
“BECAUSE OF SEX”: THE EVOLVING LEGAL RIDDLE OF SEXUAL VS. GENDER IDENTITY*

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INTRODUCTION

The American social revolution associated with passage of Title VII of the Civil Rights Act of 1964¹ prompted an examination of the nature of sex and gender, and the extent to which characteristics of each are protected against discrimination

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1. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000e-1 to -17 (2000)). In 1972, Congress amended this most widely applicable employment discrimination law to cover public and private educational institutions. Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972).

under law. The legal question offers a profound riddle, resolution of which engages fundamental issues of human and civil rights, social and cultural norms, medical assessment, and legislative intent. Although surprisingly little litigation has involved college and university defendants, many campuses serve as the forefront for social activism designed to create new policy boundaries for the protection of gay, lesbian, bisexual, and transgender students and employees.

Section I of this article explores the search for doctrinal coherence in the courts. Necessarily, it examines judicial and scholarly efforts to define key terms such as “sex” and “gender” in federal and/or state non-discrimination laws. When reviewing this discussion of the case law, the reader should keep in mind the medical and sociological definitions of these terms: in sum, “sex” may be defined as an individual’s biological identity, including chromosomal and/or reproductive composition, while “gender” may be defined as an individual’s social identity, as related or unrelated to sex, encompassing culturally traditional masculine and/or feminine characteristics. These and related definitions are discussed in more detail in Subsection I.B. below. Section I also examines how courts have approached the intersection of sexual orientation and gender identity issues and summarizes the various views of courts and advocates as to whether transgender individuals can, or even should, seek protection under disability laws.

Section II of the article identifies legislative trends at the federal, state, and local levels.² It also notes the emerging, and often conflicting, positions of change-advocates who seek to establish legal protection under various rubrics.

The final section of the article discusses the implications of these legal developments for colleges and universities, including non-discrimination policy revisions and their practical implications.

I. THE SEARCH FOR DOCTRINAL COHERENCE

A. Title VII and its Legislative History

As noted by the U.S. Supreme Court, in passing Title VII of the Civil Rights Act of 1964, “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.”³ Although the protected classifications appear

2. For a comparison of European trends, see Betty C. Burke, Note, *No Longer the Ugly Duckling: The European Court of Human Rights Recognizes Transsexual Civil Rights in Goodwin v. United Kingdom and Sets the Tone for Future U.S. Reform*, 64 LA. L. REV. 643 (2004); Leslie I. Lax, *Is the U.S. Falling Behind? The Legal Recognition of Post-Operative Transsexuals’ Acquired Sex in the U.S. and Abroad*, 7 QUINNIPIAC HEALTH L.J. 123 (2003).

3. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989). The operative section provides:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

facially self-explanatory, the meaning of the term “sex” has, in particular, sparked judicial, scholarly, and activist debate of noteworthy intensity.

Uncertainty as to meaning is due in part to the absence of legislative history associated with inclusion of sex as a protected classification. One court derived from such legislative history that Congress was concerned primarily with race discrimination, and that “sex was added to the list of prohibited grounds of discrimination by a congressional opponent at the last moment in the hopes that it would dissuade his colleagues from approving the bill; it did not”; thus, the court concluded, “legislators had very little preconceived notion of what types of sex discrimination they were dealing with when they enacted Title VII.”⁴ This paucity of express evidence of intent has led several courts to attempt to divine the scope of “sex” as used in Title VII by reference to what Congress has since chosen *not* to do: that is, amend Title VII to prohibit discrimination based on sexual orientation.⁵

In this uncertain context, one court observed:

Viewed in the abstract, a prohibition of discrimination based on “sex” is broad and perhaps even undefinable. Arguably, such a prohibition might be read to preclude discrimination based on human psychological and physiological characteristics or on sexual orientation. It might also

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (2000).

4. Doe by Doe v. City of Belleville, 119 F.3d 563, 572 (7th Cir. 1997), *vacated*, 523 U.S. 1001 (1998) (vacated in light of *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)). In support of this proposition, the *Belleville* decision cited *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) and Christopher W. Deering, Comment, *Same-Gender Sexual Harassment: A Need to Re-examine the Legal Underpinnings of Title VII’s Ban on Discrimination “Because Of” Sex*, 27 CUMB. L. REV. 231, 268–69 (1996–97) (citing legislative history, including 110 CONG. REC. 2577–84 (1964), and scholarly sources). In the *Meritor* decision, the Court commented as follows on the lack of pertinent legislative history as to the meaning of “sex” in Title VII:

The prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives. 110 Cong. Rec. 2577–2584 (1964). The principal argument in opposition to the amendment was that “sex discrimination” was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. See *id.*, at 2577 (statement of Rep. Celler quoting letter from United States Department of Labor); *id.*, at 2584 (statement of Rep. Green). This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on “sex.”

Meritor, 477 U.S. at 63–64. See also the discussion in *Price Waterhouse*, 490 U.S. at 243 n.9 (citing C. & B. WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 115–17* (1985)), in which the Court noted the “somewhat bizarre path by which ‘sex’ came to be included as a forbidden criterion for employment” (it being included in an attempt to *defeat* the bill).

5. See, e.g., *Simonton v. Runyon*, 232 F.3d 33, 35–36 (2d Cir. 2000); *Ulane v. E. Airlines*, 742 F.2d 1081, 1085 (7th Cir. 1984); *Etsitty v. Utah Transit Auth.*, No. 2:04CV616 DS, 2005 WL 1505610, at *3 (D. Utah June 24, 2005).

be read to prohibit all workplace sexual behavior or words and deeds having sexual content. . . .

In the context of Title VII's legislative history, however, it is apparent that Congress did not intend such sweeping regulation. The suggestion that Title VII was intended to regulate everything sexual in the workplace would undoubtedly have shocked every member of the 88th Congress, even those most vigorously supporting passage of the Act. Detached from their historical setting, the terms of Title VII's prohibition of discrimination, "because of" an individual's "sex," stand only as "inert language, lifeless words," and, perhaps, even "playthings with which to reconstruct the Act."⁶

From precedent emergent since passage of Title VII, the court ultimately identified a principle on which the American judiciary generally agrees: although inclusion of "sex" as a protected classification was specially intended to ensure equal employment rights for women, its scope encompasses men as well.⁷

Additional developments clarified the contours of the law. In 1986, *Meritor Savings Bank* held that the Title VII prohibition against "discrimination" protects employees against sexual harassment.⁸ Furthermore, in 1998, the U.S. Supreme Court ruled in *Oncale v. Sundowner Offshore Services, Inc.*⁹ (*Oncale*), that Title VII provides a cause of action for same-sex harassment.¹⁰

Although these seemingly conclusive pronouncements were themselves rife with ambiguity, the more vexing jurisprudential question of the modern era involves definition of impermissible "sexual stereotyping," and the extent to which the distinction between "sex" and "gender" is relevant to the resolution of this question. The primary genesis for the debate is attributable to *Price Waterhouse v. Hopkins*¹¹ (*Price Waterhouse*), in which the Court confirmed that, 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."¹² The Court observed that an employer

6. *Hopkins v. Balt. Gas & Elec. Co.*, 77 F.3d 745, 749 (4th Cir.) (quoting *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 379 (1959) (Frankfurter, J.)).

7. *Id.* at 749-50 (citing, e.g., *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983) (finding that insurance plan that provided less extensive pregnancy benefits to married male employees than to married female employees discriminated against males in violation of Title VII)). U.S. Supreme Court confirmation of this principle is found in *Nevada v. Dep't of Human Res.*, 538 U.S. 721 (2003) (holding that the Family and Medical Leave Act aims to protect the right to be free from gender-based discrimination in the workplace and that the FMLA targets mutually-reinforcing stereotypes that only women are responsible for family caregiving and that men lack domestic responsibilities).

8. *Meritor*, 477 U.S. 57.

9. 523 U.S. 75 (1998).

10. *Id.* at 82.

11. 490 U.S. 228 (1989).

12. *Id.* at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, amended Title VII, among other points superseding *Price Waterhouse* with respect to issues of proof and liability in "mixed motive" cases. An unlawful employment practice is now established when the

who objects to aggressiveness in women—but whose positions require this trait—places women in an “intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”¹³

The *Price Waterhouse* Court’s alternating use of the terms “sex” and “gender,” and its featuring of the term of art “sexual stereotyping,” precipitated new and vexing debates that are the focus of this article. The debaters variously cite further divination of Congressional intent, medical authorities, and, in some instances, samples from an eclectic literature. This controversy is well-represented by the following observation by the Fourth Circuit:

Because Congress intended that the term “sex” in Title VII mean simply “man” or “woman,” there 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 “sex” and “gender” interchangeably to refer simply to the fact that an employee is male or female. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 239–41, 109 S.Ct. 1775, 1784–86, 104 L.Ed.2d 268 (1989) (using “gender” and “sex” interchangeably). Indeed, the use of “sex” and “gender” interchangeably may impose a useful limit on the term “sex,” which otherwise might be interpreted to include sexual behavior. Some academic writers, however, seek to maintain or to heighten a distinction between the terms “sex” and “gender,” asserting that “gender” connotes cultural or attitudinal characteristics distinctive to the sexes, as opposed to their physical characteristics. *See, e.g., 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 (1995) (“gender [is] to sex what masculine and feminine are to male and female”). *See also JEB v. Alabama*, [511] U.S. [127], [129] n. 1, 114 S.Ct. 1419, 1436 n. 1, 128 L.Ed.2d 89 (1994) (Scalia, J., dissenting). While it may be useful to disaggregate the definition of “gender” from “sex” for some purposes, in this opinion we make no such effort, using the terms interchangeably to refer to whether an employee is a man or a woman.¹⁴

The distinctions some courts were initially unwilling to make proved to be more than academic exercises. In fact, the ensuing debate has required resolution of whether sexual orientation falls within the ambit of protection against sex discrimination—with most courts concluding it does not. It has also required study of the scope of the “stereotyping” prohibition and whether, at its boundaries,

complaining party demonstrates that the protected characteristic (e.g., sex) was a motivating factor for any employment practice, even though other factors may have motivated it as well. Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-2(m) (2000). *See, e.g., Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1306 n.9 (N.D. Cal. 1992).

13. *Meritor*, 490 U.S. at 251.

14. *Hopkins*, 77 F.3d at 749 n.1. *See also Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1084 (7th Cir. 2000) (“Congress intended the term ‘sex’ to mean ‘biological male or biological female,’ and not one’s sexuality or sexual orientation.”).

transgender persons are entitled to Title VII protection as a class or because of their individualized manifestation of nonconforming characteristics and behavior.

