefore based not on sex but on “gender identity.”⁹⁵ Analogously, discrimination against transsexuals is discrimination based not on sex but on “change of sex.” This lack of protection for sexual minorities parallels the courts’ rationale in rejecting claims of discrimination based on sexual orientation.⁹⁶ The courts’ fear was that the plaintiffs were attempting to bootstrap new protections into Title VII’s “because of . . . sex” language when the language by itself does not evince a congressional intent to offer those protections.⁹⁷

The first case in which the “bootstrapping” logic was employed to deny relief to a transsexual plaintiff was the 1975 case of *Grossman v. Bernards Township Board of Education*.⁹⁸ Paula Grossman, formerly Paul

⁹³ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

⁹⁴ *Id.*

⁹⁵ These two characteristics are sometimes juxtaposed as if sex were natural and immutable and gender identity were psychological and mutable. This is not the case. See *supra* notes 54–64 and accompanying text. Even if they were, however, Title VII has never distinguished between mutable and immutable characteristics. For example, religion is certainly a mutable characteristic, and religion has been protected under Title VII since the Civil Rights Act of 1964 was passed. See Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)–(a)(1), 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-2(a)–(a)(1) (2006)); *Garcia v. Gloor*, 618 F.2d 264, 269 n.6 (5th Cir. 1980) (“Religion is, of course, a forbidden criterion, even though a matter of individual choice.”).

⁹⁶ See, e.g., *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) (“Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by [plaintiff]—and, indeed, his very claim—indicated only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII.” (citations omitted)); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 329–30 (9th Cir. 1979) (holding that discrimination based on sexual orientation is not discrimination based on sex), *overruled by Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001).

⁹⁷ See, e.g., *DeSantis*, 608 F.2d at 330–31.

⁹⁸ No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975).

Grossman, was a teacher employed by the defendant and was fired after she underwent an unspecified sex reassignment surgery.⁹⁹ The court concluded that any discrimination that occurred was not because of sex (i.e., the plaintiff's status as a female) but rather "because of her *change* in sex from the male to the female gender."¹⁰⁰ The court justified its holding by relying on its intuition that the "plain meaning" of "sex" does not include trans identities: "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."¹⁰¹

The Ninth Circuit followed the same line of reasoning in its 1977 opinion in *Holloway v. Arthur Andersen & Co.*¹⁰² The court concluded that, in absence of clear congressional intent otherwise, Title VII's prohibition on discrimination "because of . . . sex" should be interpreted according to the "traditional meaning" of "sex."¹⁰³ Relying on dictionaries, it found that this "traditional meaning" included only the "two divisions of organisms distinguished respectively as male or female."¹⁰⁴ It likewise found that the purpose of Title VII was to place women on equal standing with men; protecting transsexuals was not a part of that goal.¹⁰⁵ Under the Ninth Circuit's reading in *Holloway*, Title VII only protects transsexuals if they can show that they were discriminated against because of their sex, separate from their transsexual status—a tall order indeed.¹⁰⁶

The Eighth Circuit also adopted a "plain meaning" reading of Title VII. In *Sommers v. Budget Marketing, Inc.*, Audra Sommers, a transgender woman,¹⁰⁷ alleged that her former employer had violated Title VII by terminating her employment.¹⁰⁸ The district court found that the definition of "sex" for purposes of Title VII was "anatomical classification,"¹⁰⁹ and the

⁹⁹ *Id.* at *1.

¹⁰⁰ *Id.* at *4. Note that here the court used the terms "sex" and "gender" interchangeably.

¹⁰¹ *Id.* Unfortunately, the court did not then specify what it thought the plain meaning of "because of . . . sex" was or cite to any authority defining or construing that plain meaning.

¹⁰² 566 F.2d 659 (9th Cir. 1977).

¹⁰³ *Id.* at 662–63.

¹⁰⁴ *Id.* at 662 n.4, 663.

¹⁰⁵ *Id.* at 662.

¹⁰⁶ *Id.*

¹⁰⁷ 667 F.2d 748, 748 n.2, 749 (8th Cir. 1982). The court recognized Sommers as a transsexual. *Id.* at 750. Nonetheless, Sommers described herself as a "female with the anatomical body of a male" without a clear plan or desire to undergo sex reassignment surgery. *Id.* at 748 (internal quotation marks omitted). She may fit better in the more recently recognized category of transgender people because it was her gender expression and behavior that did not conform to social expectations, not the indicators of her biological sex, and because there is no indication that she was seeking surgery to alter her anatomy.

¹⁰⁸ *Id.* at 749.

¹⁰⁹ *Id.*

court of appeals felt that “sex” should be accorded its “plain meaning.”¹¹⁰ The appellate court did not clarify what it thought the plain meaning of “sex” was, but it held that transsexuality was not within it.¹¹¹

The clearest statement of this narrow construction of sex in Title VII came in the Seventh Circuit’s 1984 decision in *Ulane v. Eastern Airlines, Inc.*¹¹² The court held that Title VII does not forbid discrimination against transsexuals.¹¹³ The plaintiff began flying for Eastern Airlines in 1968 and went on to earn promotion to First Officer, serve as a flight instructor, and log over 8000 flight hours.¹¹⁴ From an early age, she felt like a female trapped in a male body, and she struggled with her sexual identity throughout her career.¹¹⁵ She first sought psychiatric and medical attention in 1968 while she was still in the Army, and eventually she began taking female hormones.¹¹⁶ She was diagnosed as a transsexual in 1979 and underwent sex reassignment surgery in 1980.¹¹⁷ After her surgery, she obtained a new birth certificate indicating that she was a female, and the FAA indicated that she was a female on her flight certification.¹¹⁸ In 1981, Eastern fired Ulane,¹¹⁹ citing possible safety concerns in stressful situations.¹²⁰

The Seventh Circuit noted the difficulty of nailing down a way to define “sex” as it struggled with the problem of how to define Ulane’s sex.¹²¹ She referred to herself as female and had a female presentation and female external morphology (breasts and a vagina).¹²² Yet she did not have female internal morphology (ovaries and a uterus), nor did she fit a functional definition of the female sex because she was unable to bear children.¹²³ Nor, for that matter, did she have the expected female karyotype.¹²⁴ In the end, the court noted a scholarly debate about whether transsexuals who undergo ge-

¹¹⁰ *Id.* at 750.

¹¹¹ *Id.*

¹¹² 742 F.2d 1081 (7th Cir. 1984).

¹¹³ *Id.* at 1084.

¹¹⁴ *Id.* at 1082–83.

¹¹⁵ *Id.* at 1083.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 1082.

¹²⁰ Obituary, *Karen Ulane, 48, Pilot; Who Had Sex Change*, N.Y. TIMES, May 24, 1989, at D25, available at <http://www.nytimes.com/1989/05/24/obituaries/karen-ulane-48-pilot-who-had-sex-change.html>.

¹²¹ *Ulane*, 742 F.2d at 1083 n.6.

¹²² *Id.* at 1082 n.2, 1083 & n.4.

