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LAW, POLICIES IN PRACTICE AND SOCIAL NORMS:

COVERAGE OF TRANSGENDER DISCRIMINATION UNDER SEX DISCRIMINATION LAW[1]

I. Introduction

To achieve any lasting change in social justice, I believe three variables must operate in a synergistic fashion: law, policies in practice, and social norms.

By "law," I mean the words of the law developed by three sets of actors established on the federal level by Articles I, II, and III of the Constitution – the Congress, the President, and the courts. Law thus includes the text of the statute as written and enacted by a legislature, the text of regulations and guidance that are issued by an agency implementing the law, and finally the text of judicial decisions interpreting either the statute or administrative regulations and guidance. In other words -- lots of *words*. (And, of course, this development of law is replicated on the state and local levels.)

By "policies in practice," I mean whether and how the text of a statute, a regulation or guidance, or a court decision has been *absorbed* into the workings of an entity that is regulated by the law. Simply having a law in place, written and implemented by a legislature, agency and court, will not guarantee effective policies in practice. For that, one needs entities governed by the law to truly absorb the law into the very sinews of their organizations. For example, if employers do not understand a law well, it will be hard to get good compliance from employers. Or if employers are antagonistic about a law, for whatever reason, it will also be hard to get good compliance from them.

By "social norms," I mean the normative assumptions or beliefs that underlie a social justice goal. This is about how people feel and think about the social goal that the law is trying to bring about. Do they agree that it is a good and right thing to achieve? Social norms are about changing hearts and minds – not something we usually associate with law. And yet, social norms affect the development of law and of policies in practice, and are affected by law and policies in practice in turn.

Law schools have historically focused on only one segment of the first variable I have just described – law as described in judicial opinions. But to develop effective social justice advocates, law schools must educate students about all three variables—and about how they interact with each other.

The following article explores the interaction between these variables by considering the

[1] An abbreviated version of this essay is set to appear in GENDER IDENTITY IN THE WORKPLACE: A PRACTICAL GUIDE (forthcoming).

development of coverage for transgender persons under Title VII, including the role played by my agency, the Equal Employment Opportunity Commission ("EEOC" or "the Commission") in our recent decision in *Macy v. Department of Justice*.[2] The term "sex" in Title VII, as created by the Congress and as interpreted by the agencies and the courts; the policies put into practice to advance women's workforce participation; and changes in social norms – both with regard to women and to transgender people -- have all operated in a synergistic fashion to achieve the social justice goal of removing consideration of gender from most employment decisions.

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On April 20, 2012, the Equal Employment Opportunity Commission ("EEOC" or "the Commission") issued its decision in Mia Macy, Complainant, v. Eric Holder, Attorney General, Department of Justice.[3]

Macy v. DOJ was one of thousands of decisions issued by the Commission regarding the rights of federal employees in 2012. The vast majority of these decisions were issued by our Office of Federal Operations, pursuant to power delegated to it by the Commission. The Office of Federal Operations decides what cases should be reviewed and voted on by the Commission, based on the issues raised in the case. In 2012, the Commission reviewed and voted on only 13 cases, including *Macy*.

The Commission's ruling in *Macy* was straightforward: "Complaints of discrimination on the basis of transgender status should be processed under Title VII of the Civil Rights Act of 1964, and through the federal sector EEO complaint process as claims of sex discrimination."

The legal reasoning in *Macy* was also straightforward. Title VII of the Civil Rights Act of 1964 (as amended in 1972 to apply to the federal government) prohibits employment discrimination on the basis of "sex."[4] That means that a covered employer may not take sex into account, unless hiring a person of a particular sex is a "bona fide occupational qualification." If an employer is willing to hire a person when that person is a man, but is not willing to hire that same person if she has transitioned and is now a woman -- that employer has taken sex into account in violation of the statute.

In *Macy*, legal logic has come full circle. But the opinion's legal logic had to be preceded by changes in cultural logic. In this essay, I briefly lay out how social norms hindered courts from applying the plain meaning of the word "sex" in Title VII following passage of the law because of the role women were expected to play in the family, and how those legal developments subsequently hindered protection for transgender individuals. I then explain how changes in social norms have helped bring back to life the plain words of the statute.

II. The Beginning: The Statute Can't Possibly Mean What It Says

[2] EEOC Appeal No. 0120120821 (April 20, 2012); 2012 WL 1435995 (E.E.O.C.) (*Macy v. DOJ*)
[3] Id.
[4] 42 U.S.C. § 2000e-16(a).

Courts and commentators have created the myth that there is not much legislative history to inform the interpretation of the meaning of sex in Title VII of the Civil Rights Act of 1964. They also created the myth—which unfortunately has had significant staying power—that Republican Congressman Howard Smith (D-VA) proposed adding the term "sex" to the bill *solely* in order to kill the bill.

Both of these myths have been thoroughly discredited by historians and legal scholars. While Congressman Smith was perfectly happy to have the Civil Rights Act be defeated (he had opposed the bill in the House Rules Committee), he was not happy with the idea that black men would have more rights than white women in employment, should the bill pass. And there was plenty of legislative history on efforts to prohibit sex discrimination through enactment of the Equal Rights Amendment, the history of which forms the necessary backdrop to Congressman Smith's proposed addition of sex to Title VII.[5]

But courts found it exceedingly difficult to believe that the word "sex" in the statute meant what it said and these myths provided them with a bulwark against the plain meaning of the words. And while the EEOC initially balked at the plain meaning of the term "sex" as well, the agency subsequently took the lead, throughout the 1970s, in

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[5] The myth that there is little legislative history to inform our understanding of the addition of sex to Title VII appears to have been started by (or at least, heavily supported by) Harvard Law School students, who announced in a 1971 overview of sex discrimination law that there was no legislative history or prior consideration given to the addition of sex, and that it was simply a ploy to undermine passage of the law. As the students opined: "The addition of sex as a forbidden basis of discrimination in employment was offered as a floor amendment to Title VII in the House, without any prior legislative hearings or debate. The original proponent of the measure was a southern congressman who voted against the Act, and whose strategy was allegedly to "clutter up" Title VII so that it would never pass at all. [FN3] The passage of the amendment, and its subsequent enactment into law, came without even a minimum of congressional investigation into an area with implications that are only beginning to pierce the consciousness and conscience of America." That was the entire analysis proffered by the students and their only citation (footnote 3) was to a statement by Congresswoman Edith Green (D-OR), the only woman Member to speak against the amendment. Congresswoman Green's arguments were very similar to the ones that she and other progressive legislators had advanced against the Equal Rights Amendment over the years. See fn 3, quoting 110 Cong. Rec. 2581 (1964) (statement of Rep. Green).

An accurate historical narrative has long since been offered by both historians and legal scholars. A fascinating account of the long and complicated history of adding sex discrimination prohibitions to our country's laws, including Title VII, can be found in Cynthia Ellen Harrison, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945-1968 (U. of California Press 1988). Specific explications of the addition of sex to Title VII can be found in Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 J. S. HIST. 37 (1983); Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. J. 163, 165-72 (1991); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 14-25 (1995); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997); Mary Anne Case, *Reflections on Constitutionalizing Women's Equality*, 90 CALIF. L. REV. 765 (2002); and Cary Franklin, *Inventing the "Traditional Concept" of Sex Discrimination*, 125 HARVARD L. REV. 1307 (2012).