B. The Literature of Scholars and Activists

In contrast to the approach of many courts, scholars and activists (and activist-scholars) typically find significant distinction in meaning between “sex” and “gender,” and many maintain that Title VII and state fair employment practice acts (FEPAs) should be interpreted to cover discrimination on the basis of sexual orientation and gender identity and expression, including discrimination against transgender persons.¹⁵

Definitions of the various terms abound. One commentator offers the following:

[S]ex refers to biological sex. Though the categories involved are complicated by the existence of transgender and intersex individuals, sex generally refers to chromosomal and/or reproductive system composition. Gender refers to one’s social identity as related (or not related) to one’s sex, specifically, masculine or feminine. . . . Sexual orientation refers to sexual attraction to members of one or both biological sexes.¹⁶

Apart from state fair employment law amendments that differentiate between these categories, Title VII remains “cast in terms of sex discrimination.”¹⁷ Moreover, although some scholars question whether the “traditional binary categories of male and female sex”¹⁸ reflect reality—instead arguing that

15. See, e.g., Courtney Weiner, *Sex Education: Recognizing Anti-Gay Harassment Under Title VII and Title IX*, 37 COLUM. HUM. RTS. L. REV. 189, 194 (2005) (arguing, based on sexual harassment theory and social science research, that sex, gender, and sexual orientation are inextricably linked in reality and should be similarly linked in the law). See also Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 495–96 (2001) (“Although the scholars draw connections between gender and sex to argue that gender discrimination should already be protected under Title VII, a few also argue that there should be a concomitant analytical distinction between sex and gender. In other words, for the purposes of including protection against gender discrimination under Title VII, there should be an aggregation of sex and gender, but at the same time, there should be a disaggregation of sex and gender as distinct concepts and categories. There is an inherent tension in this framework, and this tension is further complicated when gender identity is added to the mix.”); John M. Ohle, *Constructing the Trannie*, 8 J. GENDER RACE & JUST. 237, 243–44 (2004) (“Courts have continually used sex and gender in an interchangeable way: sex is gender, and gender is sex. Wrong. Interchanging these definitions poses many problems for individuals who have worked in theorizing these terms for years and years. There is, of course, no universal definition for sex or gender, at least none that a majority of academics agree upon.”) (footnotes omitted).

16. Weiner, *supra* note 15, at 191–92.

17. *Id.* at 192.

18. Carolyn E. Coffey, *Battling Gender Orthodoxy: Prohibiting Discrimination on the Basis of Gender Identity and Expression in the Courts and the Legislatures*, 7 N.Y. CITY L. REV. 161, 167–68 (2004) (citing Richard F. Storrow, *Naming the Grotesque Body in the “Nascent Jurisprudence of Transsexualism,”* 4 MICH. J. GENDER & L. 275 (1996–97)); see also Dylan Vade, *Expanding Gender and Expanding the Law: Toward a Social and Legal Conceptualization*

differentiations should be seen as a “continuum,” “with no exclusive male and female categories and without regard to genitalia”¹⁹—“lawmaking is generally geared toward categorical explanations and classifications.”²⁰

With this categorical predisposition of legislators, and the courts that must construe their laws, in mind, this article will assume the following definitions:

Sex: an individual’s biological identity, including chromosomal and/or reproductive composition.²¹

Gender: An individual’s social identity, as related or unrelated to sex, encompassing culturally traditional masculine and/or feminine characteristics or traits.²² Gender identity may include “a person’s identity, appearance, or behavior, whether or not that identity, appearance, or behavior is different from that traditionally associated with a person’s gender assigned at birth.”²³

Transgender: An umbrella term encompassing anyone whose gender identity or behavior falls outside of stereotypical gender norms or societal conventions regarding appearance or conduct associated with his or her sex at time of birth, including transsexuals and persons suffering from gender dysphoria.²⁴

of Gender that is More Inclusive of Transgender People, 11 MICH. J. GENDER & L. 253 (2004–05). Vade observes, “Often, when we get past the binary gender system, the notion that there are only two genders, female and male, we do so by seeing gender as a spectrum or line running from female to male.” *Id.* at 261. More poetically, Vade also observes that “[t]he separation of gender from sex is a separation of expression from biology, of culture from nature, of emotion from reason, and of subjectivity from objectivity. These are false distinctions, and they are not helpful if we are looking for a world that protects and celebrates difference.” *Id.* at 279.

19. Coffey, *supra* note 18, at 170 (citing Terry S. Kogan, *Transsexuals and Critical Gender Theory: The Possibility of a Restroom Labeled “Other,”* 48 HASTINGS L.J. 1223, 1238 (1996–97)).

20. *Id.* at 170–71.

21. See Weiner, *supra* note 15, at 191–92. Among the “biological criteria” generally associated with sex are “genetics/chromosomes, gonads, internal reproductive morphology, external reproductive morphology, hormones, and phenology/secondary sex features.” Vade, *supra* note 18, at 280 (quoting Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278 (1999)).

22. See Vade, *supra* note 18, at 280–87.

23. *Id.* at 312. Vade states that the definition arose out of discussions with the National Center for Lesbian Rights and Transgender Law and Policy Institute. *Id.* at 312 n.246. Also noteworthy is the distinction between gender identity as an “internal experience,” also described as “a person’s internal, deeply felt sense of being either male or female,” and gender expression, which is an “external experience,” or “society’s perception of ‘the external characteristics and behaviors that are socially defined as either masculine or feminine.’” The latter includes how one dresses, speaks, or interacts socially. Samantha J. Levy, *Trans-Forming Notions of Equal Protection: The Gender Identity Class*, 12 TEMP. POL. & CIV. RTS. L. REV. 141, 143–44 (2002) (quoting PAISLEY CURRAH & SHANNON MINTER, *TRANSGENDER EQUALITY: A HANDBOOK FOR ACTIVISTS AND POLICYMAKERS* (2000)).

24. See Andrea Gehman & Veronica D. Gray, *Sexuality and Transgender Issues in Employment*, 6 GEO. J. GENDER & L. 575, 577 (2005) (citing Levy, *supra* note 23, at 144); Phyllis R. Frye & Katrina C. Rose, *Responsible Representation of Your First Transgendered Client*, 66 TEX. B.J. 558, 558–59 (July 2003). It should be noted that transgender persons have the same diversity of sexual orientations as other persons, i.e., from the standpoint that their gender identity may be heterosexual, homosexual, or bisexual. See Vade, *supra* note 18, at 270 (“Gender identity is who one is. Sexual orientation is to whom one is attracted.”). One author

Transsexual: One who desires “to change one’s anatomic characteristics to conform physically with one’s perception of sex as a member of the opposite sex.”²⁵

Intersex: Persons born with mutated, incomplete, or dual genitals; with chromosomal patterns other than XX or XY; or whose gender identity development was affected in some manner by pre-natal hormonal imbalances.²⁶

Despite the fact that it used the terms sex and gender interchangeably, *Price Waterhouse* expanded the interpretation of Title VII language to encompass not only the status of an employee based on his or her sex, but discrimination based on notions of traits and characteristics stereotypically attributed to one sex or the other. To this extent, it established that “enforcing a specific sex-gender match may be discrimination.”²⁷ As the next section will demonstrate, however, according to most courts the decision did not further extend the protections of the

states that an increasing number of gay men and lesbians are identifying themselves as transgender “whether because of a nonconforming gender presentation or in recognition of the fact that we violate gender norms simply by virtue of our same-sex orientation, since homo- and bisexuality confound the male-female dyad in which women traditionally have been subordinated to men.” 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. 392–93 & n.3 (2001) (citing Jamison Green, *Introduction to CURRAH & MINTER*, *supra* note 23, at 5).

25. STEDMAN’S MEDICAL DICTIONARY 1841 (26th ed. 1995). As a medical proposition, transsexualism is classified as a psychiatric disorder known as “gender identity disorder,” or “gender dysphoria.” AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS IV (1994) (DSM). Diagnosis of gender identity disorder is based on four criteria: (1) evidence of a strong and persistent cross-gender identification; (2) exhibition of persistent discomfort with his/her assigned sex; (3) the individual must not be intersexed; and (4) the individual must suffer significant distress or impairment in functioning in society. Lax, *supra* note 2, at 124–25. A diagnosis may be confirmed when gender dysphoria exists for at least two years and the feelings of having the wrong sexual identity at birth are alleviated by “cross-gender identification.” Coffey, *supra* note 18, at 163. Although gender identity disorder is considered to be a psychiatric disorder, the treatment for the condition typically includes one or more of the following components: (1) hormone therapy; (2) living as a member of the other sex (known as the “real life experience”); (3) sex-reassignment surgeries; and (4) “psychotherapeutic treatments” such as voice therapy and electrolysis. *Id.* at 163. See also SHANNON MINTER, REPRESENTING TRANSSEXUAL CLIENTS: SELECTED LEGAL ISSUES (2004), <http://www.nclrights.org/publications/pubs/tgclients.pdf> (citing HARRY BENJAMIN INT’L GENDER DYSPHORIA ASS’N, STANDARDS OF CARE FOR THE DIAGNOSIS AND TREATMENT OF GENDER IDENTITY DISORDERS (6th ed. 2001), available at <http://www.hbigda.org/Documents2/socv6.pdf>). One court noted that the terms “transsexual” and “transsexualism” are “comparatively new” as they were first coined in European medical literature in the early- and mid-twentieth century, and gained recognition in the United States following publication of THE TRANSSEXUAL PHENOMENON by Dr. Benjamin in 1964. It further noted that the DSM did not include the disorder until 1980, although medical researchers have documented its existence “dating to antiquity.” *Rush v. Johnson*, 565 F.Supp. 856, 863 (N.D. Ga. 1983).

26. See Frye & Rose, *supra* note 24, at 558–59 (citing inter alia website of the Intersex Society of North America, <http://isna.org>). Frye and Rose note that the term “hermaphrodite,” while still in use, is disfavored. *Id.* at 559. They also address cross-dressers and transvestites, stating that “[a]lthough some assert that there are differences between the two, these terms both refer to persons whose gender variance is expressed on a part-time basis, though ‘transvestite’ is now the less favored term.” *Id.*

27. Weiner, *supra* note 15, at 204.

law to gay, lesbian, and transgender persons by virtue of their status, despite the fact that the discrimination they experience is also “grounded in normative gender rules and roles.”²⁸ As one writer notes:

From a gender-equality perspective, traditional marriage and the patriarchal family, whatever their merits might be, also undeniably function to maintain sex-gender differentiation and inequality. Thus, conservative claims that address same-sex sexuality in terms of the danger it poses to the family also necessarily address gender issues. Those critiques that address sexual behavior adhere to the premise that men must only be sexual with women, and women must be sexual only with men (preferably within monogamous marriage)—a part of the gender role assigned to men and women in our society. Thus, the entire spectrum of gender roles is implicated within the most common conservative arguments against “homosexuality.”²⁹

Similarly, another commentator states:

like transsexuals, homosexuals can be seen as extreme gender nonconformers: they do not conform to the stereotype that men ought to desire women sexually or that women ought to desire men sexually. Homosexuality and transsexuality subvert norms and expectations about how women and men should live their lives as sexual beings.³⁰

Because the discrimination facing individuals whom Title VII does not encompass is, to many observers, “rooted in the same stereotypes that have fueled unequal treatment of women, lesbian, gay, bisexual people and people with disabilities—i.e., stereotypes about how men and women are ‘supposed’ to behave and about how male and female bodies are ‘supposed’ to appear,”³¹ it may seem most logical to seek protection under existing laws, rather than through legislation that separately addresses their various circumstances. Due to the generally unfavorable outcomes resulting from litigation under Title VII and FEPAs, however, there is a discernable trend toward legislative initiatives—particularly at the local level—as discussed in Section III of this article.

There is not consensus within the various social and political communities seeking protection against discrimination about the extent to which their movements should merge or whether litigation testing the boundaries of existing legislation provides the best approach. As one commentator offers:

28. Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 *LAW & SEXUALITY: A REV. OF LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES* 605, 612 (2004) (quoting Katherine M. Franke, *The Central Mistake of Employment Discrimination Law: The Disaggregation of Sex from Gender*, 144 *U. PA. L. REV.* 1, 2 (1995)).

29. *Id.* at 631–32.

30. Melinda Chow, *Smith v. City of Salem: Transgendered Jurisprudence and an Expanding Menu of Sex Discrimination Under Title VII*, 28 *HARV. J.L. & GENDER* 207, 215 (2005).