¹²³ *Id.* at 1083 (“Ulane’s own physician explained, however, that the operation would not create a biological female in the sense that Ulane would ‘have a uterus and ovaries and be able to bear babies.’”).

¹²⁴ *See id.*

nital surgery are legally of the opposite sex after surgery, but it unhelpfully evaded the difficult question of how to define sex, Ulane's or otherwise.¹²⁵

Instead, the Seventh Circuit elaborated on the so-called plain meaning of Title VII's "because of . . . sex" language.¹²⁶ The district court judge had found that "sex is not a cut-and-dried matter of chromosomes" and is at least in part psychological.¹²⁷ Although the district court judge had little problem saying in dictum that homosexuality and transvestitism are plainly outside the scope of Title VII's protections, it was "an altogether different question as to whether the matter of sexual identity is comprehended by the word, 'sex.'"¹²⁸

The Seventh Circuit disagreed.¹²⁹ Transsexuals are not protected by Title VII, it reasoned, because transsexuality was not within the "ordinary, common meaning" of sex.¹³⁰ Despite the expert testimony in the record as to the difficulty of defining sex,¹³¹ the Seventh Circuit held that "[t]he phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men."¹³² The court dispensed with the contention that a person's sexual identity is part of her sex by calling Ulane's identity as a woman a "sexual identity disorder," not a legitimate sexual identity.¹³³

B. *Title VII and the Intersex: Wood v. C.G. Studios, Inc.*

*Wood v. C.G. Studios, Inc.*¹³⁴ is the only reported case of an employment discrimination charge brought by an intersex plaintiff. The plaintiff, Wilma Wood, alleged that C.G. Studios had failed to promote her and had terminated her employment solely because it had discovered that, prior to her employment with the company, she had undergone genital reconstructive surgery because of an intersex condition.¹³⁵ Judge O'Neill's opinion indicates neither how the company discovered this fact nor the exact nature of Wood's condition.

¹²⁵ See *id.* at 1083 n.6.

¹²⁶ *Id.* at 1085 (interpreting 42 U.S.C. § 2000e-2(a)(1) (1982)).

¹²⁷ *Id.* at 1084 (quoting *Ulane v. E. Airlines, Inc.*, 581 F. Supp. 821, 825 (N.D. Ill. 1983)) (internal quotation marks omitted).

¹²⁸ *Id.* at 1084 n.10 (quoting *Ulane*, 581 F. Supp. at 823).

¹²⁹ *Id.* at 1084.

¹³⁰ See *id.* at 1085 (citing *Perrin v. United States*, 444 U.S. 37, 42 (1979)).

¹³¹ See *id.* at 1083 n.6.

¹³² *Id.* at 1085.

¹³³ See *id.* ("[A] prohibition against discrimination based on an individual's sex is not synonymous with a prohibition against discrimination based on an individual's *sexual identity disorder* or discontent with the sex into which they were born." (emphasis added)).

¹³⁴ 660 F. Supp. 176 (E.D. Pa. 1987).

¹³⁵ *Id.* at 176.

Wood filed suit under the Pennsylvania Human Relations Act (PHRA).¹³⁶ Judge O’Neill held that discrimination “because of . . . sex” in the PHRA means discrimination against a woman because of her status as female or a man because of his status as male.¹³⁷ The fact that Wood had undergone gender-corrective surgery was irrelevant because, as of 1987, all existing “Title VII cases [had] unanimously h[e]ld that Title VII does not extend to transsexuals nor to those undergoing sexual conversion surgery, and that the term ‘sex’ should be given its traditional meaning.”¹³⁸

Because there was no legislative history or case law on which to draw, Judge O’Neill’s reasoning turned on his interpretation of the word “sex” in the PHRA.¹³⁹ Like the courts of many other states, Pennsylvania’s courts interpret its antidiscrimination legislation, the PHRA, in accord with the federal courts’ interpretations of Title VII.¹⁴⁰ Thus, like the federal courts in *Grossman*,¹⁴¹ *Holloway*,¹⁴² *Sommers*,¹⁴³ and *Ulane*,¹⁴⁴ Judge O’Neill constrained himself to deciding *Wood* on the “plain meaning” of “sex” in the PHRA. Judge O’Neill construed the plain meaning of the statute in terms reminiscent of the Seventh Circuit’s construction of Title VII in *Ulane*.¹⁴⁵ To the extent that *Price Waterhouse*¹⁴⁶ and *Oncale*¹⁴⁷ have opened new

¹³⁶ *Id.* The PHRA is a Pennsylvania analogue to the Federal Civil Rights Act. When Wood filed her claim, the statute read:

It shall be an unlawful discriminatory practice, unless based upon a bona fide occupational qualification . . .

(a) For any employer, because of . . . sex . . . to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions, or privileges of employment . . .

43 PA. STAT. ANN. § 955(a) (West 1986) (current version at 43 PA. STAT. ANN. § 955(a) (West 2009)).

¹³⁷ *Wood*, 660 F. Supp. at 177 (“The plain meaning of the term ‘sex’, as it is used in the [PHRA], would encompass discrimination against women because of their status as females and discrimination against males because of their status as males.”).

¹³⁸ *Id.* at 178. This statement of case law was true at the time, but other jurisdictions have since disagreed. See *infra* Part II.D.

¹³⁹ *Wood*, 660 F. Supp. at 177.

¹⁴⁰ *Id.* at 177–78 (“The Commonwealth Court recognizes Title VII cases as persuasive authority on the subject of sex discrimination due to the substantial similarity between Section 2000e-2(a)(1) of Title VII and Section 5(a) of the PHRA.” (citing *Leechburg Area Sch. Dist. v. Commonwealth*, 339 A.2d 850, 853 n.2 (Pa. Commw. Ct., 1975))).

¹⁴¹ *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302, at *4 (D.N.J. Sept. 10, 1975).

¹⁴² *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977).

¹⁴³ *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982).

¹⁴⁴ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

¹⁴⁵ See *Wood*, 660 F. Supp. at 177 (opining that the plain meaning of “sex” encompasses “discrimination against women because of their status as females and discrimination against males because of their status as males”); see also *Ulane*, 742 F.2d at 1085 (opining that the plain meaning of “sex” implies that it is unlawful to “discriminate against women because they are women and against men because they are men”). Judge O’Neill did not cite directly to *Ulane* for this proposition, but he was certainly aware of that decision and cited to it later in his opinion. See *Wood*, 660 F. Supp. at 178.

¹⁴⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

doors for transsexuals to attack their exclusion from Title VII protections after *Ulane*, however, these cases have also undermined Judge O'Neill's reasoning in *Wood v. C.G. Studios, Inc.* for excluding the intersex from the protection of Title VII.