One can perhaps forgive law students in 1971 for their inadequate review of history, but continued adherence by courts and commentators to an erroneous view of facts aided courts in avoiding the plain meaning of the term "sex" in Title VII.

trying to give the plain words of the statute their due – at least in some areas.

In *Phillips v. Martin Marietta*,[6] one of the earliest Title VII cases to reach the Supreme Court, the Fifth Circuit simply announced that there wasn't much legislative history for it to use in deciding whether Martin Marietta's rule – that female applicants with pre-school age children would not be considered for certain employment, while male applicants with similar-age age children would be– violated Title VII.

Mrs. Ida Phillips had run afoul of this rule and had filed a charge with the EEOC. The Commission investigated and concluded there was reasonable cause to believe the rule violated the statute by discriminating on the basis of sex.

Because these events occurred prior to 1972, and hence the EEOC did not yet have authority to bring litigation, Mrs. Phillips filed a class action suit on her own. But EEOC attorneys David Cashdan and Philip Sklover, under the leadership of Daniel Steiner and Russell Specter, then General Counsel and Assistant General Counsel at the EEOC respectively, participated as amicus curiae in her case. Phillips lost on summary judgment in the district court and on appeal to the Fifth Circuit Court of Appeals, but following a Supreme Court decision, she won the right to bring her claim under Title VII.

The Fifth Circuit took note that EEOC's position was that "where an otherwise valid criterion is applied solely to one sex, then it automatically becomes a per se violation of the Act."[7] That sounds like a pretty straightforward application of the words of the statute to me. One might assume that having young children could be distracting to getting a job done and that employers might want to hire only employees who have children above a certain age. But if an employer has such a neutral criterion (that is, the requirement that an employee's children must be above a certain age), it must apply that criterion equally to women and to men. Otherwise, the employer would be taking sex into account in violation of the statute.

But the Fifth Circuit then presented the company's position which – to our modern ear – might appear as a somewhat stretched and creative view of the plain language of Title VII: that "before a criterion which is not forbidden can be said to violate the Act, the court must be presented some evidence on which it can make a determination that women as a group were treated unfavorably, or that the applicant herself was singled out because she was a woman."[8]

One might expect the court to have then turned to the plain words of the statute to see which party's argument was correct. But instead the Fifth Circuit observed that "neither litigant is able to present substantive support for its theory" although each "cite[s] selected sections from the congressional history of the bill."[9] The court then summarily concluded: "[H]owever, a perusal of the record in Congress will reveal that the word 'sex' was added to the bill only at the last moment and no helpful discussion is present

[6] 411 F.2d 1 (5th Cir., 1969) *vacated and remanded by Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).
[7] *Phillips* supra n. 6, 411 F.2d at 4 (5th Cir., 1969)
[8] Id. at 3.
[9] Id.

from which to glean the intent of Congress."[10]

Perhaps there was no "helpful discussion" in the legislative debates that the Fifth Circuit panel could find. But there was actually a fair amount of debate about what prohibiting discrimination on the basis of sex (or conversely, in the Equal Rights Amendment, mandating equality of the basis of sex) would mean – including a fair amount of hysteria. Anyone who wants to know more about this can read Professor Cynthia Harrison's fascinating historical account, *On Account of Sex: The Politics of Women's Issues*, 1945-1968, first published in 1988. Or you can read the extensive research done by Professor Katherine Franke for her 1995 article, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender.*[11] Or you can read the most recent rendition of this history by Professor Cary Franklin, who recounts at length in her 2012 article some of the legislative debate around adding "sex" to the statute:

> Legislators who opposed adding "sex" to Title VII shared . . . fears about the effect that a law prohibiting sex discrimination in employment would have on the regulation of traditional sex and family roles. If the sex amendment became law, Representative Emanuel Celler [the leading sponsor of the Civil Rights Act] asked:
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> > Would male citizens be justified in insisting that women share with them the burdens of compulsory military service? What would become of traditional family relationships? What about alimony? Who would have the obligation of supporting whom? Would fathers rank equally with mothers in the right of custody to children? What would become of the crimes of rape and statutory rape? Would the Mann Act be invalidated? Would the many State and local provisions regulating working conditions and hours of employment for women be struck down?[12]

Although such rhetoric might strike us as excessive today, Representative Cellar was simply repeating well-worn arguments that had been advanced by opponents of the Equal Rights Amendment, including by progressive labor legislators, for decades. The reality is that women and men played very different roles in work and family in 1964, and even progressive legislators viewed those roles as legitimate. Moreover, it was commonly understood that one way to ensure that these different roles could continue was to allow employers to apply what could be termed sex stereotyping in the workplace -- for example, allowing employers to assume that women with young children would not be good employees without being forced to make the same assumption about men.[13]

Taking the prohibition against sex discrimination on its face, therefore, could have wrecked havoc. Presumed Congressional intent thus became the means to both

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[10] Id. at 4.
[11] See footnote 5, supra, for citations.
[12] Franklin, supra n. 5, 125 HARVARD L. REV. 1307, 1318 (2012) *quoting* 110 Cong. Rec. 2577 (statement of Rep. Celler)
[13] For excellent discussions of the potential impact of Title VII on women's roles in society and the family, see articles by Professors Katherine Franke, Mary Ann Case, and Cary Franklin in footnote 5.

manage and constrain that potential havoc.

The salutary result (at least for the courts) can be seen in the *Phillips* case. The Fifth Circuit was forced to acknowledge that "[w]here an employer, as here, differentiates between men with pre-school age children, on the one hand, and women with preschool age children, on the other, there is *arguably an apparent discrimination founded upon sex.*"[14] But because the EEOC had argued that the employer could not, under the statute, justify this differential treatment under the "bona fide employment disqualification" provision, the court explained that it was left with no choice but to conclude that the rule did not discriminate based on sex in the first place.

If you doubt that the court actually said that, it did. Please read the full quote in the footnote—which ends with the following observation:

> The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute.[15]

The Supreme Court, in its opinion in *Phillips v. Martin Marietta*, rescued the nation from the EEOC's plain reading of text. In an unsigned and brief *per curiam* opinion, the Court simply stated that Title VII prohibited having "one hiring policy for women and another for men, each having pre-school-age children."[16] But the Court then ensured many more years of litigation and lengthy law review articles (espousing new and complicated theories of "sex-plus" discrimination) by stating that "the existence of such conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man" could form the basis of a BFOQ defense.[17]

Justice Marshall rejected the possibility of a BFOQ defense for such a rule, quoting the EEOC's Guidelines of Discrimination on the Basis of Sex: "Congress intended to prevent employers from refusing 'to hire an individual based on stereotyped characterizations of the sexes.'"[18] Justice Marshall sensibly noted that an employer "could require that all of his employees, both men and women, meet minimum

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[14] *Phillips*, supra n. 6, 411 F.2d at 4 (emphasis added).

[15] Here is the full quote: [The Commission] has left us, if the prohibition is to be given any effect at all in this instance, only with the alternative of a Congressional intent to exclude *absolutely any consideration of the differences between the normal relationships of working fathers and working mothers to their pre-school age children*, and to require that an employer *treat the two exactly alike in the administration of its general hiring policies*. If this is the only permissible view of Congressional intention available to us, as distinct from concluding that the seeming discrimination here involved was not founded upon 'sex' as Congress intended that term to be understood, we have no hesitation in choosing the latter. The common experience of Congressmen is surely not so far removed from that of mankind in general as to warrant our attributing to them such an irrational purpose in the formulation of this statute. Id. at 4. (emphasis added.)

[16] *Phillips v. Martin Marietta*, 400 U.S. 542, 544 (1971).