31. Abby Lloyd, *Defining the Human: Are Transgender People Strangers to the Law?*, 20 *BERKELEY J. GENDER L. & JUST.* 150, 153 n.5 (2005) (quoting Paisley Currah & Shannon Minter, *Unprincipled Exclusions: The Struggle to Achieve Judicial and Legislative Equality for Transgender People*, 7 *WM. & MARY J. WOMEN & L.* 37, 38–39 (2000)).

It was not until recently that transgender and gender variant individuals came to be included in the “gay” movement, now known as the GLB(T) movement. . . . After a while, many gay men and lesbians decided that working together would be more effective than the separatist and failed identity-based movements of the past. Eventually, gay men and lesbians decided to add bisexual folks in their liberation movement, creating the GLB affiliation. The lesbians then, upset with the order of letters in the acronym, rearranged the letters, creating LGB. Transgender was added much later, creating LGBT; however, this move is still not universally accepted by some members of the movement. For example, it was not until 2001 (after years of open criticism) that one of the major gay rights organizations, The Human Rights Campaign (hereinafter HRC), finally added transgender people to its mission statement. It is not surprising that HRC still refuses to include gender identity in the proposed Employment Non-Discrimination Act (ENDA) (which Congress has yet to pass).³²

In addition to resistance to the merging of distinctive categories of persons, some activists intensely oppose what has been called the “medicalization” of gender identity³³ and, on a related note, attempts of transgender persons to seek refuge under the aegis of disability discrimination laws.³⁴ One scholar determined that where medical assessment established a diagnosis of gender dysphoria, courts were more willing to resolve litigation in favor of transgender plaintiffs, thus theorizing that “surgery to align one’s psychological and physical sexes may be acceptable in light of courts’ tendency to favor congruence.”³⁵

The next section of this article reviews the case law that emerged following *Price Waterhouse* under Title VII and FEPAs involving gender identity and expression. After that summary, the article provides an overview of related legislative initiatives at the federal, state, and local levels.

C. The Case Law

1. Title VII

a. Sexual Orientation

As noted earlier, the overwhelming weight of authority holds that Title VII does not provide protection against discrimination on the basis of sexual orientation, a conclusion typically justified by congressional rejection of attempts to amend Title VII to provide such coverage. Courts nonetheless wrestle with the difficulty of

32. Ohle, *supra* note 15, at 240–42 (footnotes omitted).

33. See, e.g., Vade, *supra* note 18, at 287 (“[T]he sex-gender distinction sets up the doctor-assigned gender as truth, and the transgender person’s self-identified gender as something solely in that person’s head.”).

34. Disability laws and transgender issues are discussed *infra* Section I.C.3.

35. Coffey, *supra* note 18, at 167 (citing Storrow, *supra* note 18, at 284).

distinguishing sexual orientation discrimination claims from assertions of sexual stereotyping, the latter of which may give rise to Title VII protection under *Price Waterhouse*.

In *Dawson v. Bumble & Bumble*,³⁶ the Second Circuit concluded that a lesbian former employee failed to establish a “sexual stereotyping claim” under Title VII, reasoning that, while failure to conform to gender stereotypes can be manifested through behavior and/or appearance, the plaintiff had not alleged behavioral non-conformance and the record lacked substantial evidence that she was subjected to adverse employment consequences due to her appearance.³⁷ Although the court conceded that “[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality,”³⁸ it warned that gender stereotyping should not be used “to bootstrap protection for sexual orientation into Title VII.”³⁹ The court recognized, however, that individual employees who face adverse employment actions as a result of an employer’s animus toward their exhibition of behavior considered stereotypically inappropriate for their gender may have a claim under Title VII.⁴⁰

Similarly, in *Bibby v. Philadelphia Coca Cola Bottling Co.*,⁴¹ the Third Circuit held that a plaintiff may have a same-sex discrimination claim by showing that the defendant was retaliating against or penalizing the plaintiff for not complying with gender stereotypes, but that Title VII does not prohibit discrimination based on sexual orientation, reasoning that Congress has “repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.”⁴² The court explained that, following *Oncale*, it is established that Title VII provides a cause of action for same-sex sexual harassment and that, while the question of how to prove that same-sex harassment is “because of sex” is not an easy one to answer, circumstances include: (1) where there is evidence that the harasser sexually desires the victim; (2) where the harasser displays hostility to the presence of a particular sex in the workplace; and/or (3) where there is evidence that the harasser’s conduct was motivated by a belief that the victim did not conform to stereotypes because of his or her gender.⁴³ Once it has been shown that the harassment was motivated by the victim’s sex, the court stated, it is no defense that

36. 398 F.3d 211 (2d Cir. 2005).

37. *Id.* at 221–22.

38. *Id.* at 218 (quoting *Howell v. N. Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)).

39. *Id.* at 218 (quoting *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000)). The Second Circuit has more than once cautioned plaintiffs and their counsel against attempts to “bootstrap” into the holding of *Price Waterhouse* protection against discrimination on the basis of sexual orientation. In addition to the *Dawson* decision, see *Trigg v. New York City Transit Authority*, 50 Fed. App’x 458 (2d Cir. 2002), *aff’g* No. 99-CV-4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001). Concluding that sexual orientation and not gender stereotyping was the “sine qua non” of the grievance, the district court referenced *Simonton*’s admonition against “bootstrapping.” *Trigg*, 2001 WL 868336, at *5.

40. *Dawson*, 398 F.3d at 218 (citing the landmark decision in *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2000) (discussed *infra*)).

41. 260 F.3d 257, 261 (3d Cir. 2001).

42. *Id.* at 261.

43. *Id.* at 261–63.

the harassment may also have been motivated by anti-gay or anti-lesbian animus.⁴⁴ The court concluded that “[h]arassment 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.”⁴⁵

The Seventh Circuit reviewed this confluence of issues in *Spearman v. Ford Motor Co.*⁴⁶ The court held that Congress intended the term “sex” as used in Title VII to mean “biological male or biological female,” and not one’s sexuality or sexual orientation.⁴⁷ The court therefore found that harassment based solely upon a person’s sexual orientation, and not on one’s sex, is not an unlawful employment practice under Title VII, stating:

[W]hile sex stereotyping may constitute evidence of sex discrimination, “[r]emarks at work that are based on sex-stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on [the plaintiff’s] gender in making its decision.” Therefore, according to *Oncale* and *Price Waterhouse*, we must consider any sexually explicit language or stereotypical statements within the context of all of the evidence of harassment in the case, and then determine whether the evidence as a whole creates a reasonable inference that the plaintiff was discriminated against because of his sex.⁴⁸

The court ultimately determined that the record showed that the plaintiff’s co-workers maligned him because of his apparent homosexuality, and not because of his sex.⁴⁹

In *Equal Employment Opportunity Commission v. Grief Brothers Corp.*,⁵⁰ the court observed that the Second Circuit has joined other circuits in holding that Title VII does not prohibit discrimination on the basis of sexual orientation, but ruled that the instant record contained sufficient evidence from which a jury could find that harassment occurred not because the plaintiff is homosexual, but because of his sex, male.⁵¹ In so ruling, the court rejected arguments that *Oncale*, which identified three avenues of proof for same-sex harassment claims, had established the only theories under which same-sex harassment claims may be brought.⁵² The court also cited cases from the First, Third, Sixth, Seventh, and Ninth Circuits recognizing that nonconformance with gender stereotypes is a viable theory of sex

44. *Id.* at 265.

45. *Id.* *Bibby* is discussed at length in *Allen v. Mineral Fiber Specialists, Inc.*, No. Civ. A.02-7213, 2004 WL 231293 (E.D. Pa. Jan. 30, 2004) (stating that there was no evidence or argument that co-workers thought that the plaintiff did not subscribe to particular male stereotype).

46. 231 F.3d 1080 (7th Cir. 2000).

47. *Id.* at 1084.

48. *Id.* at 1085 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 (1989)).

49. *Id.*

50. No. 02-CV-468S, 2004 WL 2202641 (W.D.N.Y. Sept. 30, 2004).

51. *Id.* at *14.

52. *Id.* at *12.

discrimination, either same-sex or between sexes, under Title VII.⁵³

Along similar lines, the court in *Centola v. Potter*⁵⁴ denied summary judgment on the basis of evidence that the plaintiff's co-workers had punished him because they perceived him to be "impermissibly feminine" for a man.⁵⁵ Noting that while the law is "relatively" clear that discrimination on the basis of sexual orientation is not barred under Title VII—as long as persons discriminating are not also doing so on the basis of a protected characteristic, such as sex or race—the line between sexual orientation and sex discrimination is "hardly clear. Sex stereotyping is central to all discrimination: Discrimination involves generalizing from the characteristics of a group to those of an individual, making assumptions because of that person's gender, assumptions that may or may not be true."⁵⁶

Centola further explained that, if the plaintiff can meet his burden relative to sexual stereotyping, the presence of a "mixed motive"—including sexual orientation discrimination—has no legal significance under Title VII.⁵⁷ The court deemed this rule of special importance in cases such as the one at bar, precisely because of the difficulty of differentiating behavior that is prohibited (discrimination on the basis of sex) from behavior that is not prohibited (discrimination on the basis of sexual orientation). The court stated:

[S]exual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, "real men don't date men." The gender stereotype at work here is that "real" men should date women, and not other men. Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do.

In this case, however, I need not go so far. *Centola* never disclosed his sexual orientation to anyone at work. His co-workers made certain assumptions about him, assumptions informed by gender stereotypes.

53. *Id.* at *13. The cited decisions are *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2000) (discussed *infra*); *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998); and *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864 (9th Cir. 2001).

54. 183 F. Supp. 2d 403 (D. Mass. 2002).

55. *Id.* at 410.

56. *Id.* at 408–09.

57. *Id.* at 410.

For example, they placed a picture of Richard Simmons “in pink hot pants” in Centola’s work area. Without placing too fine a point on it, Richard Simmons “in pink hot pants” is hardly what most people in our society would consider to be a masculine icon. Certainly, a reasonable jury could interpret this picture, unaccompanied by any text, as evidence that Centola’s co-workers harassed him because Centola did not conform with their ideas about what “real” men should look or act like. Just as Ann Hopkins was vilified for not being “feminine” enough, Centola was vilified for not being more “manly.”⁵⁸

The judge’s observations in *Centola* illustrate that the line between non-cognizable sexual orientation-based claims and cognizable gender-stereotype based claims, to which we will next turn, is thin indeed.

b. Gender Stereotyping

Although the cases discussed in the various subsections of Section I.C.1 of this article necessarily overlap, several decisions specially focus on *Price Waterhouse* themes. In *Doe by Doe v. City of Belleville*,⁵⁹ the court held that evidence

58. *Id.* (footnote omitted). See also *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003) (stating that sexual stereotyping claim is cognizable under Title VII, but plaintiff failed to make sufficient showing that he was harassed because of his sex; distinguishing between failure to adhere to sex stereotypes and discrimination based on sexual orientation may be difficult, especially when a perception of homosexuality may result from an impression of nonconformance with sexual stereotypes); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (en banc) (holding that Title VII prohibits sexual harassment without regard to the sexual orientation—real or perceived—of the victim, thus protecting openly gay male against physical conduct of sexual nature by male co-workers; concurring opinion also classifies the case as one of actionable gender stereotyping harassing); *Schmedding v. Tnemec Co.*, 187 F.3d 862, 865 (8th Cir. 1999) (holding that despite use of phrase “perceived sexual preference,” complaint stated a claim for sexual harassment under Title VII based on a hostile work environment; fact that some of the harassment alleged included taunts of being a homosexual did not transform the complaint from one alleging harassment based on sex to one alleging harassment based on sexual orientation); *Fischer v. City of Portland*, No. CV 02-1728, 2004 WL 2203276 (D. Or. Sept. 27, 2004) (holding that sexual orientation discrimination is not protected under Title VII, but same sex harassment is; similarly, gender stereotyping, whether by the same or opposite sex, is actionable under Title VII); *Broadus v. State Farm Ins.*, No. 98-4254CVCSOWECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (stating that “sexual stereotyping which plays a role in an employment decision is actionable under Title VII”; it is nonetheless unclear whether a transsexual is protected from sex discrimination and sexual harassment under the statute, and Title VII protection does not extend to discrimination on basis of sexual orientation or sexual preference); *Carrasco v. Lenox Hill Hosp.*, No. 99Civ. 927(AGS), 2000 WL 520640 (S.D.N.Y. Apr. 28, 2000), *aff’d*, 4 Fed. App’x 29 (2d Cir. 2001) (stating that discrimination based on sexual orientation as opposed to sex or gender are beyond the purview of Title VII; however, the statute does not bar discrimination claims “because of sex” merely because plaintiff and the person charged with acting on behalf of the employer are of the same sex).