C. The Evolution of the Law: Price Waterhouse and Oncale

In 1987, the Supreme Court handed down its decision in *Price Waterhouse v. Hopkins*, which held that Title VII forbids employers from making employment decisions based on an employee's failure to conform to gender stereotypes.¹⁴⁸ The appellant was the well-known auditing and accountancy partnership, Price Waterhouse.¹⁴⁹ The respondent, Ann Hopkins, had worked for Price Waterhouse in Washington, D.C., for five years when her office proposed her as a candidate for partnership.¹⁵⁰ Hopkins was the sole woman among the eighty-eight candidates for partnership at Price Waterhouse that year.¹⁵¹ Her candidacy was eventually put on "hold," meaning that she was denied partnership but was still eligible for reconsideration the following year.¹⁵²

In the course of her consideration, Hopkins received written reviews from several partners.¹⁵³ No one could dispute that Hopkins was more than qualified; the trial judge noted that "[n]one of the other partnership candidates at Price Waterhouse that year had a comparable record in terms of successfully securing major contracts for the partnership."¹⁵⁴ She was "generally viewed as a highly competent project leader who worked long hours, pushed vigorously to meet deadlines and demanded much from the multidisciplinary staffs with which she worked."¹⁵⁵

Yet many of Hopkins's reviewers focused not on her performance but on her aggressive manner.¹⁵⁶ And many did so in overtly gendered terms, suggesting that Hopkins was "macho," that she was "overcompensat[ing] for being a woman," that she needed to take "a course at charm school,"

¹⁴⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁴⁸ *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) ("[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'" (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978))).

¹⁴⁹ *Id.* at 232.

¹⁵⁰ *Id.* at 233.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 234 (alteration in original) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1112 (D.D.C. 1985)) (internal quotation marks omitted).

¹⁵⁵ *Id.* (quoting *Hopkins*, 618 F. Supp. at 1112–13) (internal quotation marks omitted).

¹⁵⁶ *Id.* at 234–35.

that her use of foul language was unladylike, and so on.¹⁵⁷ One partner made his expectations particularly clear when he suggested that, to make partner, Hopkins should “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”¹⁵⁸

The Supreme Court agreed that Hopkins had been judged against an inappropriate standard.¹⁵⁹ It noted that Hopkins was stuck in a catch-22 situation because the aggressive attitude that had cost her the promotion had been necessary for her success in the high-stakes world of Big Eight accounting.¹⁶⁰ Yet Hopkins was not passed over because she was a *woman*; she was passed over because she was not *womanly*.¹⁶¹ *Price Waterhouse* established that employees can show that the discrimination against them was “because of . . . sex” if motivated by their failure to conform to gender expectations.¹⁶² The Court thus gave its approval to gender-nonconformity discrimination as a basis for Title VII claims.¹⁶³

Lower courts have applied the reasoning of *Price Waterhouse* to cases of gender-nonconformity discrimination beyond the narrow catch-22 reading: high-powered women are not the only ones protected under the Court’s holding in *Price Waterhouse*. In *Doe v. City of Belleville*, the Seventh Circuit held that H. Doe, a teenage seasonal employee, had a cause of action under Title VII after his coworkers harassed him, touched him, and called him derogatory names.¹⁶⁴ Unlike Hopkins, Doe did not owe success on the job to his gender nonconformity, but the Seventh Circuit nonetheless upheld the trial court’s finding that Doe had been harassed because of his failure to conform to gender expectations. It also found that sexual harassment based

¹⁵⁷ *Id.* at 235 (internal quotation marks omitted).

¹⁵⁸ *Id.* (quoting *Hopkins*, 618 F. Supp. at 1117) (internal quotation marks omitted).

¹⁵⁹ *See id.* at 235–37.

¹⁶⁰ *Id.* at 251 (“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.”).

¹⁶¹ *See id.* at 237.

¹⁶² *Id.*

¹⁶³ This approval quietly settled a split that had grown between the circuits on the question of whether discrimination based on gender nonconformity was “based on . . . sex.” *Compare* *Fadhl v. City & Cnty. of San Francisco*, 741 F.2d 1163 (9th Cir. 1984) (holding the city liable to a female police officer when evaluations leading to her termination were based on nonconformity to gender stereotypes), *and* *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding the city liable for failing to hire a qualified female as a police officer based on sex stereotypes), *with* *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325 (5th Cir. 1978) (holding that a male job applicant who wore long hair and was refused a job for being too “effeminate” was not discriminated against because of sex).

¹⁶⁴ 119 F.3d 563, 566–68 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998).

on a failure to conform to gender stereotypes is sex discrimination for purposes of Title VII.¹⁶⁵

The Supreme Court cut another leg out from under the “plain meaning” rules of *Ulane* and its brethren¹⁶⁶ a decade after *Price Waterhouse*¹⁶⁷ with its decision in *Oncala v. Sundowner Offshore Services, Inc.*¹⁶⁸ The plaintiff in *Oncala* was subjected to relentless sex-related taunting, harassment, and touching.¹⁶⁹ One coworker threatened to rape him.¹⁷⁰ He left his job and sued his employer, but both the district court and the Fifth Circuit found that harassment of a man by other men was not actionable “discrimination because of . . . sex” under Title VII.¹⁷¹

Justice Scalia wrote for a unanimous Court reversing the Fifth Circuit.¹⁷² The Court affirmed the principle that Title VII should be construed broadly¹⁷³ because its language “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”¹⁷⁴ Indeed, the Court noted, “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.”¹⁷⁵

The Court’s reasoning in *Oncala* reinforced the notion that the cause of action for gender-nonconformity discrimination was not limited to the facts of *Price Waterhouse*, and the circuit courts have followed suit. In *Nichols v. Azteca Restaurant Enterprises*,¹⁷⁶ the Ninth Circuit held that the plaintiff had a cause of action under Title VII for hostile environment sex discrimination based on gender nonconformity when his coworkers had subjected him to a barrage of insults, name-calling, and vulgarity for failure to conform to gender expectations.¹⁷⁷ The Ninth Circuit then affirmed that hold-

¹⁶⁵ *Belleville*, 119 F.3d at 581 (“[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex.”).

¹⁶⁶ See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749 (8th Cir. 1982); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975); *supra* Part II.A.

¹⁶⁷ *Price Waterhouse*, 490 U.S. 228.

¹⁶⁸ 523 U.S. 75 (1998).

¹⁶⁹ *Id.* at 77.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 76, 82.

¹⁷³ See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

¹⁷⁴ *Oncala*, 523 U.S. at 78 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (internal quotation marks omitted).

¹⁷⁵ *Id.* at 79.

¹⁷⁶ 256 F.3d 864 (2001).