[17] Id. "The term 'sex plus' originated with Judge Brown's dissent to the denial of rehearing en banc in … *Martin Marietta*." BARBARA T. LINDEMANN, PAUL GROSSMAN, AND C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW, Ch. 10.VIII.A (Sex Plus), p.10-92 n.451 (Bloomberg BNA 5th ed. 2013), citing Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260, 2 FEP 185 (5th Cir. 1969) (Brown, J., dissenting), *vacated & remanded*, 400 U.S. 542, 3 FEP 40 (1971).

[18] Id. at 545, *quoting* 29 C.F.R. §1604.1(a)(i)-(ii).

performance standards" and could "try to insure compliance by requiring parents, both mothers and fathers, to provide for the care of their children so that job performance is not interfered with."[19]

Using the historical account by Professor Cynthia Harrison, Professor Cary Franklin recounts how the EEOC had to go through its own evolution before interpreting the sex discrimination provision of Title VII in the straightforward manner later endorsed by Justice Marshall. When first presented with the natural implications of the plain meaning of the statute, the majority of the EEOC had recoiled:

> In September of 1965, the EEOC announced . . . that the practice of dividing job advertisements into male and female columns did not qualify as sex discrimination because "[c]ulture and mores, personal inclinations, and physical limitations will operate to make many job categories primarily of interest to men or women." Thus, the EEOC concluded, segregating ads by sex simply helped applicants and employers find what they were looking for. The EEOC initially required employers who advertised in sex-segregated columns to "specifically state[] that the job is open to males and females," but upon reflection determined that this requirement constituted too onerous a burden. In the spring of 1966, the agency withdrew its initial guideline and issued a new guideline which permitted employers to place job advertisements in male or female columns without "stat[ing] specifically that both sexes may apply."[20]

The EEOC's decision did not go over well with the budding feminist movement. Indeed, the National Organization for Women (NOW) was founded in 1966 precisely because advocates felt that the EEOC was ignoring women's claims of sex discrimination.[21] And the EEOC ultimately became one of the fiercest advocates for the position that the statute does not permit taking sex stereotypes into account, including as a basis for a BFOQ justification.

Employment rules requiring married women to leave a job, or banning women who have children below a certain age for applying for a job, may seem anachronistic now (the stuff of the television series *Mad Men*). But they were the freighted weight of controversy for almost two decades. And as employers began losing the battle of convincing courts that, although they had taken sex into account, a sexual stereotype nonetheless served as a legitimate BFOQ, (for example, the airlines' dramatic loss in *Sprogis v. United Air Lines, Inc.*[22]), employers redoubled their efforts to cabin the reach of what the statute meant in prohibiting discrimination "because of sex."

This essay cannot do justice to the effort to create this new "traditional" understanding of the term "sex" in Title VII. For that, I commend to you the various law review articles I cite in footnote five. But suffice it to say that a significant victory for such cabining was

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[19] Id. at 544-545.
[20] Franklin, supra n. 5, at 1340 (footnotes omitted)
[21] *See* National Organization of Women, The Founding of NOW *available at* http://www.now.org/history/the_founding.html (last visited 1/20/2013); Harrison, On Account of Sex at xx-xx..
[22] 444 F.2d 1194 (7th Cir. 1971)

achieved with the Supreme Court's opinion in *General Electric Co v. Gilbert*,[23] in which the Court decided that pregnancy discrimination did not constitute sex discrimination and that the "traditional" understanding of sex discrimination were practices that divided men and women into two groups and not anything else.[24] And although Congress overturned the *Gilbert* decision through passage of the Pregnancy Discrimination Act in 1978,[25] the Supreme Court's pronouncements regarding the "traditional" understanding of sex discrimination continued to impact the reasoning of lower courts.[26]

By the time transgender individuals started bringing cases under Title VII, therefore, two myths were well entrenched: 1) that there was little legislative history regarding the sex discrimination provision and 2) that Congress' sole intent had been to ensure that men and women were not classified differently. Moreover, the emphasis on legislative intent was so strong that the Fifth Circuit in 1975, in an *en banc* decision overturning a panel decision applying the plain meaning of "sex" in a hair grooming case, actually stated: "The beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question."[27]

There was a minor chord in Supreme Court jurisprudence sounding in sex stereotyping theory, reflected in its 1978 decision in *Los Angeles Department of Water & Power v. Manhart*.[28] While this approach would ultimately be resurrected by the Supreme Court in the case of *Price Waterhouse v. Hopkins*, the primary message throughout the 1970s and 1980s was that Title VII should be interpreted solely to enact the presumed Congressional intent that employers not divide men and women into separate categories.

Given this context, it is of little surprise that courts found it easy to rule that transgender individuals who experienced discrimination because of their gender identity could not avail themselves of Title VII's anti-discrimination sex protection.[29] Indeed, the EEOC played a role in enabling the courts to reach this conclusion. While the words of the statute carried sufficient weight to generate one positive district court ruling and one dissent in an appellate decision, that was a minority chord during this time period.

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[23] 429 U.S. 125 (1976).
[24] Id. at 145.
[25] Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. §2000e(k) (2006)).
[26] See Franklin, supra n. 5, 125 HARVARD L. REV. 1307, 1358-1377 (2012).
[27] Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084,1090 (5th Cir. 1971).
[28] 435 U.S. 702, 707 (1978). The Court noted that "[b]efore the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid." 435 U.S. 702, 707 (1978). However, the Court explained, "[i]t is now well recognized that employment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males or females." Id. According to the Court, in "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." Id. at 708 n.13. This strand of Supreme Court jurisprudence was reinvigorated with the issuance of the Supreme Court's 1989 decision in *Price Waterhouse*. See Section III below.
[29] As law review articles by numerous legal academics including Mary Anne Case and Katherine Franke (*see* footnote 5 *supra*), make clear, there were also complicated issues around the definitional and ideological aspects of gender and sex.

In the early years of the EEOC, the Commission issued its findings of cause and no cause in written decisions. The confidentiality requirements of Title VII mandated that charging parties and employers not be identified by name, but the legal reasoning used by the Commission was often adopted by courts in judicial decisions.

The first written Commission decision involving a transgender person concerned a grammar school music teacher who started employment with a school system in 1957 as a man and was fired in 1972 after transitioning to being a woman. In August 1972, the teacher filed a charge with the EEOC claiming the school board had discriminated against her on the basis of sex. Two years later, in September 1974, the EEOC issued its decision finding no cause to believe that discrimination had occurred on the basis of sex.

The Commission explained its reasoning as follows:

> Charging Party alleges that Respondent's actions, which were based upon Charging Party having undergone a sex reassignment operation, constitute discrimination on the basis of sex. Charging Party does not allege, and the record in the instant case provides no evidence, that Charging Party was treated disparately by Respondent on the basis of sex. There is no evidence of record, for example, that different standards of incapacity or unfitness have been utilized by Respondent for male and female teachers. There is no evidence that Respondent ever employed a similarly situated person of the opposite gender of Charging Party, i.e. a female who underwent sex reassignment.
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> In addition, Charging Party does not allege, and there is no evidence to indicate, that discrimination against individuals having sex reassignment operations has a significant disproportionate impact upon either the male or female gender. In fact, the proportion of individuals undergoing such operations is so small as to negate such a conclusion. Finally, Charging Party does not allege, and there is no evidence to indicate, that Charging Party would have been suspended or required to undergo psychiatric examinations had Charging Party remained a male or had Charging Party always been a female.
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> There is no further evidence of record which would lead us to conclude that Charging Party has alleged a case of discrimination because of sex, rather than a case of possible discrimination because of having undergone a particular operation. Although the operation in question was a sex reassignment, we find nothing in the legislative history of Title VII to indicate that such claims were intended to be covered by Title VII. Absent evidence of a Congressional intent to the contrary, we interpret the phrase "discrimination because of sex," in accordance with its plain meaning, to connote discrimination because of gender.