59. 119 F.3d 563 (7th Cir. 1997), *vacated and remanded*, 523 U.S. 1001 (1998). The rationale for the remand of *Belleville* was questioned in *Bibby*, 260 F.3d at 263 n.5 (“Absent an explicit statement from the Supreme Court that it is turning its back on *Price Waterhouse*, there is no reason to believe that the remand in *City of Belleville* was intended to call its gender stereotypes holding into question.”). *Accord* *Equal Employment Opportunity Commission v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *13 n.8 (W.D.N.Y. Sept. 30, 2004)

construed in the plaintiffs' favor permitted an inference that they were harassed because of their sex, citing among other facts that one plaintiff wore an earring, and that a co-worker had repeatedly inquired of a plaintiff whether he was a boy or a girl.⁶⁰ The court explained:

[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. . . . Just as in *Price Waterhouse* . . . gender stereotyping establishes the link to the plaintiff's sex that Title VII requires. The contexts of the two cases are admittedly different, but the differences are immaterial. The question in both cases is whether a particular action (in *Price Waterhouse*, the exclusion from partnership, here, the harassment by co-workers) can be attributed to sex; reliance upon stereotypical notions about how men and women should appear and behave (in *Price Waterhouse*, by the partners, here, by H. Doe's tormentors) reasonably suggests that the answer to that question is yes. . . . (Of course, this is ultimately for the factfinder to resolve; we are merely considering what inferences one may reasonably draw from the evidence before us).⁶¹

In so ruling, the court rejected as "simply wrong" the defendant's contention that *Price Waterhouse* was inapposite because "[t]he type of stereotyping actionable under *Price Waterhouse* is that of traditionally perceived personality traits, not personal appearance or physical traits."⁶² Instead, the court stated, *Price Waterhouse* itself recognizes that "gender discrimination may manifest itself in the employer's stereotypical notions as to how an employee of a given gender should dress and present herself."⁶³

The *Belleville* court also rejected as erroneous any inference that the defendant drew from an earlier Seventh Circuit decision⁶⁴ that harassment stemming from the employee's failure to meet the stereotypical expectations of his gender is not discrimination "against a man because he is a man,"⁶⁵ reasoning that *Price Waterhouse* foreclosed that conclusion. Reviewing *Price Waterhouse*, the court stated:

Recall that the remarks at issue there did not suggest that the employer believed women as a class were inappropriate candidates for partnership. Rather, they reflected an insistence that female employees

(concluding that gender stereotypes holding of *Belleville* was not disturbed).

60. *Belleville*, 119 F.3d at 566–67.

61. *Id.* at 581–82.

62. *Id.* (quoting from Brief of Defendant at 8).

63. *Id.* at 582. The court in fact noted that, ten years in advance of *Price Waterhouse*, it had recognized that "workplace dress codes founded on cultural stereotypes are not permissible under Title VII." *Id.* (citing *Carroll v. Talman Fed. Sav. & Loan Ass'n of Chi.*, 604 F.2d 1028 (7th Cir. 1979) (invalidating rule requiring female but not male employees to wear bank-approved uniforms)).

64. *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984).

65. *Belleville*, 119 F.3d at 592.

conform to traditional views of how women should appear and behave. This is precisely the type of biased thinking to which H. Doe attributes his adverse treatment as Belleville's employee. See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 Mich. L. Rev. 2479, 2516 (1994) (noting that the harassment of men who do not fit neatly within the male stereotype has much in common with the sexual harassment of women).⁶⁶

Finally, relative to mixed-motive issues, the court noted that the possibility that the harassment may have been motivated by more than one type of animus made the case no different from other mixed-motive cases in which an employer may have treated a plaintiff adversely for various reasons, some proscribed by law and some not: the fact that one motive is permissible does not exonerate an employer from liability under Title VII, if a prohibited motive played a role in the employer's action.⁶⁷

The court in *Sturchio v. Ridge*⁶⁸ found that the evidence failed to support a Title VII sexual harassment claim made by a U.S. Border Patrol employee who asserted that she was subjected to a hostile workplace environment initially because she had a feminine appearance, and subsequently because she had changed her gender.⁶⁹ In so ruling, the court held that Title VII does not apply to grooming and dress standards *unless* they impose unequal burdens on one sex;⁷⁰ thus, the employer's prohibition against wearing dresses due to the nature of the job (including safety issues it presented) did not place a greater burden on one sex than another.⁷¹ The court also failed to find actionable defendant's requirement that, after the plaintiff had made her transition, plaintiff use the men's restroom where unisex restrooms were not available, stating:

The Court is unaware of any requirement imposed on an employer to permit a person in Plaintiff's situation to use the women's restroom. Perhaps, in the future, the law may impose on an employer an obligation to comply with medical directions for an employee who is going through a gender change. However, at this time, there is no such obligation. Moreover, the management had no notice of the protocol in the period in question, and the direction to use the men's restroom in other locations was not discriminatory.⁷²

In *Kastl v. Maricopa Community College*⁷³ (*Kastl*), the court ruled that an allegation that the employer violated Title VII by requiring a biological female believed to possess stereotypically male traits to provide proof of genitalia or face

66. *Id.*

67. *Id.* at 594.

68. No. CV-03-0025-RHW, 2005 WL 1502899 (E.D. Wash. June 23, 2005).

69. *Id.*

70. *Id.* at *16.

71. *Id.*

72. *Id.*

73. No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 30, 2004).

consignment to men's restrooms stated a claim.⁷⁴ Assuming all of the plaintiff's allegations to be true for purposes of deciding the defendant's motion to dismiss, the court reasoned as follows:

"We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group," whether that stereotype relates to an individual's behavior, appearance, or anatomical features. The presence or absence of anatomy typically associated with a particular sex cannot itself form the basis of a legitimate employment decision unless the possession of that anatomy (as distinct from the person's sex) is a bona fide occupational qualification (BFOQ). Therefore, neither a woman with male genitalia nor a man with stereotypically female anatomy, such as breasts, may be deprived of a benefit or privilege of employment by reason of that nonconforming trait. Application of this rule may not be avoided merely because restroom availability is the benefit at issue.⁷⁵

The court also stated that "to create restrooms for each sex but to require a woman to use the men's restroom if she fails to conform to the employer's expectations regarding a woman's behavior or anatomy, or to require her to prove her conformity with those expectations, violates Title VII."⁷⁶ Thus, the court concluded that the plaintiff had alleged a set of facts sufficient to create an issue for trial.⁷⁷

The case of *Oiler v. Winn-Dixie Louisiana*,⁷⁸ involved an individual discharged because he publicly cross-dressed and impersonated a person of the opposite sex. The plaintiff sought to establish a cause of action under *Price Waterhouse*, arguing that his termination was due to his failure to conform to gender stereotypes, and not his gender identity disorder.⁷⁹ The court concluded, however, that the facts did not present a situation where a plaintiff failed to conform to gender stereotypes; rather, "the plaintiff disguised himself as a person of a different sex and presented himself as a female for stress relief and to express his gender identity."⁸⁰ The court distinguished *Price Waterhouse* by reasoning that while Ann Hopkins may not have behaved as partners thought a woman should, she never pretended to be a man or adopted a male persona. The court felt that the case before it, by contrast, was "not just a matter of an employee of one sex exhibiting characteristics associated with the opposite sex. This is a matter of one person assuming the role

74. *Id.* at *3.

75. *Id.* at *2-3 (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251(1989)) (footnote omitted).

76. *Id.* at *3.

77. Furthermore, the court stated that defendant's argument—that segregating restroom use by genitalia is permissible because doing so cannot be sex discrimination—simply created a factual dispute regarding the nature of its restroom policy. The question of whether the policy is segregation of use by "sex" or genitalia was not for the court to decide at the motion to dismiss stage. *Id.*

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

79. *Id.* at *4.

80. *Id.* at *5.

of a person of the opposite sex.”⁸¹ The court went on to state its agreement with *Ulane* and its progeny to the effect that Title VII prohibits discrimination on the basis of biological sex and, while that includes sex stereotypes, it does not, in the court’s view, include sexual identity or gender identity disorders.⁸²

c. Transgender Discrimination

i. Cases Recognizing Title VII Protection

The landmark case in this evolving area of the law is *Smith v. City of Salem*.⁸³ The dispute involved allegations by a fire department employee, who was born male and subsequently diagnosed with gender identity disorder, that discrimination had occurred based on gender non-conforming behavior and appearance, which the defendant felt was inappropriate for a male.⁸⁴

The *Smith* court preliminarily stated that, to establish a *prima facie* case of employment discrimination pursuant to Title VII, the plaintiff must show (1) membership in a protected class; (2) adverse employment action; (3) qualification for the position in question; and (4) different treatment from similarly situated individuals outside of the protected class.⁸⁵

As to the first element, the court ruled that Smith was a member of a protected class: the complaint asserted that he was a male with gender identity disorder, and Title VII’s prohibition of discrimination “because of sex” protected men as well as women.⁸⁶

Regarding the “because of sex” issue, the court determined that the plaintiff adequately stated a claim for sex stereotyping under *Price Waterhouse*, rejecting

81. *Id.* at *6.

82. *Id.* See also *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 at 261 n.4 (1st Cir. 1999) (suggesting in dicta that a male plaintiff can ground Title VII claims on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 WL 2202641, at *13–15 (W.D.N.Y. Sept. 30, 2004) (discussing gender stereotype issues); *Martin v. N.Y. State Dep’t of Corr. Servs.*, 115 F. Supp. 2d 307, 313 (N.D.N.Y. 2000) (synthesizing Second Circuit cases to hold that, to prevail on a claim against a union for breach of duty of fair representation based on gender, the plaintiff must show that he was subjected to disadvantageous terms or conditions of representation to which the female staff had not been exposed; the mere statement that he was subjected to discriminatory conduct and that he believes such conduct was motivated by his failure to meet gender stereotypes is insufficient to meet burden of proof for a claim of gender discrimination); *EEOC v. Trugreen Ltd. P’ship.*, 122 F. Supp. 2d 986 (W.D. Wis. 1999) (determining when harassment is “because of” the victim’s gender). *Cf. Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (noting that while Equal Credit Opportunity Act, which is interpreted in light of Title VII, does not cover style of dress or sexual orientation, allegations in the case at bar were that discriminatory actions were taken on the basis of the plaintiff’s sex, and the cross-dressing plaintiff states a claim under equal credit law if he was treated differently than a woman dressing as a man would have been).