¹⁷⁷ *Id.* at 870, 874–75.

ing en banc in *Rene v. MGM Grand Hotel, Inc.*¹⁷⁸ In *Rene*, the plaintiff's coworkers subjected him to sexual taunting and touching because of his gender-nonconforming appearance and behavior.¹⁷⁹ The court reversed summary judgment for the defendant on the ground that a hostile environment involving sexual touching is "because of . . . sex."¹⁸⁰ In their concurrence, three judges pointed out that Rene's allegations supported the same cause of action under a gender-nonconformity theory.¹⁸¹

Thus, the courts do not require that the plaintiff be stuck in Ann Hopkins's catch-22 to successfully state a case for discrimination based on gender nonconformity. The plaintiffs in *Belleville*, *Sanchez*, and *Rene* had not enjoyed success because of their feminine mannerisms. In fact, the opposite was true: each had suffered harassment at the hands of his coworkers. The lower courts agreed that *Price Waterhouse*¹⁸² established discrimination motivated by a plaintiff's perceived gender nonconformity as discrimination "because of . . . sex" for the purposes of Title VII.¹⁸³ The courts' agreement gave new hope to the transgender and transsexual communities—hope that courts would use Title VII to shield them from employment discrimination. Instead, jurisdictions have split over whether Title VII protects trans plaintiffs or not.

D. New Protections for Trans Plaintiffs: Smith and Schroer

Armed with the gender-nonconformity theory from *Price Waterhouse*¹⁸⁴ and the Court's reasoning in *Oncale*,¹⁸⁵ trans plaintiffs have had some success in winning employment protections within the Sixth Circuit. In *Smith v. City of Salem*, the Sixth Circuit held that Title VII protects transsexuals under *Price Waterhouse*'s gender-nonconformity theory.¹⁸⁶ The plaintiff was a transsexual employed by the fire department of Salem, Ohio.¹⁸⁷ After being informed that the city government was looking for a way to force him out of his job,¹⁸⁸ he retained counsel.¹⁸⁹ When the city

¹⁷⁸ 305 F.3d 1061 (9th Cir. 2002) (en banc).

¹⁷⁹ *Id.* at 1064.

¹⁸⁰ *Id.* at 1067–68.

¹⁸¹ *Id.* at 1068 (Pregerson, Trott & Berzon, JJ., concurring).

¹⁸² *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

¹⁸³ *See also Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 262–63 (3d Cir. 2001) (“[A] plaintiff may be able to prove that same-sex harassment was discrimination because of sex by presenting evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to the stereotypes of his or her gender.”).

¹⁸⁴ *Price Waterhouse*, 490 U.S. 228.

¹⁸⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁸⁶ 378 F.3d 566, 572, 575 (6th Cir. 2004).

¹⁸⁷ *Id.* at 568. Although Smith identified as a woman, I defer to the court’s practice of referring to him using masculine pronouns.

¹⁸⁸ *See id.* at 569.

¹⁸⁹ *Id.*

subsequently suspended him, he filed suit in federal court, alleging sex discrimination in violation of Title VII.¹⁹⁰

The court reasoned that if Title VII protects men who engage in stereotypically feminine behavior, as the Ninth Circuit held in *Nichols* and *Rene*,¹⁹¹ then Title VII also protected Smith.¹⁹² The court also reasoned that Smith's transsexualism was no bar to recovery; neither Title VII nor the rationale of *Price Waterhouse* evinced an intent to exclude transsexuals from the statute's prohibition against discrimination based on gender nonconformity.¹⁹³ In *Barnes v. City of Cincinnati*, the Sixth Circuit affirmed this opinion, granting a Title VII cause of action to a transgender police officer who was considered for promotion to sergeant but was singled out for scrutiny during the probationary period and was ultimately denied the promotion.¹⁹⁴

The United States District Court for the District of Columbia has also protected transsexual persons albeit by relying on *Oncale*¹⁹⁵ instead of *Price Waterhouse*.¹⁹⁶ In *Schroer v. Billington*, the court held that discrimination against transsexuals is "based on . . . sex."¹⁹⁷ Diane Schroer, formerly David Schroer, was a transsexual who was offered a job as a terrorism research analyst at the Library of Congress after twenty-five years in the Armed Forces.¹⁹⁸ Schroer accepted the position, but her supervisor revoked the offer after Schroer informed her that she would be beginning the job as a female.¹⁹⁹ The court found that Schroer had indeed stated a valid claim under Title VII.²⁰⁰ It rejected the *Price Waterhouse* gender-nonconformity theory that the *Smith* court had relied on,²⁰¹ saying that it made little sense as applied to trans people, who are trying to conform to the expectations of the gender they claim.²⁰² Instead, revisiting the district court's reasoning in *Ulane v. Eastern Airlines, Inc.*,²⁰³ the district court recognized that transsexualism "stem[s] from real variations in . . . the different components of biological sexuality—chromosomal, gonadal, hormonal, and neurological."²⁰⁴ The court held that, given those many factors that determine sex, discrimi-

¹⁹⁰ *Id.*

¹⁹¹ *See supra* notes 176–81 and accompanying text.

¹⁹² *Smith*, 378 F.3d at 571–72, 574.

¹⁹³ *Id.* at 574–75.

¹⁹⁴ 401 F.3d 729, 733–38 (6th Cir. 2005).

¹⁹⁵ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

¹⁹⁶ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *see supra* Part II.C.

¹⁹⁷ 424 F. Supp. 2d 203, 213 (D.D.C. 2006). Schroer went on to win her case at trial. *See Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

¹⁹⁸ *Schroer*, 424 F. Supp. 2d at 205–06.

¹⁹⁹ *Id.* at 206.

²⁰⁰ *Id.* at 213.

²⁰¹ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004).

²⁰² *See Schroer*, 424 F. Supp. 2d at 209–11.

²⁰³ 581 F. Supp. 821 (N.D. Ill. 1983), *rev'd*, 742 F.2d 1081 (7th Cir. 1984).

²⁰⁴ *Schroer*, 424 F. Supp. 2d at 212–13.

nation against transsexuals was discrimination based on sex for the purposes of Title VII.²⁰⁵

E. *The Transsexual Exception After Price Waterhouse*

Despite the growing precedent in favor of protecting transsexual plaintiffs from anti-trans discrimination under Title VII, many of the jurisdictions that have revisited the issue after *Price Waterhouse* have continued to find for defendants under the bootstrapping reasoning of *Ulane*. In *Dobre v. National Railroad Passenger Corp.*, the Eastern District of Pennsylvania dismissed the case of a transsexual alleging sex discrimination in violation of Title VII.²⁰⁶ A few months after she was hired, the plaintiff informed her supervisors at Amtrak that she would be undergoing hormone injections and begin presenting herself as a woman.²⁰⁷ Her supervisors did not accommodate her transition, and her employment ended shortly thereafter.²⁰⁸ The court did not address the *Price Waterhouse* gender-nonconformity theory but relied instead on nonbinding precedent to hold that sex should be given a narrow reading that excluded all claims by transsexuals alleging discrimination for any reason not generally applicable to members of their new sex.²⁰⁹ The court applied the same rationale to the language of the Pennsylvania Human Rights Act that prohibited discrimination based on sex.²¹⁰

The Eastern District of Pennsylvania is not the only court that still excludes trans people from Title VII. In *Oiler v. Winn-Dixie Louisiana, Inc.*, the Eastern District of Louisiana held that a man who was fired because he sometimes presented himself as a woman outside of work was not the victim of gender-nonconformity discrimination.²¹¹ The court reasoned that he was fired not for gender nonconformity but for adopting the persona of a member of the opposite sex, and he was therefore not protected under Title VII.²¹²

²⁰⁵ *Id.*

²⁰⁶ 850 F. Supp. 284 (E.D. Pa. 1993).