> We therefore are compelled to conclude that Charging Party's termination, based in part upon having undergone a sex reassignment operation, does not constitute discrimination because of sex.[30]

The EEOC issued the charging party a "right to sue" letter, which enabled her to continue her case in federal court. Her case became one of the first in which a district court found that discrimination based on transgender status would get no protection under Title VII. The Commission's decision was appended by the defendant in the case as an exhibit to the court. In an unpublished opinion in 1975, *Grossman v. Bernards Township Board of Education*,[31] the district judge essentially tracked the reasoning of the Commission directly. The court observed that Grossman "was discharged by the defendant school board *not* because of her status as a female, but rather because of her *change* in sex from the male to the female gender."[32] The court also noted that there was no indication that Grossman had been fired "because of any stereotypical concepts about the ability of females to perform certain tasks."[33] After pointing out the "scarcity of legislative history" and its "reluctance to ascribe any import to the term 'sex' other than its plain meaning," the court summarily held that Title VII does not protect against discrimination based on a change in sex.[34] The court also observed that the EEOC's determination (which, as noted, had been included as an exhibit in the case by the defendant), while not binding on the court, was also that the school board's action did not constitute discrimination on the basis of sex. Without opinion, the Third Circuit affirmed the dismissal of Grossman's lawsuit.

In 1977, in the first case to receive a full appellate decision, *Holloway v. Arthur Andersen & Co.*,[35] a transgender woman asked her company to change her personnel records to reflect her female name. The company did so and then fired her. As the Ninth Circuit in *Holloway* stated: "the sole issue before us is whether an employee may be discharged, consistent with Title VII, for initiating the process of sex transformation."[36]

A majority of the Ninth Circuit panel found it simple to affirm the district court's grant of summary judgment for the employer. The majority noted the now familiar myth that "[t]here is a dearth of legislative history" regarding the sex provision in Title VII and that "[g]iving the statute its plain meaning, this court concludes that Congress had only the traditional notions of "sex" in mind."[37] Those traditional notions were very clear: **"**The manifest purpose of Title VII's prohibition against sex discrimination in employment is to

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[30] EEOC Decisions (CCH) ¶6499 (Sept. 24, 1974), *Summary of Investigation* at ¶¶3-6 (footnotes omitted).
[31] Grossman v. Bernards Tp. Bd. of Educ., 11 FEP 1196, 1975 WL 302 (D.N.J. 1975), *aff'd without op.*, 538 F.2d 319, 13 FEP 1360 (3d Cir.), *cert. den.*, 429 U.S. 897 (1976).
[32] *Id*., 1975 WL 302, at *4.
[33] *Id*.
[34] *Id*.

[35] 566 F.2d 659 (9th Cir. 1977)
[36] Id. at 661
[37] Id. at 662.

ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex."[38] Anything beyond such an anti-classification prohibition would, as far as the panel majority was concerned, have to wait for Congress to act.

Judge Goodwin, in dissent, found it harder than the majority to ignore the plain meaning of the statute. He agreed that "Congress probably never contemplated that Title VII would apply to transsexuals," but nonetheless stated his "dissent from the decision that the statute affords such plaintiffs no benefit."[39] As Judge Goodwin noted: "The only issue before us is whether a transsexual whose condition has not yet become stationary can state a claim under the statute if discharged because of her undertaking to change her sex. I read from the language of the statute itself that she can."[40]

The majority approach in *Holloway* became the prevailing one, however, without much difficulty. In 1984, largely following *Holloway's* reasoning, the Seventh Circuit in *Ulane v. Eastern Airlines* reversed a district court ruling finding that a transgender woman had experienced unlawful discrimination under Title VII.[41] Kenneth Ulane had been hired as a pilot for Eastern Air Lines in 1968, and been fired after she transitioned to be Karen Frances Ulane in 1981. Judge Grady, hearing the case in the Northern District of Illinois, denied the company's motion to dismiss because he "believed the complaint adequately alleged that the discharge was related to sex or had something to do with sex."[42] In ultimately ruling in favor of Ulane, Judge Grady noted that he "continue[d] to hold that layman's reaction to the simple word and to the facts as alleged in the complaint."[43]

Acknowledging his own preconceptions about the meaning of sex, Judge Grady also observed that prior to his participation in the case, he would have had "no doubt that the question of sex was a very straightforward matter of whether you are male or female."[44] But after listening to the evidence in the trial, he concluded that "the term, 'sex,' as used in any scientific sense and as used in the statute can be and should be reasonably interpreted to include among its denotations the question of sexual identity and that, therefore, transsexuals are protected by Title VII."[45] Judge Grady also proffered his observation that he had "not a shadow of a doubt" that Congress had not contemplated covering transgender individuals under Title VII, but that "working with the word that the Congress gave us to work with, it is my duty to apply it in what I believe to be the most reasonable way."[46]

The Seventh Circuit would have none of that. In a panel decision with no dissent, the court stated: "While we do not condone discrimination in any form, we are constrained

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[38] Id. at 663.
[39] Id. at 664. (Goodwin, J. dissenting).
[40] Id.
[41] *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984).
[42] *Ulane v. Eastern Airlines, Inc.*, 581 F.Supp. 821, 822 (N.D. IL1983).
[43] Id.
[44] Id. at 823.
[45] Id. at 825.
[46] Id.

to hold that Title VII does not protect transsexuals and that the district court's order on this count therefore must be reversed for lack of jurisdiction."[47] According to the court, its duty was to "determine what Congress *intended* when it decided to outlaw discrimination based on sex."[48]

Unlike other courts, the Seventh Circuit did at least begin its analysis by noting that "[i]t is a maxim of statutory construction that, unless otherwise defined, words should be given their ordinary, common meaning."[49] But it then concluded 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."[50]

Of course, it is true that Title VII prohibits discriminating against women because they are women and against men because they are men. But as the EEOC Guidelines had noted since 1972, the plain language also prohibited treating women differently than men based on sexual stereotypes regarding a woman's role in the family. And the plain language could also presumably prohibit taking sex into account through the fact that a person has transitioned from one sex to another.