83. 378 F.3d 566 (6th Cir. 2004).

84. *Id.* at 572–74.

85. *Id.* at 570.

86. *Id.*

the district court's implication that the sexual stereotyping allegation was an "end run" around his real claim, which the lower court stated was "based on his transsexuality" and thus not within scope of Title VII.⁸⁷ After reviewing the plaintiff's specific factual contentions, the appeals court summarized, and rejected, the rationale of the previous circuit court decisions as follows:

Having alleged that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind Defendant's actions, Smith has sufficiently pleaded claims of sex stereotyping and gender discrimination.

In so holding, we find that the district court erred in relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because "Congress had a narrow view of sex in mind" and "never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex." *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085, 1086 (7th Cir.1984); see also *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 661–63 (9th Cir. 1977) (refusing to extend protection of Title VII to transsexuals because discrimination against transsexuals is based on "gender" rather than "sex"). It is true that, in the past, federal appellate courts regarded Title VII as barring discrimination based only on "sex" (referring to an individual's anatomical and biological characteristics), but not on "gender" (referring to socially-constructed norms associated with a person's sex). See, e.g., *Ulane*, 742 F.2d at 1084 (construing "sex" in Title VII narrowly to mean only anatomical sex rather than gender); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (holding that transsexuals are not protected by Title VII because the "plain meaning" must be ascribed to the term "sex" in the absence of clear congressional intent to do otherwise); *Holloway*, 566 F.2d at 661–63 (refusing to extend protection of Title VII to transsexuals because discrimination against transsexualism is based on "gender" rather than "sex," and "sex" should be given its traditional definition based on the anatomical characteristics dividing "organisms" and "living beings" into male and female). In this earlier jurisprudence, male-to-female transsexuals (who were the plaintiffs in *Ulane*, *Sommers*, and *Holloway*)—as biological males whose outward behavior and emotional identity did not conform to socially-prescribed expectations of masculinity—were denied Title VII protection by courts because they were considered victims of "gender" rather than "sex" discrimination.

However, the approach in *Holloway*, *Sommers*, and *Ulane*—and by the district court in this case—has been eviscerated by *Price Waterhouse*. See *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway*

87. *Id.* at 571–72.

[and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*.”). By holding that Title VII protected a woman who failed to conform to social expectations concerning how a woman should look and behave, the Supreme Court established that Title VII’s reference to “sex” encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.⁸⁸

Rather, the court continued, after *Price Waterhouse*, an employer who discriminates against women because they do not wear dresses or makeup is engaging in sex discrimination because the discrimination would not occur but for the victim’s sex; it followed that employers who discriminate against men because they *do* wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.⁸⁹ In so reasoning, it rejected the stance of some courts that the latter form of discrimination was for some reason permissible:

For instance, the man who acts in ways typically associated with women is not described as engaging in the same activity as a woman who acts in ways typically associated with women, but is instead described as engaging in the different activity of being a transsexual (or in some instances, a homosexual or transvestite). Discrimination against the transsexual is then found not to be discrimination “because of . . . sex,” but rather, discrimination against the plaintiff’s unprotected status or mode of self-identification. In other words, these courts superimpose classifications such as “transsexual” on a plaintiff, and then legitimize discrimination based on the plaintiff’s gender non-conformity by formalizing the non-conformity into an ostensibly unprotected classification.⁹⁰

In the case at bar, the appeals court noted, the lower court declined to discuss the applicability of *Price Waterhouse*, giving insufficient consideration to Smith’s claims regarding “his contra-gender behavior,” and instead characterizing the pleadings as an effort to secure protection from discrimination on the basis of his status as a transsexual, which is outside the scope of Title VII’s prohibition.⁹¹ The Sixth Circuit concluded:

Such analyses cannot be reconciled with *Price Waterhouse*, which 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. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.

88. *Id.* at 572–73 (internal citations omitted).

89. *Id.* at 574.

90. *Id.*

91. *Id.*

Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as "transsexual," is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII's prohibition of sex discrimination.⁹²

The *Smith* court also found the complaint adequate as to remaining elements of the prima facie case because it alleged that Smith was qualified for the position in question (having been a lieutenant in the fire department for seven years without any negative incidents), and that Smith would not have been treated differently, on account of his non-masculine behavior and gender identity disorder, had he been a woman instead of a man.⁹³ The Sixth Circuit again endorsed the rationale of its *Smith* decision in *Barnes v. City of Cincinnati*,⁹⁴ in which it held that a police officer, a pre-operative transsexual bringing an action under Title VII, was a member of a protected class.⁹⁵

A transsexual plaintiff who may have been fired, at least in part, because her appearance and behavior did not conform to her company's stereotypes—rather than solely because of her transgender status—was deemed to state a claim under Title VII in *Doe v. United Consumer Financial Services*.⁹⁶ In so ruling, the court conceded the complexity of the "seemingly straightforward" question of whether Title VII's prohibitions apply to transsexuals.⁹⁷ It found *Ulane's* reliance on congressional intent in rejecting coverage for transsexuals to be at odds with *Oncale*, reasoning that, in holding that male-on-male workplace harassment may be actionable, *Oncale* acknowledged that it was applying Title VII to a situation not likely considered by Congress when it passed the Civil Rights Act.⁹⁸

92. *Id.* at 574–75.

93. *Id.* at 570.

94. 401 F.3d 729, *cert. denied*, 126 S.Ct. 624 (2005).

95. *Id.* at 737. *Barnes* cited the *Smith* rule that sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of the behavior, and that a label, such as "transsexual," is not fatal to a sex discrimination claim on that theory. As in *Smith*, the court held that the plaintiff in the case at bar had established membership in a protected class by alleging discrimination arising out of his failure to conform to sex stereotypes. *Id.*

96. No. 0:01CV1112, 2001 WL 34350174, at *5 (N.D. Ohio Nov. 9, 2001).

97. *Id.* at *2.

98. *Id.* at *1 n.7. See also *Mitchell v. Axcan Scandipharm, Inc.*, 2006 WL 456173 (slip copy) (Feb. 17, 2006) (denying a motion to dismiss a state and Title VII sex discrimination claim brought by a pre-operative male-to-female transsexual, based on the gender stereotyping rationale of *Barnes* and *Smith*); *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PhX-SRB, 2004 WL 2008954, at *2 (D. Ariz. June 3, 2004) (discussed *infra*) (holding that Title VII claim was stated by allegations that the employer required a biological female believed to possess stereotypically male traits to provide proof of genitalia or face consignment to men's restroom); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E(SC), 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003) (holding that transsexuals are protected under Title VII to the extent discriminated against on basis of sex); *Broadus v. State Farm Ins. Co.*, No. 98-4254CVC50WECF, 2000 WL 1585257, at *4 (W.D. Mo. Oct. 11, 2000) (holding that sex

ii. Cases Refusing to Find Title VII Protection

The rationale of the *Smith* decision has not been accepted universally by post-*Price Waterhouse* decisions. For example, the court in *Etsitty v. Utah Transit Authority*⁹⁹ held that the *Price Waterhouse* prohibition against sex stereotyping should not be applied to transsexuals.¹⁰⁰ In so ruling, the *Etsitty* court characterized as “complex” the question of how Title VII’s prohibition against discrimination “because of . . . sex” applies to transsexuals,¹⁰¹ and concluded that all federal courts that have dealt directly with this issue have concluded that Title VII does not prohibit discrimination based on an individual’s transsexualism.¹⁰² The court also found support for its conclusion in the failed attempts to amend Title VII, which it considered to be an indication that Congress intended the phrase “because of sex” to be narrowly construed, excluding protection for transsexuals.¹⁰³ The court expressly rejected the Sixth Circuit’s rationale in *Smith*, stating:

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. An authoritative treatise on Gender Identity Disorder states the following:

Gender Identity Disorder can be distinguished from simple nonconformity to stereotypical sex role behavior by the extent and pervasiveness of the cross-gender wishes, interests, and activities. This disorder is not meant to describe a child’s nonconformity to stereotypic sex-role behavior as, for example, in “tomboyishness” in girls or “sissyish” behavior in boys. Rather, it represents a profound disturbance of the individual’s sense of identity with regard to maleness or femaleness.

American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 564 (4th ed. 1994). Clearly, the medical community does not equate transsexualism with a mere failure to conform to stereotypes.¹⁰⁴

The *Etsitty* court also stated concerns about practical issues, which it foresaw as emanating from the *Smith v. Salem* approach:

stereotyping which plays a role in an employment decision is actionable under Title VII, but that it is unclear whether a transsexual is protected from sex discrimination under the statute).

99. No. 2:04CV616DS, 2005 WL 1505610 (D. Utah June 24, 2005).

100. *Id.* at *4–6.

101. *Id.* at *3.

102. *Id.* The court cited *Johnson v. Fresh Mark, Inc.*, 337 F. Supp. 2d 996, 999 (N.D. Ohio 2003), *aff’d*, 98 Fed. App’x 461 (6th Cir. 2004), which in turn cited *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984), and *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982).

103. *Etsitty*, 2005 WL 1505610, at *3–4.

104. *Id.* at *5.

Taken to the extreme, the theory in the *Smith* case would mean that if an employer cannot bar a transsexual male from dressing and appearing as a woman (because it would be sex stereotyping under *Price Waterhouse*), then a non-transsexual male must also be allowed to dress and appear as a woman. In fact, if something as drastic as a man's attempt to dress and appear as a woman is simply a failure to conform to the male stereotype, and nothing more, then there is no social custom or practice associated with a particular sex that is not a stereotype. And if that is the case, then any male employee could dress as a woman, appear and act as a woman, and use the women's restrooms, showers and locker rooms, and any attempt by the employer to prohibit such behavior would constitute sex stereotyping in violation of Title VII. *Price Waterhouse* did not go that far.

This complete rejection of sex-related conventions was never contemplated by the drafters of Title VII and is not required by the language of the statute or the Supreme Court opinion in *Price Waterhouse*.¹⁰⁵

In *Dobre v. National Railroad Passenger Corp.*,¹⁰⁶ the court ruled that Congress intended the term "sex" in Title VII to refer to biological or anatomical characteristics, not sexual identity or gender.¹⁰⁷ Thus, the court held that Congress did not intend Title VII to protect transsexuals from discrimination on the basis of their "transsexualism."¹⁰⁸ The court recognized that transsexual individuals could pursue claims of discrimination on the basis of biological sex, but concluded in the case at bar that the acts of discrimination alleged were not due to stereotypic concepts about the abilities of women or conditions common to women only.¹⁰⁹ Rather, the court reasoned, if the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become female, which failed, in the court's view, to state a claim.¹¹⁰

In a case suggesting that facilities-related issues may be treated differently than more obvious disparate treatment issues, the Sixth Circuit held that a pre-surgical transsexual woman could be fired after she refused to use men's restrooms and refused to return to work, ruling that the employer's action did not violate Title VII.¹¹¹ Rejecting the plaintiff's *Price Waterhouse* argument, the federal district court had noted that the employer had not required plaintiff to conform her appearance to a particular gender stereotype, but, rather, had required her to adhere

105. *Id.* at *5–6.

106. 850 F. Supp. 284 (E.D. Pa. 1993).

107. *Id.* at 286 (citing *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977)).

108. *Id.* at 286–87 (citing *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1087 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 750 (8th Cir. 1982); *Holloway*, 566 F.2d at 663).