²⁰⁷ *Id.* at 285.

²⁰⁸ *Id.* at 286 (noting that Dobre was required to dress as a male, was not permitted to use the women's restroom, and was not referred to by her female name).

²⁰⁹ *Id.* at 286–87 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982); *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176 (E.D. Pa. 1987); *Grossman v. Bernards Twp. Bd. of Educ.*, No. 74-1904, 1975 WL 302 (D.N.J. Sept. 10, 1975)); see also *supra* Part II.A (discussing trans-exclusive readings of Title VII before *Price Waterhouse*); *supra* Part II.B (discussing *Wood*'s intersex-exclusive reading of Title VII).

²¹⁰ *Dobre*, 850 F. Supp. at 287–88.

²¹¹ No. Civ. A. 00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002).

²¹² *Id.* at *5 (“Rather, the plaintiff disguised himself as a person of a different sex and presented himself as a female The plaintiff was terminated because he is a man with a sexual or gender identity disorder who, in order to publicly disguise himself as a woman, wears women’s clothing, . . . pretends to be a woman, and publicly identifies himself as a woman named ‘Donna.’”).

In the 2007 decision of *Etsitty v. Utah Transit Authority*, the Tenth Circuit avoided the question of whether transsexuals are protected from discrimination based on gender nonconformity.²¹³ It affirmed the decision of the court below, which had held that the gender-nonconformity theory was not available to transsexual plaintiffs:

There is a huge difference between a woman who does not behave as femininely as her employer thinks she should, and a man who is attempting to change his sex and appearance to be a woman. Such drastic action cannot be fairly characterized as a mere failure to conform to stereotypes.²¹⁴

Both the Tenth Circuit panel and the district court claimed that the Seventh Circuit's rule in *Ulane*²¹⁵—that discrimination based on transsexualism is not discrimination based on sex—was still good law.²¹⁶ In so doing, they created a split between themselves and the Sixth Circuit.²¹⁷

F. Goldilocks Jurisprudence Lives On

There is now a division in the law between the jurisdictions that protect transgender plaintiffs under Title VII and those that do not. The jurisdictions that do not protect transgender plaintiffs under Title VII divide the spectrum of gender conformity into three classes. If the plaintiff in a case conforms too closely to gender norms, then that plaintiff has no evidence of sex discrimination under the *Price Waterhouse* theory.²¹⁸ If a plaintiff fails to conform to society's gendered expectations to such a degree that she identifies more with being a member of the other sex, then the cause of action fails because the plaintiff has left the realm of "mere" nonconformity and entered a nebulous zone of "disguis[ing] [one]self as a person of a different sex."²¹⁹ The middle category in this Goldilocks test, a hard-to-define category of people who do not conform to gender stereotypes but who are not transgender, is the only one that is "just right" and thereby protected under Title VII from discrimination because of sex.²²⁰

²¹³ *Etsitty II*, 502 F.3d 1215, 1224 (10th Cir. 2007).

²¹⁴ *Etsitty v. Utah Transit Auth. (Etsitty I)*, No. 2:04CV616 DS, 2005 WL 1505610, at *5 (D. Utah June 24, 2005).

²¹⁵ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

²¹⁶ See *Etsitty II*, 502 F.3d at 1221; *Etsitty I*, 2005 WL 1505610, at *3–4.

²¹⁷ Compare *Etsitty II*, 502 F.3d at 1221, with *Barnes v. City of Cincinnati*, 401 F.3d 729, 737–38 (6th Cir.), cert. denied, 126 S. Ct. 624 (2005), and *Smith v. City of Salem*, 378 F.3d 566, 571–75 (6th Cir. 2004).

²¹⁸ Although such a gender-conforming plaintiff may be able to prove sex discrimination under another legal theory, this analysis focuses solely on the *Price Waterhouse* theory, which is unavailable to a person whose gender conforms to society's expectations.

²¹⁹ See *Oiler v. Winn-Dixie La., Inc.*, No. Civ.A. 00-3114, 2002 WL 31098541, at *5 (E.D. La. Sept. 16, 2002).

²²⁰ *Price Waterhouse* rescued Ann Hopkins from being stuck between the Scylla of losing her promotion and the Charybdis of losing the reason for her success. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). It is no small irony that many jurisdictions have stuck plaintiffs between a rock and a

The three-category Goldilocks test contrasts with the simpler binary test of *Smith v. City of Salem*.²²¹ The Sixth Circuit's test in *Smith* is the same as the Supreme Court's test in *Price Waterhouse*: Was the plaintiff subjected to discrimination because of a failure to live up to social expectations of appropriate gender expression?²²² Under such a test, there is no hazy distinction to draw between gender nonconformity and minority gender identity. Yet in either kind of jurisdiction, a cause of action may exist for intersex plaintiffs on a theory of anatomical nonconformity.

III. THE CASE FOR A NEW INTERSEX LAW: ANATOMICAL NONCONFORMITY

Whether or not it was correct according to the law as it existed in 1987, the holding of *Wood v. C.G. Studios, Inc.*²²³ should not be considered persuasive authority today. The court found that a person discriminated against because she is intersex has not been discriminated against because of sex.²²⁴ *Wood's* "plain meaning" reading of "sex" in the statute excludes many people whose lives are already much burdened by the legal system,²²⁵ and it has been called into question by the Supreme Court's opinions in *Price Waterhouse*²²⁶ and *Oncale*.²²⁷ First, I discuss how the law has moved beyond the "plain meaning" rationale of *Wood* and conclude that *Wood* is no longer good law. Then, by analogy to the *Price Waterhouse* cause of action for discrimination based on gender nonconformity, I argue for a cause of action under Title VII for discrimination based on anatomical nonconformity—that is, the failure for a person's anatomical sex to conform to societal expectations for their gender.

The reasoning of *Wood* turns on the premise that a plain reading of the term discrimination "based on . . . sex" only includes discrimination against women because they are women and discrimination against men because

hard place by requiring them to plead sufficient gender nonconformity without pleading too much—if plaintiffs overshoot in either direction, they have no case. See generally Keith J. Hilzendeger, *Walking Title VII's Tightrope: Advice for Gay and Lesbian Title VII Plaintiffs*, 13 LAW & SEXUALITY 705 (2004) (discussing *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (en banc)).

²²¹ *Smith*, 378 F.3d 566.

²²² *Id.* at 574–75; see also *Price Waterhouse*, 490 U.S. at 251; *Barnes*, 401 F.3d at 737 (citing *Smith* and finding a cause of action where plaintiff alleged discrimination based on "his failure to conform to sex stereotypes").

²²³ 660 F. Supp. 176 (E.D. Pa. 1987).

²²⁴ *Id.* at 178.