But noting first the "[the dearth of legislative history" regarding the sex discrimination provision, and then describing it as "[t]he total lack of legislative history supporting the sex amendment," the Seventh Circuit concluded "that Congress never considered nor intended that this 1964 legislation apply to anything other than the traditional concept of sex."[51] And that traditional concept did not include protecting transgender individuals.[52]

III. The Middle: Maybe the Statute Means A Bit of What It Says

Almost twenty years ago, in October 1993, I participated at an event at Harvard Law School called Celebration 40. The event celebrated forty years of women attending

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[47] *Ulane*, supra n.41, 742 F.2d at 1084.
[48] Id. (emphasis added.)
[49] Id. at 1085.
[50] Id.
[51] Id.
[52] *Sommers v. Budget Marketing*, 667 F.2d 748 (CA8 1982), the third appellate court decision of this period, was an oddly argued and decided opinion. The district court required the plaintiff, Sommers, "to submit an amended complaint to indicate whether she had been discriminated against because she was male, female, or transsexual, and whether she had in fact successfully undergone sexual conversion surgery." Id. at 749. Sommers' amended complaint claimed "she had been discriminated against because of her status as a female, that is, a female with the anatomical body of a male, and further stated that sexual conversion surgery had not been performed." *Id.* According to Eight Circuit, Sommers had "nonetheless argued that the court should not be bound by the plain meaning of the term "sex" under Title VII as connoting either male or female gender, but should instead expand the coverage of the Act to protect individuals such as herself who are psychologically female, albeit biologically male." *Id.* (footnote omitted). The court concluded that there was "no genuine issue of fact as to the plaintiff's sex at the time of discharge from employment," and that there was no dispute that Sommers is "for the purposes of Title VII, . . . male because she is an anatomical male." Because the court accepted "the biological fact as the basis for determining sex," it found entry of summary judgment for the employer to be appropriate. As I noted, it is an oddly argued and decided opinion.

Harvard Law School.[53] I spoke on a panel with Anne Hopkins, the plaintiff in an important case the Supreme Court had decided five years earlier, *Price Waterhouse v. Hopkins*.[54]

I distinctly remember Ann Hopkins pointing out to me her children who were in the audience and then informing me that she was heterosexual and not a lesbian. That struck me as unusual, since people did not ordinarily bother to tell me that they were heterosexual. They (correctly) assumed that being heterosexual was the societal default and that they would need to disclose their sexual orientation to me only if it differed from the societal norm – i.e., if they were gay, lesbian or bisexual.

But I ultimately came to realize that the fact that Ann Hopkins was not a lesbian was a key variable of the *Price Waterhouse* case of which she was the star.

Ann Hopkins joined Price Waterhouse's Office of Government Services in Washington, D.C. in 1977 and was proposed for partnership five years later. I am sure she had every reason to assume she would be made a partner. In the statement supporting her candidacy, the partners in her office "showcased her successful 2-year effort to secure a $25 million contract with the Department of State, labeling it 'an outstanding performance' and one that Hopkins carried out virtually at the partner level.'"[55] At trial, she had one official from the State Department "describe her as 'extremely competent, intelligent,' 'strong and forthright, very productive, energetic and creative,'" while another praised her "decisiveness, broadmindedness, and 'intellectual clarity.'"[56] What's not to like?

But of the 662 partners at the firm at that time, only seven were women. And of the 88 individuals proposed for partnership that year, only one – Ann Hopkins -- was a woman.[57] Indeed, some partners at Price Waterhouse apparently believed that a woman should never be a partner. As the trial judge found, in previous years "[o]ne partner repeatedly commented that he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers-yet the firm took no action to discourage his comments and recorded his vote in the overall summary of the evaluations."[58]

But the Washington office of Price Waterhouse clearly wanted Ann Hopkins to be a partner and put her forward as a candidate. What a shock it must have been to this highly competent woman when she did not come though with flying colors. Forty-seven of the 88 candidates that year were accepted for partnership, 21 were rejected, and the

[53] The only record of the event I can find is the following news story, describing Justice Ruth Bader Ginsburg's address to the conference: http://www.thecrimson.com/article/1993/10/4/ginsburg-speaks-at-law-reunion-pus/ (last visited 1/20/13).
[54] 490 U.S. 228 (1989).
[55] Id. at 233.
[56] Id. at 234.
[57] Id. at 233.
[58] Id. at 236.

rest, including Hopkins, were "held" over for reconsideration to the following year.[59]

Hopkins did nothing that year, although she must have heard through the grapevine some of the concerns that had been expressed. As the trial evidence ultimately showed, the partners at Price Waterhouse had some concerns about her interpersonal skills. Judge Gesell, the trial judge, noted that both supporters and opponents of Hopkins "'indicated that she was sometimes overly aggressive, unduly harsh, difficult to work with and impatient with staff.'"[60]

But it is hard to unpack some of those concerns from the partners' perception of how a woman was expected to act in the workplace. As reported in the plurality Supreme Court decision:

> One partner described her as "macho" (Defendant's Exh. 30); another suggested that she "overcompensated for being a woman" (Defendant's Exh. 31); a third advised her to take "a course at charm school" (Defendant's Exh. 27). . . Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed mgr to an authoritative, formidable, but much more appealing lady ptr candidate."[61]

I don't know how many of those comments Ann Hopkins knew about before she sued Price Waterhouse. But we do know that Tom Beyer, the partner who had to tell Hopkins that she was being held over for a year, advised her that "in order to improve her chances for partnership, she should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"[62]

Hopkins presumably gritted her teeth and soldiered on, perhaps even with some makeup. But the following year, the partners in her office refused to propose her again for partnership.[63] At that point, Hopkins sued Price Waterhouse under Title VII of the Civil Rights Act of 1964 for sex discrimination.

Ann Hopkins began her suit in 1984. At that point, courts had consistently rejected claims by gay men and lesbians who had experienced what they claimed to be sex discrimination, as well as claims by transgender individuals. Had Ann Hopkins been a lesbian (or had been perceived as such), it is quite possible that any comments about her not being sufficiently feminine would have been mixed in with comments about her actual or presumed sexual orientation. And any lawyer worth his or her salt would have told Ann Hopkins not to bother bringing a suit given the state of the case law at the time.

So the fact that Anne Hopkins was heterosexual and not a lesbian was, indeed, a very relevant fact.

What is ultimately interesting about the *Price Waterhouse* decision is how little attention

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[59] Id. at 233.
[60] Id. at 234-235.
[61] Id. at 235.
[62] Id.
[63] Id. at 231-232.

was paid to the gender stereotyping analysis in the case. The Supreme Court accepted the case "to resolve a conflict among the Courts of Appeals concerning the respective burdens of proof of a defendant and plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate motives,"[64] and that is precisely what most of the case focused on. The Court's ruling on that issue garnered only a plurality (Justices Brennan, Marshall, Blackmun and Stevens), with Justices White and O'Connor concurring in the judgment and writing separately on the burden of proof issue.

But all six Justices had no difficulty with the gender stereotyping analysis. The plurality's legal analysis began as follows:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.[65]

The footnote to this sentence stated: "We disregard, for purposes of this discussion, the special context of affirmative action."[66]

Well, let me be clear -- this was a "simple, but momentous" statement for the Supreme Court plurality to make. The reality is that courts (including the Supreme Court) had twisted themselves into pretzels over previous decades in order to avoid interpreting Title VII's prohibition on sex discrimination in the same manner that they were interpreting racial discrimination. But that cognitive conflict was strikingly absent in the *Price Waterhouse* decision. Instead, the plurality observed that "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute,"[67] and that the plurality "[took] these words to mean that gender must be irrelevant to employment decisions."[68]

As to whether gender had been taken into account as part of the company's motive for denying Hopkins the partnership, the plurality observed that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender."[69] With regard to the "legal relevance of sex stereotyping," the plurality simply returned to the sex stereotyping strand that had been present in its 1978 case of *Los Angeles Department of Water & Power v. Manhart,* stating: "[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

[64] Id. at 232
[65] Id. at 239.
[66] Id. at n. 3.
[67] Id. at 239,
[68] Id. at 240.
[69] Id. at 250.

disparate treatment of men and women resulting from sex stereotypes.'"[70]

Neither Justice White nor Justice O'Connor, concurring in the judgment and writing separately on the burden of proof question, took issue with the simple and straightforward manner in which the plurality had set forth the Title VII requirement that gender could not be taken into account in employment decisions. Indeed, Justice O'Connor observed that there "is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself. As Senator Clark put it, '[t]he bill simply eliminates consideration of color [or other forbidden criteria] from the decision to hire or promote.'"[71] Again, the previous machinations by courts to avoid interpreting sex discrimination in an identical manner to race discrimination were simply elided in Justice O'Connor's opinion.