109. *Id.* at 287.

110. *Id.*

111. *Johnson v. Fresh Mark, Inc.*, 98 Fed. App'x 461 (6th Cir. 2004), *aff'd*, 337 F. Supp. 2d 996 (N.D. Ohio 2003).

to “accepted principles established for gender-distinct public restrooms.”¹¹² The plaintiff had conceded that her driver’s license identified her as male, and that the State Bureau of Motor Vehicles refuses to approve assignment of a gender identity incongruent with an individual’s birth-designated sex without proof that the individual has undergone sex reassignment surgery.¹¹³ As a result, the court stated, it was not unreasonable for the employer to presume that the plaintiff had not undergone complete sex reassignment surgery.¹¹⁴ The court also found it important that the plaintiff had declined to provide an opinion from her physician regarding which facilities would be appropriate to use.¹¹⁵

Finally, in *Mario v. P & C Food Markets, Inc.*,¹¹⁶ the court stated in dicta that it was unclear whether plaintiff, a transsexual, is a member of a protected class, and also whether the employer’s denial of medical benefits coverage for procedures “closely identified with being female” constitutes an adverse employment action under Title VII.¹¹⁷

iii. Other Cases

A federal district court in Minnesota faced a plaintiff alleging sex and religious discrimination claims under Title VII and state law arising out of her having encountered a transgender co-employee (who had transitioned from male to female) in the women’s restroom.¹¹⁸ Granting summary judgment to defendant on

112. *Johnson*, 337 F. Supp. 2d at 1000. After receiving complaints that the plaintiff had used both men’s and women’s restrooms, the employer told her that she could not return to work until it received a note from her doctor stating whether she was male or female and whether there were any reasons she should be using the restroom of the opposite gender. *Id.*

113. *Id.* at 998.

114. *Id.*

115. *Id.*

116. 313 F.3d 758 (2d Cir. 2002).

117. *Id.* at 767. The *Mario* court declined to reach these issues on the ground that plaintiff had failed to make out a prima facie case that denial of benefits occurred under circumstances giving rise to an inference of discrimination based on his transsexualism or his failure to conform to gender stereotypes; moreover, it stated, even if plaintiff had established a prima facie case, the employer proffered a legitimate, nondiscriminatory reason for its actions: that the surgeries were not medically necessary. Finally, the court noted that the plaintiff had not offered any proof that employer’s proffered reason was pretextual. *Id.* See also *Schroer v. Billington*, 424 F.Supp.2d 203 (D.D.C. 2006) (observing in *dicta*, while denying a motion to dismiss, that the plaintiff (a highly qualified male-to-female transsexual job applicant whose offer was withdrawn after she disclosed her intention to present as a woman when she started work) could not rely upon *Price Waterhouse* and the rationale of the *Smith* and *Barnes* cases if, in light of further factual development, her outward appearance and behavior would have been in conformance with feminine stereotypes, but the employer’s discrimination was because she formerly presented as stereotypically male); *Sweet v. Mulberry Lutheran Home*, No. IP02-0320-C-H/K, 2003 WL 21525058 (S.D. Ind. June 17, 2003) (holding that under *Ulane*, discrimination on basis of sex means discrimination on basis of plaintiff’s biological sex, not sexual orientation or sexual identity, including an intention to change sex); *Rentos v. Oce-Office Sys.*, No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996) (holding that postoperative transsexual was not protected from discrimination under Title VII).

118. *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964 (D. Minn. 2001).

the sex discrimination claim, the court held that, even assuming proof of other requisites, the plaintiff failed to show that the employer's policy of allowing the transgender co-employee to use the "gender appropriate" restroom following her transition affected a term, condition, or privilege of plaintiff's employment with such severity or pervasiveness as to alter conditions of employment and create an abusive work environment.¹¹⁹ The court also noted that the plaintiff had the option of using other restrooms in the school not regularly used by the transgender employee.¹²⁰

iv. Summary

While it is difficult to generalize about a body of law that is evolving quickly and affected by the predilections of individual courts, the following themes may be derived. First, the overwhelming weight of authority concludes that sexual orientation discrimination does not fall within the ambit of protection against discrimination "because of sex" under Title VII. Same-sex harassment, however, is under U.S. Supreme Court precedent a violation of the statute. In addition, where sex stereotyping results in discrimination against lesbians or gay men due to their behavior or appearance—and not their status as lesbians or gay men—it is unlawful.

Second, most courts accept that sex-stereotyping, as framed by *Price Waterhouse*, is a form of sex discrimination forbidden by Title VII. There is some skepticism about attempts by plaintiffs and their counsel to make "end-runs" around the absence of protection against sexual orientation discrimination through conclusory invocations of *Price Waterhouse* and sex-stereotyping, and thus courts are inclined not only to scrutinize characterizations in pleadings but the factual underpinnings of claims.

Finally, courts have consistently held that transsexuals are not a subcategory of persons protected under the "sex" classification of Title VII. Nevertheless, a number of courts now consider transsexuals and other transgender persons to be entitled to Title VII protection to the extent that their behavior or appearance results in discrimination based on sex-stereotyping.

d. State Fair Employment Practices Acts and Sex Discrimination

The outcome of litigation under FEPAs is necessarily influenced by variations in their respective statutory language. Most FEPAs, however, expressly prohibit sex discrimination, and state courts are inclined at least to consider Title VII precedent in construing their state laws.

i. State Cases Affording Protection to Transgender Individuals

In *DePiano v. Atlantic County*,¹²¹ the plaintiff, a correctional officer, claimed

119. *Id.* at 968–69.

120. *Id.* at 969.

121. No. Civ.02-5441 RBK, 2005 WL 2143972 (D.N.J. Sept. 2, 2005).

that the warden and staff at the facility created a hostile work environment motivated by gender stereotype-based bias, because he sometimes wore women's clothes while off-duty.¹²² Noting that New Jersey law prohibits discrimination on the basis of "affectional or sexual orientation," the court held that that prohibition was not squarely at issue in the case due to a lack of evidence that the plaintiff was perceived as homosexual. The court nonetheless held that the sex-based gender stereotyping theory was itself sufficient to state a claim under New Jersey law.¹²³

In another case involving interpretation of state nondiscrimination law, a Massachusetts court first observed that federal law encompasses both biological differences between men and women *and* actions based on failure to conform to socially-prescribed gender expectations.¹²⁴ Ultimately, the court held that the male-to-female transsexual plaintiff had set forth a prima facie case of sex discrimination in allegations that she was fired by her employer for failing to wear traditionally male attire.¹²⁵

In *Enriquez v. West Jersey Health Systems*,¹²⁶ the court held that the state law prohibiting sex discrimination precluded an employer from discriminating on the basis of gender identity.¹²⁷ In so ruling, the court found persuasive the conclusion earlier reached by a state Justice that "a person's sex or sexuality embraces an individual's gender, that is, one's self-image, the deep psychological or emotional sense of sexual identity and character."¹²⁸ Stating its agreement with the principle that "'sex' embraces an 'individual's gender' and is broader than anatomical sex,"¹²⁹ the court held that the word "sex" as used in the state Law Against Discrimination should be interpreted to include gender, protecting the plaintiff from discrimination on the basis of sex or gender.¹³⁰ While the case did not involve New Jersey's prohibition on "sexual orientation" discrimination because the plaintiff failed to provide evidence that she was homosexual, bisexual, or perceived to be either, it is noteworthy that the court relied by analogy on the breadth of protections afforded in the state law, reasoning as follows:

It is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder. We conclude that sex discrimination under the LAD

122. *Id.* at *3.

123. *Id.* at *7-9.

124. *Lie v. Sky Publ'n Corp.*, No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002).

125. *Id.* at *5.

126. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

127. *Id.* at 373.

128. *Id.* (quoting *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976)).

129. *Id.*

130. *Id.*

includes gender discrimination so as to protect plaintiff from gender stereotyping and discrimination for transforming herself from a man to a woman.¹³¹

Similarly, in 2001, the Massachusetts Commission against Discrimination ruled that discrimination against an individual because she or he is a transsexual violates the state law prohibition against sex discrimination and, in so doing, criticized the logic of decisions that failed to find protection for transsexuals under the rubric of Title VII.¹³² Although asserting that transsexuality is sufficiently “sex-linked” to bring it within the scope of sex discrimination law, the commission noted that the current state of federal law is that “discrimination based on *change of sex* is not the same thing as discrimination *based on sex*”—the rationale for which the Commission found “utterly unsatisfying.”¹³³ The commission stated:

We believe that discrimination against transsexuals is a form of sex discrimination within the conceptual framework of cases such as *Price-Waterhouse* . . . and its progeny; where an individual was subjected to workplace discrimination not because of the anatomical notion of “sex,” but because of a broader concept incorporating elements of “gender” and societal expectation. Hopkins was subjected to discrimination because she was “macho” and wore masculine suits. The complainant here contends that she was subjected to harassment because of the kind of man she was—one who wanted to be a woman.¹³⁴

One of the most intriguing cases of recent origin, *Doe ex rel. Doe v. Yunits*¹³⁵ (*Yunits*), resulted in an injunction in favor of a transgender student, allowing her to attend school and dress in accordance with her self-proclaimed gender identity.¹³⁶ The defendant school had informed the plaintiff, a high school student diagnosed with gender identity disorder, that she could not enroll for the school year if she wore girls’ clothes or accessories. The plaintiff sought an injunction on eight bases under Massachusetts law, including asserted rights to freedom of expression, liberty interest in appearance, and sex and disability discrimination.¹³⁷ Regarding sex discrimination, the court said:

Since plaintiff identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of

131. *Id.*

132. *Millett v. Lutco, Inc.*, No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm’n Against Discrim. Oct. 10, 2001).

133. *Id.* at *5.

134. *Id.* at *3.

135. No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), *aff’d sub nom. Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000).

136. On appeal, the court denied defendants’ petition for interlocutory relief stating, *inter alia*, that the defendants had not offered substantial evidence in support of their proposition that the plaintiff’s attire and disruptive behavior were “so inextricably linked that the behavior cannot be reasonably controlled without also controlling the plaintiff’s manner of dress.” *Brockton*, 2000 WL 33342399, at *1.

137. *Yunits*, 2000 WL 33162199, at *1–2.

clothes plaintiff chooses to wear. If the answer to that question is no, plaintiff is being discriminated against on the basis of her sex, which is biologically male. Therefore, defendants' reliance on cases holding that discrimination on the basis of sexual orientation, transsexualism, and transvestitism are not controlling in this case because plaintiff is being discriminated against because of her gender.¹³⁸

In response to the defendants' citation of cases upholding gender-specific dress codes predicated on important governmental interests, such as fostering conformity with community standards, the court stated:

This court cannot allow the stifling of plaintiff's selfhood merely because it causes some members of the community discomfort. "Our constitution . . . neither knows nor tolerates classes among citizens." *Plessy v. Ferguson*, 163 U.S. 537, 539 (1896) (dissenting opinion of Harlan, J.). Thus, plaintiff in this case is likely to establish that the dress code of South Junior High, even though it is gender-neutral, is being applied to her in a gender discriminatory manner.¹³⁹

The *Yunits* court ultimately granted plaintiff the injunction after balancing the equities,¹⁴⁰ which it determined to weigh in her favor. The court also held that the defendants failed to make an adequate showing of corresponding harm to the public interest.¹⁴¹

In *Rentos v. Oce-Office Systems*,¹⁴² the court held that transsexuals are protected from discrimination under state and city human rights laws, but not under Title VII.¹⁴³

Finally, in *Jette v. Honey Farms Mini Market*,¹⁴⁴ an administrative body found that under Massachusetts law, discrimination against transsexuals because of their transsexuality is discrimination based on "sex."¹⁴⁵ It also held, however, that transsexuality is not a "sexual orientation" within the meaning of the state statute at issue.¹⁴⁶

138. *Id.* at *6 (footnote omitted).