²²⁵ See Megan Bell, Comment, *Transsexuals and the Law*, 98 NW. U. L. REV. 1709, 1719–20 (2004) (describing legal challenges faced by those outside the normal sex–gender dichotomies in seeking gender reassignment on their legal documentation).

²²⁶ *Price Waterhouse*, 490 U.S. 228.

²²⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

they are men.²²⁸ This reading is troublesome on its own, and it conflicts with the constructions used by the Supreme Court in *Price Waterhouse* and *Oncale*. One problem with *Wood*'s "plain meaning" reading of "because of . . . sex" is that it turns partly on the question of what defines a man or a woman. The decision in *Wood* implied that there are two and only two sexes, that these two classifications are distinct and immutable, and that Wilma Wood was a member of neither.²²⁹ One plain reading of this language is that a person's protection under Title VII depends on her membership within one (and only one) biological sex. Yet ambiguity, conflict, and indeterminacy beset any biological definition of sex.²³⁰ If a person with ambiguous or incongruent sex attributes is subjected to discrimination because of her status as a woman, she could nonetheless fail the *Wood* test because she may not pass a threshold question: whether she is biologically a woman.

The *Wood* court also supported its decision by reasoning that a "plain reading" of the statute should not include the untraditional and unusual without clear instructions from the legislature.²³¹ This exception runs contrary to Title VII's textual prohibition of all discrimination on the basis an individual's sex and goes against the spirit of the Civil Rights Act, which exists to protect minorities from unfair discrimination.²³² If the "untraditional and unusual" exception were applied to Title VII's other protections, "race, color, religion, sex, or national origin,"²³³ it would lead to absurd results. If a plain reading of "race" were to exclude the "untraditional and unusual," courts might have grounds to ignore discrimination against multiracial persons, for example. Their racial status was untraditional and unusual when the Act was written in the 1960s²³⁴—interracial marriage was

²²⁸ 660 F. Supp. at 177 (explaining that "sex discrimination" for Title VII purposes means "discrimination against women because of their status as females and discrimination against males because of their status as males").

²²⁹ See Greenberg, *supra* note 40, at 323–24.

²³⁰ See *supra* Part I.A.

²³¹ 660 F. Supp. at 178; *cf.* *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984) ("Congress has a right to deliberate on whether it wants such a broad sweeping of the *untraditional and unusual* within the term 'sex' as used in Title VII." (emphasis added)).

²³² H.R. REP. NO. 88-914, at 18 (1963) ("In various regions of the country there is discrimination against some minority groups. . . . [I]n the last decade it has become increasingly clear that progress has been too slow and that national legislation is required to meet a national need . . . evidenced, on the one hand, by a growing impatience by the victims of discrimination with its continuance and, on the other hand, by a growing recognition on the part of all of our people of the incompatibility of such discrimination with our ideals and the principles to which this country is dedicated.").

²³³ 42 U.S.C. § 2000e-2(a)–(a)(1) (2006). Notably, the court in *Wood* gave no reason why its "untraditional and unusual" exception should be limited to sex.

²³⁴ The United States Census did not allow people to identify as multiracial until the 2000 census. See Solomon Moore, *Census' Multiracial Option Overturns Traditional Views*, L.A. TIMES (Mar. 5, 2001), <http://articles.latimes.com/2001/mar/05/news/mn-33659>. Even so, only about 2.4% of Americans identified as multiracial in the 2000 census. SOC. SCI. DATA ANALYSIS NETWORK, CENSUSSCOPE: MULTIRACIAL PROFILE (2001), http://www.censuscope.org/us/chart_multi.html.

still banned or criminalized (or both) in sixteen states.²³⁵ If a plain reading of “religion” excluded the “untraditional and unusual,” a court would have grounds to ignore employment discrimination against members of novel, small religious groups like Wicca, whose beliefs are certainly atypical enough to be “untraditional”²³⁶ and whose membership is small enough to make them “unusual.”²³⁷ *Wood*’s “untraditional and unusual” exception for Title VII’s protected classes excludes minorities too small to have political power and too atypical to easily garner majority support. If a member of an oppressed minority is excepted from any protection because her minority is small, dispersed, and politically powerless,²³⁸ then the Civil Rights Act of 1964 falls far short of the intentions of the Congress that passed it²³⁹ and of our collective aspiration for fair practices in employment.

Another problem is that *Wood*’s “discrimination against women because of their status as females and . . . against males because of their status as males”²⁴⁰ language wrongly elevates classification as a particular sex above an individual’s particular sexual identity. The current of the law now flows in another direction; after *Oncale*, appeals courts have held that it is sufficient that the basis of the discrimination is sexual.²⁴¹ Under the reading of the court in *Wood*, a plaintiff only has a cause of action if the plaintiff is discriminated against because of *membership* in a sex. In other words, a plaintiff only has a cause of action when she has been discriminated against because of a biological characteristic that marks membership in one of the two major sexes. This line of reasoning is contradicted by Justice Brennan’s opinion for the Court in *Price Waterhouse v. Hopkins*:

²³⁵ The Civil Rights Act was passed three years *before* the Supreme Court struck down antimiscegenation laws in *Loving v. Virginia*, invalidating the laws of the sixteen states that still criminalized interracial marriages. 388 U.S. 1, 6 n.5 (1967).

²³⁶ Wicca is a decentralized neopagan religion that worships the earth. *See generally Wicca: A Neopagan, Earth-Centered Religion*, ONT. CONSULTANTS ON RELIGIOUS TOLERANCE, <http://www.religioustolerance.org/witchcra.htm> (last updated Sept. 17, 2011) (describing the tenets and characteristics of the Wiccan faith).

²³⁷ As of 2001, there were only 134,000 self-described Wiccans living in the United States. BARRY A. KOSMIN ET AL., GRADUATE CTR. OF THE CITY UNIV. OF N.Y., AMERICAN RELIGIOUS IDENTIFICATION SURVEY 13 (2001), *available at* http://www.gc.cuny.edu/CUNY_GC/media/CUNY-Graduate-Center/PDF/ARIS/ARIS-PDF-version.pdf.

²³⁸ *See United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”).

²³⁹ *See H.R. REP. NO. 88-914*, at 18 (1963) (“[The Civil Rights Act] is designed as a step toward eradicating significant areas of discrimination on a nationwide basis. It is general in application and national in scope.”).

²⁴⁰ *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987).

²⁴¹ *See, e.g., Rene v. MGM Grand Hotel*, 305 F.3d 1061, 1067 (9th Cir. 2002) (en banc) (holding that the plaintiff pleaded sufficient facts to have a Title VII cause of action for sexual harassment in alleging that he suffered physical touching and verbal abuse about his sexual orientation because the harassment was sexual).