Even Justice Kennedy, writing in dissent for himself, Chief Justice Rehnquist and Justice Scalia, did not take issue with the concept that sex stereotyping might result in a violation of Title VII's sex discrimination prohibition. Rather, he simply emphasized that there is "no independent cause of action for sex stereotyping" under Title VII," but that "[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent"[72] – that is, whether gender has inappropriately been taken into account under the law.

Hence seventeen years after the EEOC had stated in its Guidelines that employers could not refuse "to hire an individual based on stereotyped characterizations of the sexes," new life was breathed into that prohibition by the *Price Waterhouse* decision.

The fact that the Supreme Court reached a conclusion in 1989 that had previously seemed unthinkable in the mid to late 1970's is not entirely surprising. A number of important social and cultural movements related to sex flourished in the intervening years. A resurgent feminist movement, for instance, sought to inject awareness of gender and its implications into every avenue of society – political, social, sexual, etc. Academic researchers began to examine the pervasive impact of gender socialization from an early age [73] and to question the assumption that conforming to gender stereotypes was necessarily healthy or desirable.[74] Labor-force participation by women began to steadily increase and depictions of independent working women became common themes for television programs and films.[75]

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[70] *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 707, n. 13 (1978), quoting *Sprogis v. United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (CA7 1971).
[71] Id. at 264, citing 110 Cong.Rec. 7218 (1964) (O'Connor, J. concurring).
[72] Id. at 294 (Kennedy, J. dissenting).
[73] *See* Richard A. Fabes, Carol Lynn Martin, Cindy Faith Miller, Diane N. Ruble, and Kristina M. Zosuls, *Gender Development Research in* Sex Roles*: Historical Trends and Future Directions*, 64 Sex Roles 826 (June, 2011).
[74] See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation*, 105 Yale L.J. 1, 19-37 (October, 1995).
[75] See Bureau of Labor Statistics, The Editors Desk: Women in the Labor Force, 1970-2009 available at http://www.bls.gov/opub/ted/2011/ted_20110105.htm (last visited 9/17/2012). Also, the 1970's saw the introduction of the Mary Tyler Moore Show and One Day at a Time both of which centered on independent women in the workforce.

Together, these changes helped to increase societal awareness of gender roles. While the perception of sexual differences had previously been limited to physical characteristics, the idea that societal notions and conceptions were also intrinsically related to sex was gaining ground in society. These cultural shifts gradually fed into the legal understanding of "sex" in Title VII.

It took a bit of time for courts to apply the *Price Waterhouse* analysis to cases brought once again by transgender individuals under Title VII. It was probably not even until Justice Scalia wrote the opinion for a unanimous Supreme Court in *Oncale v. Sundowner Offshore Services*, [76] holding that workplace harassment can violate Title VII's prohibition against sex discrimination even when the harasser and the harassed employee are of the same sex, that courts began to realize that, indeed, the *words* of Title VII mattered significantly – not just what the 1964 Congress had contemplated in enacting those words.

I am not personally an adherent of the theory of statutory construction espoused by Justice Scalia; my theory is more in line with that of Justice Stevens, as set forth in his opinion in *INS v. Cardoza-Fonseca*.[77] But I believe Justice Scalia's consistent focus on statutory text has had the salutary effect of forcing courts, agencies and even Congress itself to focus more carefully on the words of a statute. I cannot imagine any court today pronouncing that "[t]he beginning (and often the ending) point of statutory interpretation is an exploration of the legislative history of the Act in question."

The *words* of a statute must *always* be the beginning point of any statutory analysis. If the statutory text is not ambiguous, or if the legislative history fails to provide a clear and direct reason to disregard what appears to be the plain meaning of the statute, then agencies and courts *must* apply the words of the statute. If Congress wants a different result, it is always free to enact a change in that statutory text.

Justice Scalia's analysis in *Oncale* was thus understandably brief. He noted that nothing in the language of "Title VII necessarily bars a claim of discrimination 'because of ... sex' merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[78] And he observed that while courts had had "little trouble with that principle" in cases where an employee was passed over for a job or promotion, in cases of sexual harassment, courts had taken "a bewildering variety of stances."[79]

Well, of course they had – because those courts were struggling to decide what the 1964 Congress had intended with regard to same-sex harassment. But as Justice Scalia explained, while "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," statutory prohibitions "often go beyond the principal evil to cover reasonably comparable

[76] 523 U.S. 75 (1998)
[77] 480 U.S. 421 (1987).
[78] *Oncale*, supra n.76, 523 U.S. at 79.
[79] Id.

evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[80]

The combination of *Price Waterhouse* and *Oncale* freed the lower courts to look once again at the plain language of Title VII in cases brought by transgender individuals under that law, as well as under other sex discrimination laws.

The first breakthrough came just two years after *Oncale* was decided, when both the Ninth Circuit and the First Circuit applied the logic of *Price Waterhouse* to find protection for transgender women who had experienced adverse actions because of their lack of gender conformity.

In *Schwenk v. Hartford*,[81] the Ninth Circuit upheld a claim by a transgender prisoner under the Gender Motivated Violence Act. Analogizing to Title VII, the court stated that "federal courts (including this one) initially adopted the approach that sex is distinct from gender and, as a result, held that Title VII barred discrimination based on the former but not on the latter."[82] However, the court noted that "[t]he initial judicial approach taken in cases such as *Holloway* has been overruled by the logic and language of *Price Waterhouse*."[83] Under *Price Waterhouse*, "discrimination because one fails to act in the way expected of a man or a woman is forbidden under Title VII."[84] As such, a prisoner who had experienced violence by a guard for her failure to conform to behavior expected of her genital sex (male) had a valid claim under the law.

Similarly, in *Rosa v. West Bank & Trust Co,*[85] the First Circuit applied the logic of *Price Waterhouse*. In *Rosa*, a transgender woman filed suit against a bank that denied her a loan because she presented as a woman, rather than in a manner that comported with her male identification cards. The claim was brought under the Equal Credit Opportunity Act (ECOA) which prohibits discrimination "with respect to any credit transaction" on the basis of color, national origin, sex, or marital status. Rosa alleged that the bank's decision to deny her a loan was based on gender-stereotypes and constituted sex discrimination under *Price Waterhouse*. The district court disagreed, holding that the bank actions were based on Rosa's choice of clothing, not her sex.[86] The First Circuit reversed, concluding that the record could show that the bank's actions were motivated by gender stereotypes such as the fact that "Rosa's attire did not accord with his male gender."[87]

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[80] Id.
[81] 204 F.3d 1187 (9th Cir. 2000).
[82] Id. at 1201.
[83] Id.
[84] Id. at 1202.
[85] 214 F.3d 213 (1st Cir. 2000).
[86] Rosa v. Park West Bank & Trust Co., Civ. Action No. 99-30085-FHF, slip op. at 1 (D. Mass. Oct. 16, 1998).
[87] *Rosa* supra n.71 214 F. 3d at 214. For an interesting perspective on early efforts to apply the reasoning of *Price Waterhouse* to claims brought by transgender individuals, see Katherine M. Franke, Rosa v. Park West Bank: Do Clothes Really Make The Man?, 7 Mich. J. Gender & L. 141 (2001); Katherine M. Franke,