139. *Id.* at *7.

140. In this regard, the court commented: "[b]ecause the school is empowered to discipline plaintiff for conduct for which any other student would be disciplined, the harm to the school in readmitting plaintiff is minimal. On the other hand, if plaintiff is barred from school, the potential harm to plaintiff's sense of self-worth and social development is irreparable." *Id.* at *8.

141. *Id.*

142. No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996).

143. *Id.* at *7-9. The court observed, "[c]ourts have faced great difficulty in conceptualizing claims for employment discrimination by transsexuals. As one commentator has noted, '[w]hile the law draws lines, a transsexual crosses lines.'" *Id.* at *6 (quoting Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMP. POL. & CIV. RTS. L. REV. 27, 27 (Fall 1995)).

144. No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrim. Oct. 10, 2001).

145. *Id.* at *1.

146. *Id.* See also *Millett v. Lutco, Inc.*, No. 98 BEM 3695, 2001 WL 1602800 (Mass. Comm'n Against Discrim. Oct. 10, 2001) (administrative holding that "transsexuality" is not a sexual orientation as the term is defined under state law).

ii. State Cases Refusing to Afford Protection to Transgender Individuals

In *Dobre v. National Railroad Passenger Corp.*,¹⁴⁷ discussed above, the court concluded that Title VII did not protect transsexuals from discrimination on the basis of their “transsexualism,” and that Pennsylvania non-discrimination law should be similarly interpreted with regard to the definition of “sex.”¹⁴⁸ In *Dobre*, the acts of discrimination were not alleged to be due to stereotypic concepts about women’s abilities, or due to conditions common to women only. Thus, the court held that if the plaintiff was discriminated against at all, it was because she was perceived as a male who wanted to become female, which in the court’s view failed to state a claim. The court concluded that the term “sex” in the state law “was to be given its plain meaning.”¹⁴⁹

In *Conway v. City of Hartford*,¹⁵⁰ the court held that the state non-discrimination law does not prohibit discrimination against transsexuals.¹⁵¹

Finally, in *Underwood v. Archer Management Services, Inc.*,¹⁵² the court held that transsexuality is not included in the definition of “sex” under the District of Columbia non-discrimination law.¹⁵³

iii. Other State Law Decisions of Interest

Other decisions construing state law come to various conclusions that are of interest to this discussion. In *Back v. Hastings on the Hudson*,¹⁵⁴ for example, the court held that stereotyping the qualities of mothers is a form of gender discrimination unlawful under the Equal Protection Clause and state law applicable in that case.¹⁵⁵

In *Goins v. West Group*,¹⁵⁶ the court held that the employer’s designation of employee restroom use based on biological gender did not constitute sexual orientation-based discrimination in violation of state law.¹⁵⁷

147. 850 F. Supp. 284 (E.D. Pa. 1993).

148. *Id.* at 286–88.

149. *Id.* at 288.

150. No. CV 950553003, 1997 WL 78585 (Conn. Super. Ct. Feb. 4, 1997).

151. *Id.* at *7.

152. 857 F. Supp. 96 (D.D.C. 1994).

153. *Id.* at 97–99.

154. 365 F.3d 107 (2d Cir. 2004).

155. *Id.* The court observed that *Price Waterhouse* suggested that the question of what constitutes a gender-based stereotype “must be answered in the particular context in which it arises, and without undue formalization,” and that stereotyped remarks can be evidence that gender played a part in an adverse employment decision. *Id.* at 120. It also noted that discrimination based on gender, once proven, can only be tolerated if the state provides “an ‘exceedingly persuasive justification’ for the rule or practice.” *Id.* at 118 (quoting *United States v. Virginia*, 518 U.S. 515, 524 (1996)).

156. 635 N.W.2d 717 (Minn. 2001).

157. *Id.* The employee self-identified as transgender, and state law defined sexual orientation to include “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *Id.* at 722.

Finally, in *Nichols v. Azteca Restaurant Enterprises, Inc.*,¹⁵⁸ the court held that harassment based on the perception that the plaintiff was effeminate, and thus did not conform to a male stereotype, was sexual harassment “because of sex” in violation of Title VII and Washington state law.¹⁵⁹

iv. Summary

In sum, courts construing FEPAs face challenges similar to those arising under Title VII, and outcomes are likewise unpredictable. Under some state nondiscrimination laws, additional classes of persons are covered, causing associated results. Under others, such as those discussed *infra* regarding disability discrimination, certain courts have found protection for persons diagnosed with gender identity disorder based on state legislative decisions not to import otherwise relevant exclusions found in federal disability laws.

Although some commentators discern a “gradual progression” at the state level toward recognition of transgender rights,¹⁶⁰ change-advocates express frustration. As one observed:

[C]ourts do not simply identify transgenderism as a distinct category from sexual orientation and operate consistently on this premise. Instead, the categories of transgenderism and sexual orientation are conflated when doing so serves to exclude transgender people from protection and are distinguished when doing so serves to exclude transgender people from protection. This produces what Currah and Minter call the “double bind.” For example, in jurisdictions that do not proscribe discrimination on the basis of sexual orientation, courts have stressed the similarity of gay and transgender people in order to rely on decisions that have excluded lesbians and gay men from protection under Title VII as a rationale for also excluding transgender people. Yet, simultaneously, courts in jurisdictions that protect gays and lesbians have held that transgenderism is a distinct category from sexual orientation and have dismissed sexual orientation claims by transgender plaintiffs on that basis.¹⁶¹

As these comments suggest, change-advocates often perceive the results the courts reach as value-laden in resolving cases involving transgender issues. Regardless of the cause of the differential outcomes, the nature of the issues tends to generate unusually strident judicial opinions.

e. Title IX

Courts examining claims under Title IX of the Education Amendments of

158. 256 F.3d 864 (9th Cir. 2001) (overruling *DeSantis v. Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979)).

159. *Id.* at 874–75.

160. *See, e.g., Levy, supra* note 23, at 142 (noting that transgender litigants are “resorting to state law for relief”).

161. Lloyd, *supra* note 31, at 191–92.

1972¹⁶² have applied Title VII analysis, including that of *Price Waterhouse*, when examining sex discrimination sex-stereotyping claims.

In *Howell v. North Central College*,¹⁶³ the court noted that differentiating between discrimination or harassment motivated by gender stereotyping—which is actionable—and discrimination or harassment motivated by sexual orientation—which is not—requires making “not always obvious” distinctions.¹⁶⁴ In fact, the court stated:

filtering discrimination based on failure to adhere to gender stereotypes and discrimination based on sexual orientation renders the picture of what might constitute a claim for gender stereotyping anything but focused. Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.¹⁶⁵

Applying Title VII analysis to a Title IX-based claim, the court in *Montgomery v. School Dist. No. 709*,¹⁶⁶ held that harassment based on stereotyped notions of masculinity constituted sex discrimination prohibited by Title IX, even though Title IX does not protect against sexual orientation discrimination.¹⁶⁷ The court also noted that “[u]nder *Oncale* the principles established in *Price Waterhouse* apply with equal force when the individual engaging in discriminatory conduct is of the same sex as the claimant.”¹⁶⁸

The case of *Miles v. New York University*¹⁶⁹ involved a student admitted to the university as female, but who was a male-to-female transsexual in the process of becoming female at the time of a professor’s alleged sexual harassment.¹⁷⁰ The court found that the student was subject to discrimination because of sex, and thus protected under Title IX.¹⁷¹ In so ruling, it distinguished cases standing for the proposition that Title VII “and hence Title IX” did not prohibit discriminatory acts

162. 20 U.S.C. § 1681 (2000). It should be noted that the Title IX sexual harassment guidance document promulgated by the Department of Education’s Office for Civil Rights, while not addressing the topic at length, observes that “it can be discrimination on the basis of sex to harass a student on the basis of the victim’s failure to conform to stereotyped notions of masculinity and femininity.” U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES v, 3 n.16 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)).

163. 320 F. Supp. 2d 717 (N.D. Ill. 2004).

164. *Id.* at 722.

165. *Id.* at 723 (citing *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003)). The court ultimately declined to find either that gender stereotyping sexual harassment is actionable or that a discrimination claim existed based on the facts alleged. *Id.* at 723–24.

166. 109 F. Supp. 2d 1081 (D. Minn. 2000).

167. *Id.* at 1092.

168. *Id.*

169. 979 F. Supp. 248 (S.D.N.Y. 1997).

170. *Id.* at 248.

171. *Id.* at 250.

against persons transitioning from one gender to another.¹⁷² The court stated:

The simple facts are, as the university was forced to admit, that Professor Eisen was engaged in indefensible sexual conduct directed at plaintiff which caused her to suffer distress and ultimately forced her out of the doctoral program in her chosen field. There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to Professor Eisen and everyone else at the university, plaintiff was not a biological female.¹⁷³

2. Section 1983 Actions and Miscellaneous Constitutional Law Claims

a. Equal Protection

In addition to asserting claims under Titles VII and IX, plaintiffs have filed actions under 42 U.S.C. § 1983, claiming protection under various amendments to the U.S. Constitution, especially the Fourteenth Amendment's Equal Protection Clause.

As the U.S. Supreme Court has stated, “[t]he guarantee of equal protection under the Fifth Amendment is not a source of substantive rights or liberties, but rather a right to be free from invidious discrimination in statutory classifications and other governmental activity.”¹⁷⁴ A threshold issue in equal protection cases is the level of scrutiny applicable to persons in the class in which the plaintiffs claim membership. To date, courts generally have been unwilling to identify transsexuals as a “suspect class” for purposes of applying heightened judicial scrutiny to the challenged action.¹⁷⁵ This conclusion results in the application of the state action-deferential “rational relationship” test.¹⁷⁶

172. *Id.* at 249.

173. *Id.* See also *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869 (N.D. Ohio 2003) (holding that a jury could determine that harassment based on perceived sexual orientation and defendants' failure to punish it was motivated by plaintiff's sex, within scope of Title IX); *Snelling v. Fall Mountain Reg'l Sch. Dist.*, No. Civ. 99-448-JD, 2001 WL 276975 (D.N.H. Mar. 21, 2001) (holding actionable under Title IX allegations that perpetrators' harassment arose out of sex-based stereotypes of masculinity); *Ray v. Antioch Unified Sch. Dist.*, 107 F. Supp. 2d 1165 (N.D. Cal. 2000) (holding that allegation of harassment by classmates was due to his perceived homosexuality was sufficient to satisfy “sexual harassment” element of student's Title IX claim).

174. *Harris v. McRae*, 448 U.S. 297, 322 (1980). See generally WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* § 3.3.2.7 (3d ed. 1995).

175. See, e.g., *Gomez v. Maass*, 918 F.2d 181 (9th Cir. 1990) (unpublished table decision); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 663-64 (9th Cir. 1977); *In Re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Rush v. Johnson*, 565 F. Supp. 856, 868-69 (N.D. Ga. 1983); *Doe v. Alexander*, 510 F. Supp. 900 (D. Minn. 1981). Also see generally the discussion in Ohle, *supra* note 15, 276-77, and the extensive discussion of related issues in a case involving same-sex marriage, *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995). Indicia for suspect classification are identified in *Frontiero v. Richardson*, 411 U.S. 677 (1973).