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against *individuals* because of *their* sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”²⁴²

Discrimination on the basis of sex is viewed from the perspective of the *individual*. Sex and gender are unique to each individual, and individuals of any sex express their individual gender in many different ways. Under the plain text of Title VII, it is the *individual’s* sex, not the sex of a larger group, that the courts must seek to protect.²⁴³ Ann Hopkins was not the subject of discrimination because of the aspects of her sex or gender that she shared with the stereotypical woman but rather because of the aspects of her gender that were peculiar to her.²⁴⁴ Congress and the Court’s command that sex be considered on an individual basis undermines the “women because of their status as females” analysis in *Wood*. A plaintiff need not have the relevant part of her individual “sex” in common with all or even most members of a traditional sex to qualify for protection under Title VII.

One final flaw in *Wood* is that it presumes that, even if the legislature intended to cure one social ill, it did not also cure others.²⁴⁵ This is fallacious given the longstanding canon of construction that remedial statutes are to be broadly construed to effect their purposes.²⁴⁶ *Wood’s* reasoning relies on a perceived intent of Congress that the term “sex” in Title VII should be narrowly construed. But in *Oncale*, a unanimous Supreme Court expressly disapproved of narrowly construing the term “sex” in 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. . . . Our holding that [Title VII prohibits] sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements.²⁴⁷

²⁴² 490 U.S. 228, 251 (1989) (emphasis added) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

²⁴³ 42 U.S.C. § 2000e-2(a)(1) (2006) (making it unlawful “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any *individual* . . . *because of such individual’s* race, color, religion, sex, or national origin” (emphasis added)).

²⁴⁴ See *Price Waterhouse*, 490 U.S. at 256 (“It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring ‘a course at charm school.’”).

²⁴⁵ See *Wood*, 660 F. Supp. at 177 (“There is no showing that the Act was intended to remedy discrimination against individuals because they have undergone gender-corrective surgery. In the absence of such a showing, I cannot conclude that . . . the term ‘sex’ as used in the Act [has] anything but its plain meaning.”).

²⁴⁶ See, e.g., *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (“[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes.”).

²⁴⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

Although the Pennsylvania General Assembly may have been thinking about discrimination against women when it passed the PHRA, they enacted a law that also provides a remedy for discrimination against members of another sex through the language they used in the statute.

There is little one can divine of Congress's intent behind adding "sex" to Title VII as a protected class. The word "sex" was added by a floor amendment to the bill on the day before the vote.²⁴⁸ There was no debate, there were no hearings, and no member of Congress read a statement on the matter into the record.²⁴⁹ There is evidence that the amendment itself may even have been offered in an effort to make the bill less popular and scuttle its chances in the House of Representatives.²⁵⁰ In other words, the sponsors who added this language to the bill may have been more interested in peeling off votes to kill the bill than in protecting anyone at all from discrimination on the basis of sex. If the courts adhered to the intent of the authors of the language on sex, Title VII would protect no one at all from sex discrimination. This would be an unsatisfactory construction, to say the least. Of course, legislative intent can be divined from many sources, but the Supreme Court's decision in *Oncale* dispenses with such analysis in its current standard: Title VII's protections should extend to prohibit all discrimination "reasonably comparable" to the principal evil that it textually prohibits.²⁵¹ Discrimination based on anatomical nonconformity is reasonably comparable to discrimination based on gender stereotypes or based on sexual anatomy altogether. Moreover, when courts cannot rely on legislative history to divine the purpose of a legislative provision, the canon that remedial statutes should be construed liberally²⁵² should be their guide.

The only evidence that courts have relied on to say that Congress intended a narrow reading of "sex" has been that members of Congress have proposed several bills to amend Title VII to protect employees from discrimination based on sexual orientation and that Congress has yet to pass one.²⁵³ Those failed bills do carry weight on the question of Congress's lack

²⁴⁸ 110 CONG. REC. 1391, 2577–84 (1964) (debating the proposed amendment of Representative Smith of Virginia to insert "sex" into the bill and culminating in a vote of 168–133 in support of the bill).

²⁴⁹ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984).

²⁵⁰ *Id.* For a more thorough historical discussion of the addition of "sex" to Title VII, see Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

²⁵¹ *Oncale*, 523 U.S. at 79.

²⁵² *See, e.g., Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) ("[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes."). *But cf. Ulane*, 742 F.2d at 1086 ("Although the maxim that remedial statutes should be liberally construed is well recognized, that concept has reasonable bounds beyond which a court cannot go without transgressing the prerogatives of Congress.").

²⁵³ *E.g.*, H.R. 427, 98th Cong. (1983); H.R. 1545, 97th Cong. (1982); H.R. 2074, 96th Cong. (1980); H.R. 451, 95th Cong. (1977); H.R. 166, 94th Cong. (1975); *see Ulane*, 742 F.2d at 1085 ("Had Congress intended more [than narrow conceptions of sex], surely the legislative history would have at

of intent to protect sexual orientation. Arguments from total congressional silence, however, should be taken with a grain of salt.²⁵⁴ Representative legislatures are far from the ideal constitutional mechanism for protecting civil rights because it can be difficult or impossible for small or dispersed minorities to attract a legislature's attention.²⁵⁵ The courts, as the only government institution insulated from a prejudiced majority, have a moral and constitutional duty to protect the interests of diffuse and stigmatized minorities, which have more trouble convincing the political branches to protect them than does a prejudiced majority.²⁵⁶ When faced with a silent Congress and a question of statutory interpretation, the courts should err on the side of the powerless by broadly construing statutes that benefit diffuse minorities.²⁵⁷ If that broad interpretation fits the legislature's intention, then the matter is settled. If the popular or legislative majority truly intends a narrow reading, that majority will have a much easier time amending the statute than would a diffuse minority.

In place of *Wood's* narrow reading of "because of . . . sex," a court faced with a case of employment discrimination against an intersex person should draw an analogy to the law on gender nonconformity. Title VII does not distinguish between sex and gender.²⁵⁸ The factors that determine a person's sex for medical purposes are just as much a part of the meaning of sex

least mentioned its intended broad coverage of homosexuals, transvestites, or transsexuals, and would no doubt have sparked an interesting debate. There is not the slightest suggestion in the legislative record to support an all-encompassing interpretation." *But see* *Schroer v. Billington*, 424 F. Supp. 2d 203, 212 (D.D.C. 2006) ("[*Ulane's*] arguments, perhaps persuasive when written, have lost their power after twenty years of changing jurisprudence on the nature and importance *vel non* of legislative history.").

Members of Congress have continued to introduce such bills in each successive Congress. *E.g.*, H.R. 3017, 111th Cong. (2009); H.R. 2015, 110th Cong. (2007); H.R. 288, 109th Cong. (2005); H.R. 214, 108th Cong. (2003); H.R. 217, 107th Cong. (2001); H.R. 311, 106th Cong. (1999); H.R. 1858, 105th Cong. (1997); H.R. 382, 104th Cong. (1995); H.R. 423, 103d Cong. (1993); H.R. 1430, 102d Cong. (1991); H.R. 655, 101st Cong. (1989); H.R. 709, 100th Cong. (1987); H.R. 230, 99th Cong. (1985). This list is incomplete; multiple bills were introduced in most Congresses.