A few years following the opinions in *Schwenk* and *Rosa*, the Sixth Circuit adopted a similar line of reasoning—this time in a Title VII case, *Smith v. City of Salem*.[88] Smith, a transgender woman, brought a claim of employment discrimination alleging she had experienced discrimination "both because of [her] gender non-conforming conduct and, more generally, because of [her] identification as a transsexual."[89] The district court rejected her claim, but the Sixth Circuit reversed. Noting that *"Price Waterhouse* . . . does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual," the Sixth Circuit reasoned that "discrimination against a plaintiff who is a transsexual – and therefore fails to act and/or identify with his or her gender – is no different from the discrimination directed against [the plaintiff] in *Price Waterhouse* who, in sex-stereotypical terms, did not act like a woman."[90]

Both prior to and following these federal court cases, state courts had also begun interpreting state and local sex discrimination laws to protect transgender individuals who had experienced discrimination based on gender identity.[91]

Two additional breakthroughs in federal court occurred in 2008 and 2011 respectively. In 2008, in *Schroer v. Billington*, [92] a federal district court in the District of Columbia held that the Library of Congress violated Title VII when it withdrew a job offer to Karen Schroer after it learned that she was transitioning from male to female. Unlike other courts, the judge in *Schroer* did not rely solely on a gender stereotyping theory as set forth in *Price Waterhouse*. Rather, Judge Robertson found, just as district court Judge Grady had in *Ulane* many years earlier, that discrimination against a transsexual because he or she is transsexual is "literally" discrimination because of sex.[93]

Amicus Curiae Brief of NOW Legal Defense and Educational Fund and Equal Rights Advocates in Support of Plaintiff-Appellant and in Support of Reversal, reprinted in 7 Mich. J. Gender & L. 163 (2001).

[88] 378 F.3d 566 (6th Cir. 2004).

[89] Id. at 571.

[90] Id. at 574-75.

[91] State courts had also been moving in this direction. See Enriquez v. W. Jersey Health Sys., 777 A.2d 365, 372–73 (N.J. Super. Ct. App. Div. 2001), cert. denied, 785 A.2d 439 (N.J. 2001) (concluding that transsexual people are protected by state law prohibition against sex discrimination); Doe v. Yunits, 15 Mass. L. Rptr. 278, 2000 WL 33162199 (Mass. Super. Ct. 2001) (holding that a transgender student had stated a viable sex discrimination claim under state law), aff'd sub nom. Doe v. Brockton Sch. Comm., 2000 WL 33342399 (Mass. App. Ct. 2000); Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 392–96 (N.Y. Sup. Ct. 1995) (holding that harassment based on the fact an employee changed his sexual status also constituted sex discrimination under the New York statute that proscribes discrimination on the basis of "sex"); Jette v. Honey Farms Mini Market, No. 95-0421, 2001 WL 1602799, at *1 (Mass. Comm'n Against Discrimination Oct. 10, 2001) (noting the holding that "discrimination against transsexuals because of their transsexuality is discrimination based on 'sex'"); accord Rentos v. Oce-Office Sys., No. 95-7908, 1996 WL 737215, at **8–9 (S.D.N.Y. Dec. 24, 1996) (relying on Maffei to hold that plaintiff could maintain a transgender discrimination claim under New York City and State law); see also McGrath v. Toys "R" Us, Inc., 409 F.3d 513 (2d Cir. 2005) (awarding attorneys' fees to plaintiffs in first case vindicating the rights of transsexuals to be free from discrimination in public accommodations under New York City Human Rights Law).

[92] 577 F.Supp.2d 293 (2008).

[93] Id.at 302-303.

And in 2011, the Eleventh Circuit in *Glenn v. Brumby*,[94] found that a legislative attorney who had transitioned from male to female and was fired for that reason by the State of Georgia had proven a viable equal protection claim as sex discrimination. Relying on *Price Waterhouse*, the court stated that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . [a]ccordingly, discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it's described as being on the basis of sex or gender."[95]

IV. The Present: The Statute Means What It Says

In 2009, President Obama made four new nominations to the EEOC which had been languishing without a full roster of Commissioners for some time. He named Jacqueline Berrien as Chair, Patrick David Lopez as General Counsel, and me and Victoria Lipnic as Commissioners to fill the available Democratic and Republican seats, respectively. The four of us started working as recess appointees in April 2010 and were all subsequently confirmed by the Senate in December 2010 to our respective terms.

With a full complement of Commissioners and a General Counsel, the EEOC took to its work with gusto – finishing work on a series of regulations and actively engaging in approving amicus briefs, reviewing subpoena determinations, approving litigation requests, and voting on opinions dealing with claims of discrimination brought by federal employees.

The first opportunity the Commission had to consider and vote on the question of coverage for transgender individuals under Title VII was in October 2011. In the Western District of Texas, a transgender woman had filed a lawsuit claiming that her employer had fired her from her job as a receptionist because of her transgender status.[96] The defendant filed a motion for summary judgment, contending that discharging a person because she is transgender is not discrimination because of sex and hence not covered under Title VII.

The General Counsel, acting at the request of the Commission, filed an amicus brief with the district court that put forward two arguments. First, under the reasoning of *Price Waterhouse*, discrimination against a transgender individual because he or she does not conform to gender norms or stereotypes is discrimination "because of ... sex" under Title VII. Second, following the reasoning in *Schroer*, discrimination because an individual intends to change, is changing, or has changed his or her sex, is likewise prohibited by the plain language of Title VII.

Although the court chose not to accept the Commission's brief, the court did deny the defendant's motion for summary judgment and the case was ultimately settled prior to

[94] 663 F.3d 1312 (11th Cir. 2011).
[95] Id. at 1316-17.
[96] *Pacheco v. Freedom Buick GMC Truck*, No. 7:10-CV-116, Docket No. 1 (W.D. Tex.) (complaint filed Sept. 27, 2010).

trial.[97]

Approximately five months following the Commission's approval of the amicus brief in *Pacheco*, the Office of Federal Operations (OFO) sent to the Commission a draft opinion in *Macy v. DOJ*[98] for its approval. In any case in which OFO determines that a particular issue warrants review and a vote by the full Commission, a draft opinion is sent to the Commission. The Commission reviews and analyzes the draft and makes whatever changes it deems necessary and appropriate. If no Commissioner calls for a vote within a designated time period, the opinion is approved by unanimous consent. If a Commissioner puts an opinion "on hold" and calls for a vote, each Commissioner's vote is recorded through an electronic system. The *Macy* decision was ultimately approved (following various revisions) through the unanimous consent system.

To understand the *Macy* decision, one must understand the Commission's role in federal sector discrimination claims. In 1972, Congress granted federal employees and applicants for federal employment an additional set of remedies regarding alleged employment discrimination, beyond the right to bring a claim in federal court. Title VII provides that "[a]ll personnel actions affecting employees or applicants for employment [in the federal government] . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin.[99] The law then gives the EEOC authority to enforce this non-discrimination guarantee "through appropriate remedies, including reinstatement or hiring of employees with or without back pay," and to issue regulations or instructions necessary to carry out its responsibilities.[100] The EEOC has issued a set of regulations laying out for agencies the complaint process they must make available to employees and applicants.[101] The end of this process is the right to appeal directly to the five-member Commission to consider the facts of a complaint and issue a remedy. If the Commission rules that an agency has engaged in unlawful discrimination, the agency must comply with the remedy ordered by the Commission.

In the case of *Macy v. DOJ*, the complainant, Mia Macy, had been a police detective in Phoenix, Arizona. She decided to relocate to San Francisco and applied for a position with a ballistics lab at the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). The application process appeared to be going well until Macy informed the hiring contractor that, although she had begun the application process as a male, she would

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[97] The *Pacheco* trial court denied the EEOC's motion for leave to file an amicus brief because (1) the EEOC's position in its brief was inconsistent with its administrative handling of the plaintiff's EEOC charge, which the EEOC had dismissed because it was unable to conclude from its investigation that Title VII was violated and (2) the EEOC's motion was moot because the trial court had denied the motion for summary judgment a few days earlier due to a genuine issue of material fact. *See Pacheco*, Docket No. 34 (W.D. Tex. Nov. 1, 2011) (Order Denying EEOC's Motion for Leave to File Brief as Amicus Curie); *Pacheco*, No. 7:10-CV-116, Docket No. 33 (W.D. Tex. Oct. 28, 2011) (Order Denying Defendant's Motion for Summary Judgment). The manner in which the EEOC field staff investigated and dismissed Pacheco's charge of discrimination was consistent with EEOC rulings in earlier cases, as discussed above.

[98] *Macy*, supra n.1.
[99] 42 U.S.C. § 2000e-16(a).
[100] 42 U.S.C. §2000e-16(b).
[101] 29 C.F.R. §1614 (called the "1614 process").

begin work as a female. Five days later, Macy was informed that, due to federal budget reductions, the position was no longer available.[102]

Believing that her transgender status had been the cause for the position being withdrawn, Macy utilized the ATF process designed to comply with EEOC's regulations under Title VII.[103] Macy spoke with an equal employment opportunity counselor and explained she felt she had been discriminated against based on sex, describing her claim of discrimination as "change in gender (from male to female)."[104] The counselor helped her fill out the formal complaint form, where Macy checked off "sex" as the basis of the complaint, checked the box "female," and then typed in "gender identity" and "sex stereotyping" as the basis of her complaint.[105]

The problem for Macy was that the Department of Justice had one system for adjudicating claims of sex discrimination under Title VII, and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination.[106] The latter system was similar in many respects to the former, but did not include the same remedies, including the right to appeal to the Commission for a ruling that the agency would be required to comply with, should the Commission find that discrimination occurred.[107] ATF wanted to deal with Macy's claim of discrimination under its system created for claims based on sexual orientation and gender identity because, according to the agency, those types of claims were not within EEOC's jurisdiction.[108]

Macy then turned to the EEOC to appeal that question of jurisdiction.[109] The legal question before the Commission was thus simple and straightforward: did the Commission have the authority, under Title VII, to hear a claim of discrimination based on gender identity? The answer by the Commission was equally simple and straightforward: yes, it had jurisdiction to hear such a claim because discrimination on the basis of gender identity was simply a form of discrimination based on sex.[110]

In one respect, the Commission's decision in Macy was simply the Commission catching up with federal and state courts that had concluded that the gender stereotyping theory of *Price Waterhouse* included protection for transgender individuals who had been discriminated against on the basis of their transgender status. Thus, the Commission – after reviewing the cases decided by the Ninth, First, and Sixth Circuits,

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[102] *Macy*, supra n.1 at 1-4.
[103] Id.
[104] Id.
[105] Id.
[106] Id.
[107] Id.
[108] Id.
[109] Id.
[110] Id. "This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court's admonition that "an employer may not take gender into account in making an employment decision." *Price Waterhouse*, 490 U.S. at 244."

as well as cases decided by various district courts and state courts – concluded with the following paragraph from the Eleventh Circuit's decision in *Glenn v. Brumby*:

> A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. "[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior." Ilona M. Turner, *Sex Stereotyping Per Se: Transgender Employees and Title VII,* 95 Cal. L. Rev. 561, 563 (2007); *see also* Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality,* 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose "appearance, behavior, or other personal characteristics differ from traditional gender norms"). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.[111]

Thus, one basis for the Commission's decision that discrimination on the basis of transgender status states a claim of sex discrimination relies on *a* sex stereotyping theory. But the Commission's decision makes clear that no proof of gender stereotyping is needed other than the fact that discrimination has occurred *because of* the person's transgender status or intent to transition. As the Eleventh Circuit correctly noted: "A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes."[112]

But the Commission's decision in *Macy* also, I hope, aided clarity by returning to the core principle on which *Price Waterhouse's* gender stereotyping analysis had been based in the first place: that Title VII prohibits employers from taking gender into account, except in the limited case of applying a bona fide occupational qualification. As the Supreme Court made clear in *Price Waterhouse*, statements expressing gender stereotypes are *evidence* that gender has been taken into account in violation of the act. But what violates the law is taking gender into *account*, regardless of the reason for doing so.[113]

Thus, as the Commission made clear in the *Macy* decision, it is possible for a transgender person to make out a claim based on the very simple and direct evidence

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[111] Id. at 9 (*quoting Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011)).
[112] Id.
[113] Id. at 10: "Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court noted, while "stereotyped remarks can certainly be *evidence* that gender played a part" in an adverse employment action, the central question is always whether the "employer actually relied on [the employee's] gender in making its decision." Id. at 251 (emphasis in original) (footnotes omitted).

that an employer has inappropriately taking gender into account in an employment decision:

> Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman-she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.[114]

In other words, the plain meaning of the words of the statute would be applied to determine whether sex had been taken into account in violation of the statute.

This type of analysis is simply a case of applying the sex discrimination provision of Title VII in the same manner as prohibitions of discrimination based on characteristics such as race or religion have always been applied. Indeed, as the Commission observed in *Macy*:

> In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee's parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype- although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer's actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.[115]

In a similar fashion, employers are not permitted to use sex as a basis for employment decisions, except in the application of a bona fide occupational qualification or pursuant to an appropriate affirmative action remedy.

V. Conclusion

My goal in this essay has been to explore how law, policies in practice, and social norms operated in a synergistic manner to affect the interpretation of Title VII's sex discrimination provision.

Following passage of Title VII, first the EEOC – but then more importantly, the courts -- struggled for ways to constrain the plain meaning of the statute so that employers could continue to make decisions based on societal expectations of the role that women and men should play in the family. Various legal mechanisms were used to achieve that

[114] Id.
[115] Id. at 13.

goal, including perpetuation of the myth that adding “sex” to the statute had been done solely to stop passage of the law and that there was little legislative history to apply in interpreting the prohibition on sex discrimination.

Thankfully, changes in society occurred – including the rise of a vigorous feminist movement that pushed for changes in societal expectations and practices. By the time the Supreme Court decided the *Price Waterhouse* case in 1989, the reality that women expected to participate fully in the workforce was so thoroughly accepted in society that no Justice had difficulty accepting that the sex discrimination provision in the law should be read identically to the other provisions of the law. The Supreme Court thus embraced the basic requirement of Title VII’s sex discrimination prohibition: that apart from a limited bona fide occupational qualification exception, employers may not take gender into account in making employment decisions.

The plain meaning of the term “sex” in Title VII has always been powerful. In the Supreme Court’s *Oncale* decision of 1998, Justice Scalia noted the power of statutory text. And now that society has begun to evolve in its understanding and acceptance of gender identity, the plain meaning of sex discrimination which has always been in the law can now be applied to offer transgender people important protection against discrimination.