²⁵⁴ See *Schroer*, 424 F. Supp. 2d at 212 ("The silence of forty years is simply that—silence.").

²⁵⁵ See *City of Mobile v. Bolden*, 446 U.S. 55, 92–93 (1980) (Stevens, J., concurring) (noting that large legislative districts disadvantage the minorities within them); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

²⁵⁶ For an analysis of how the stigma on a minority can itself impede a minority's ability to gain favorable results from the democratic process, see Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 56–57 (2006), which discusses this effect in the context of racial minorities.

²⁵⁷ See William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 324 (1988) ("In whatever manner a court interprets a statute with concentrated benefits and costs, the losing side often may obtain legislative reconsideration of what the court has done. This seems useful. The possibility of legislative reconsideration is substantially less, however, if the court's interpretation hurts a diffuse group . . .").

²⁵⁸ See *supra* notes 32–34 and accompanying text.

in Title VII as are the gender assumptions that go along with them.²⁵⁹ “Sex stereotypes” are about biological sex just as much as they are about gender. In the same way that Ann Hopkins was discriminated against because her gender expression was more masculine than the partners of Price Waterhouse were comfortable with, Wilma Wood’s sexual anatomy was slightly more male than her employers at C.G. Studios expected.

The courts can therefore protect intersex people without challenging the Goldilocks case law on gender nonconformity that exists in a number of jurisdictions.²⁶⁰ On a scale of anatomical conformity, the transgender, whose gender expression differs completely from their biological sex, are analogous to transsexuals under the gender-nonconformity case law. A transgender person’s biological sex differs completely from the presumptions that follow from her gender expression. A jurisdiction that holds that transsexuals are not covered by gender conformity case law because transsexuals are so nonconforming that protecting them is a step too far would hold that a transgender person is too anatomically nonconforming to her gender. Yet an intersex plaintiff’s biological sex markers put her squarely in the middle of the “just right” zone for protection—somewhat out of conformity with social expectations but not enough that he or she is trying to protect a right to act like or be the gender opposite to her sex.²⁶¹

The intersex form a stigmatized and dispersed group, and stigma and isolation harm their ability to win employment protections from Congress.²⁶² The current dearth of intersex discrimination cases may be less the result of the lack of need to protect them and more a powerful indication of the stigma attached to publicly acknowledging that one grew up with a DSD. The Intersex Society of North America,²⁶³ other organizations,²⁶⁴ and

²⁵⁹ See Franke, *supra* note 32, at 5 (“Ultimately, there is no principled way to distinguish sex from gender . . .”).

²⁶⁰ See *supra* Part II.F.

²⁶¹ I do not mean to say that the tripartite division is wise case law. When dividing a spectrum into three distinct categories, the courts face twice the line-drawing problems, and plaintiffs are left in the awkward position of having to plead and argue the often contradictory positions that they are nonconforming yet not too nonconforming to be unprotected.

²⁶² Cf. *City of Mobile v. Bolden*, 446 U.S. 55, 92–93 (1980) (Stevens, J., concurring). The intersex are not concentrated in any legislative district; their votes and influence are spread too thin to affect elections.

²⁶³ The Intersex Society of North America saw the problems facing the intersex as a result of stigma and trauma, not their DSDs. *What Is ISNA’s Mission?*, INTERSEX SOC’Y N. AM., <http://www.isna.org/faq/isna/mission> (last visited Oct. 2, 2011). Despite some success, the organization shut its doors in 2008 due to a perception of bias that stifled its advocacy work. *Our Mission*, INTERSEX SOC’Y N. AM., <http://www.isna.org> (last visited Oct. 2, 2011).

²⁶⁴ Accord Alliance is an advocacy group that seeks to promulgate new treatment guidelines for children born with DSDs. ACCORD ALLIANCE, <http://www.accordalliance.org> (last visited Oct. 2, 2011). Bodies Like Ours is an online support community that makes it possible for intersex people to come together and share their experiences. *Intersex Community Forums*, BODIES LIKE OURS, <http://www.bodieslikeours.org/forums> (last visited Oct. 2, 2011). The Intersex Initiative provides re-

popular culture²⁶⁵ have raised public consciousness of the existence of the intersex and the challenges they face. As the intersex loom larger in the public eye, it is likely, perhaps inevitable, that the intersex will become more open about their status and face possible discrimination or retaliation from biased employers.²⁶⁶ When another case of intersex discrimination comes before the courts, judges will be in a position to recognize Title VII's protections for the intersex and forestall further mistreatment. Because legislatures are more beholden to concentrated interests than to the needs of diffuse, politically impotent minorities,²⁶⁷ it is better for courts to err on the side of protecting those minorities than to count on a rationally unresponsive Congress to provide a remedy. At the very least, judicial opinions holding that Title VII protects the intersex might cause Congress to debate and clarify the meaning of "sex," benefiting the courts even outside the context of intersex discrimination.

CONCLUSION

The law on sex discrimination has changed dramatically since 1987. *Wood v. C.G. Studios, Inc.* is the only case on the books dealing with sex discrimination against intersex people, but it was decided in the era before *Price Waterhouse v. Hopkins* and *Oncale v. Sundowner Offshore Systems*.²⁶⁸ Because of growing popular knowledge about intersex people and DSDs, thanks to news media coverage of stories like Caster Semenya's²⁶⁹ and popular media like the novel *Middlesex*,²⁷⁰ the stigma associated with being intersex is shrinking. Once it becomes more socially acceptable to acknowledge these conditions to friends and acquaintances, harassment and adverse employment actions will inevitably follow. The courts can expect more employment cases about intersex discrimination to come in the future, and when they arrive, the courts should recognize that people who do not conform to anatomical preconceptions of what makes a man or a woman are

sources to activists trying to influence public perceptions. INTERSEX INITIATIVE, <http://www.intersexinitiative.org> (last visited Oct. 7, 2011). Advocates for Informed Choice is a non-profit legal advocacy organization that seeks to protect and represent the interests of the intersex. ADVOCES FOR INFORMED CHOICE, <http://www.aiclegal.org> (last visited Oct. 2, 2011).

²⁶⁵ See, e.g., *supra* notes 7–16.

²⁶⁶ See *Intersex in Non-Discrimination Law: Why We Oppose the "Inclusion,"* INTERSEX INITIATIVE (Sept. 6, 2004), <http://www.intersexinitiative.org/law/nondiscrimination.html> ("As more people 'come out' publicly as 'intersex,' there is a possibility that some of them will face discrimination for having that status.").

²⁶⁷ See Eskridge, *supra* note 257, at 287.

²⁶⁸ Compare *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 177 (E.D. Pa. 1987), with *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (decided two years after *Wood*), and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (decided ten years after *Wood*).

²⁶⁹ See *supra* notes 7–12 and accompanying text.

²⁷⁰ EUGENIDES, *supra* note 7.

just as protected by Title VII from discrimination on that basis as are those who do not conform to stereotypes of gender expression.