176. See, e.g., *Holloway*, 566 F.2d at 663-64; *Rush*, 565 F. Supp. at 868-69. Since these decisions precede *Price Waterhouse*, it is unclear whether the evolution of sex-stereotyping into a form of sex discrimination places behavior and appearances disputes into the realm of the

Moreover, courts have consistently held that gays and lesbians do not constitute a suspect or quasi-suspect group for purposes of equal protection analysis, although state actors may not disadvantage persons on the basis of such status for reasons lacking a rational relationship to legitimate governmental aims.¹⁷⁷

Cases of more recent vintage see courts integrating *Price Waterhouse* principles into their analysis of equal protection violation claims. In *Zalewska v. County of Sullivan*,¹⁷⁸ a female employee challenged on various grounds a transit authority rule prohibiting the wearing of skirts.¹⁷⁹ The court began its analysis by noting that “[s]tate action is impermissible if it perpetuates old gender stereotypes by the disparate treatment of similarly situated men and women based on sex.”¹⁸⁰ The plaintiff argued that the county was subjecting her to discrimination by forcing her to “dress more masculinely” in a way that was demeaning to women.¹⁸¹ In response, the court observed: “[a]sking us to accept the proposition that a woman wearing pants dresses more masculinely requires a perpetuation of the very stereotypes that courts are supposed to suppress.”¹⁸² Ultimately, the court declined to find in the county’s policy, the kind of purposeful discrimination that would trigger the Equal Protection Clause.¹⁸³

The *Kastl* decision, discussed above, involved a challenge by a plaintiff to the defendant community college’s requirement that she use the men’s restroom until she provided proof that she had completed sex reassignment surgery.¹⁸⁴ The court

intermediate scrutiny otherwise applied to “sex.” See *United States v. Virginia*, 518 U.S. 515, 531 (1996) (scrutinizing classifications on the basis of sex closely); *Craig v. Boren*, 429 U.S. 190, 97 (1976) (applying close scrutiny to sex-based classifications); see also *infra* text accompanying notes 186–194.

177. See *Johnson v. Johnson*, 385 F.3d 503 (5th Cir. 2004). See also *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002) (holding that discrimination against homosexuals will only constitute violation of equal protection if it lacks a rational basis); *Kandu*, 315 B.R. 123 (holding that homosexuals are not a suspect or quasi-suspect class); *DiMarco v. Wyo. Dep’t of Corr.*, 300 F. Supp. 2d 1183 (D. Wyo. 2004) (holding that inmate of ambiguous gender was not a member of a quasi-suspect class); *Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002) (holding that discrimination based on sexual orientation is actionable under Equal Protection Clause); *Zavatsky v. Anderson*, 130 F. Supp. 2d 349 (D. Conn. 2001) (holding that homosexuals are not a suspect class and are entitled only to rational basis scrutiny).

178. 316 F.3d 314 (2d Cir. 2003).

179. *Id.* at 317–18.

180. *Id.* at 323.

181. *Id.*

182. *Id.*

183. *Id.* In conjunction with its ruling, the court acknowledged that the “county’s policy of disallowing skirts will affect women more than men because women will be prohibited from wearing an article of clothing they might choose to wear while men will not.” *Id.* [S]uch incidental burden alone [did] not[, however, in the court’s view,] trigger a heightened level of scrutiny where . . . the policy [was] gender-neutral.” *Id.* Rather, the court stated, “In the absence of discriminatory intent, gender-neutral classifications that burden one sex more than the other are subject only to rational basis review.” *Id.* The court noted that “[I]t [was] undisputed that the county’s policy [was] gender-neutral,” and that plaintiff had not alleged discriminatory intent. Thus, the court concluded, “the county’s rule [was] subject only to rational basis review,” and held “that the dress code did not violate [plaintiff’s] right to equal protection of the law.” *Id.*

184. *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PhX-SRB, 2004 WL

initially noted that the plaintiff had predicated her equal protection claim on the theory that she was a biological woman who did not conform to the defendant's sex stereotypes; she had *not* asserted that her status as a transsexual placed her within a protected class.¹⁸⁵

Noting that classifications on the basis of sex are closely scrutinized, the *Kastl* court stated that “[w]hether discrimination on the basis of nonconformity with sex stereotypes constitutes discrimination on the basis of sex for the purposes of equal protection [analysis] is an open question.”¹⁸⁶ The court observed that, while previous cases held that transsexuals are not a protected class, more recent jurisprudence recognizes that medical science may now support a finding that transsexuality is an “immutable characteristic determined solely by the accident of birth,” in which case it would be a “suspect” classification subject to the highest level of scrutiny.¹⁸⁷

While the *Kastl* court left open the question of whether transsexuals were entitled to protected class status, it nonetheless found that, “regardless of whether [the] defendant discriminated against [the p]laintiff on the basis of her sex, its actions . . . created a classification which must be rationally related to a legitimate state interest in order to survive judicial scrutiny.”¹⁸⁸ While agreeing that the “[d]efendant possesse[d] a legitimate interest in protecting the privacy and safety of its patrons, the [c]ourt [ultimately] fail[ed] to see . . . how . . . implementation of that policy in a manner which single[d] out nonconforming individuals, including transsexuals, for a greater intrusion upon their privacy [was] rationally related to such an interest.”¹⁸⁹

The *Kastl* court further stated that, although government action may be upheld if its connection to a legitimate interest is tenuous or the action is unwise, where “the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect.”¹⁹⁰ The plaintiff had alleged that the disputed restroom policy was created specifically in response to complaints about transsexuals; only she and another transsexual were required to provide proof of biological sex in order to use the women's restrooms; she was instructed to use the men's restroom if she could not or would not provide evidence that she lacked male genitalia; and her proffer of her state-issued identification as evidence of her biological sex was rejected.¹⁹¹ “Contrary to the [d]efendant's suggestion that the justification for the policy was ‘readily apparent,’” the court could only identify the following possible justifications: “1) transsexuals posed a greater risk to minors' and others' safety than any other group; 2) a biological woman can never have lived or presented herself as a man; and 3) the presence of a biological woman with male genitalia invades the privacy and/or threatens the safety of other

2008954, at *8 (D. Ariz. June 3, 2004).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 632–33 (1996)).

191. *Id.*

women.”¹⁹² The court characterized each of these assumptions as “baseless.”¹⁹³ Therefore, the court concluded that the “[p]laintiff ha[d] stated facts which overcame the presumption of rationality applied to government classifications, and her . . . equal protection claim survives the [d]efendant’s [m]otion to [d]ismiss.”¹⁹⁴

Addressing a § 1983 claim asserting an Equal Protection Clause violation, the court in *Schroeder ex rel. Schroeder v. Maumee Board of Education*,¹⁹⁵ ruled that “[i]ndividuals who are homosexual or who are perceived to be homosexual, and who are discriminated against on that basis, are members of an identifiable, protected class.”¹⁹⁶ The plaintiff was thus required to “show that school administrators discriminated against him ‘because of his membership in this particular class, not merely that he was treated unfairly as an individual,’”¹⁹⁷ and that the “officials’ discriminatory conduct had no ‘rational relationship to a legitimate governmental purpose.’”¹⁹⁸ The court stated, however, that “[t]he desire to ‘effectuate one’s animus’ against homosexuals can never be a legitimate governmental purpose, [and that] . . . state action based on that animus alone violates the Equal Protection Clause.”¹⁹⁹

In *Montgomery v. Independent School District No. 709*,²⁰⁰ a sexual harassment case, the court discussed the extent to which the Equal Protection Clause protects persons of a particular sexual orientation or perceived sexual orientation.²⁰¹ The court held that the Equal Protection Clause “protects all persons, whether they can prove membership in a specially protected class or not” although the nature of the class membership will affect the level of scrutiny relative to governmental classifications.²⁰² In this respect, it noted that “the Eighth Circuit had held that discrimination based on homosexuality is subject only to rational basis review,”²⁰³ but also cited *Romer v. Evans* for the proposition that even if legislation does not target a suspect class, it may fail even the most permissive level of “rational basis” review.²⁰⁴

Other cases discussed above include some analysis of equal protection claims. For example, in *Smith v. City of Salem*, the Sixth Circuit held that the plaintiff (a male-to-female transsexual subjected to disparate treatment based on gender non-

192. *Id.*

193. *Id.*

194. *Id.*

195. 296 F. Supp. 2d 869 (N.D. Ohio 2003).

196. *Id.* at 874.

197. *Id.* (quoting *Bass v. Robinson*, 167 F.3d 1041, 1050 (6th Cir. 1999)).

198. *Id.* (quoting *Romer v. Evans*, 517 U.S. 620, 635 (1996)). The plaintiff’s burden of proof also included a showing that defendants intentionally discriminated against him or acted with deliberate indifference. *Id.*

199. *Id.* (quoting *Stemler v. City of Florence*, 126 F.3d 856, 873–74 (6th Cir. 1997)).

200. 109 F. Supp. 2d 1081 (D. Minn. 2000).

201. *Id.* at 1088–89.

202. *Id.* at 1088.

203. *Id.* at 1089 (citing *Richenberg v. Perry*, 97 F.3d 256, 260–61 (8th Cir. 1996)).

204. *Id.* *Romer* held that a Colorado law prohibiting any state legislative, executive, or judicial act designed to protect individuals based on their homosexual or bisexual orientation violated the Equal Protection Clause. 517 U.S. 620, 635–36 (1996).

conforming behavior and appearance) stated a sex discrimination claim grounded in the Equal Protection Clause.²⁰⁵ The *Smith* court relied upon the decision in *Back v. Hastings on Hudson Union Free School District*, in which the Second Circuit held that stereotypical remarks about the incompatibility of motherhood and employment may be evidence that gender played an unlawful role in an employment decision, in violation of equal protection principles.²⁰⁶

b. Other Constitutional Grounds

Claims associated with gender identity and expression issues are also being advanced on other constitutional bases,²⁰⁷ including freedom of expression, liberty interests, and rights to privacy.²⁰⁸

In the *Yunits* case addressed earlier, a transgender student-plaintiff challenging dress restrictions asserted violations of her rights to free expression under state law.²⁰⁹ Considering the request for an injunction, the court determined that the plaintiff was likely to establish that, by dressing in clothing and accessories traditionally associated with the female gender, she was expressing her identification with that gender.²¹⁰ In this connection, the court observed that the plaintiff's ability to express herself and her gender identity through dress was important to her health and well-being, as attested to by her treating therapist; thus, her expression was not merely a "personal preference but a necessary symbol of

205. 378 F.3d 566, 577 (6th Cir. 2004).

206. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 117–21 (2d Cir. 2004).

207. There is a large body of cases involving prisoners' rights, including claimed violations of the Eighth Amendment to the U.S. Constitution, and rights to privacy, which are beyond the scope of this article. See generally Ohle, *supra* note 15, at 258–61; Minter, *supra* note 25, § VI. See also, Schwenck v. Hartford, 204 F.3d 1187 (9th Cir. 2000) (involving a pre-operative male-to-female transsexual); Maggert v. Hanks, 131 F.3d 670 (7th Cir. 1997) (involving a prisoner seeking estrogen therapy for gender dysphoria); DiMarco v. Wyo. Dep't of Corr., 300 F. Supp. 2d 1183 (D. Wyo. 2004) (involving a prisoner with ambiguous gender). Also beyond the scope of this article are immigration cases involving transgender persons; however, the status of the law, and a recent decision of significance, are discussed in Minter, *supra* note 25, § VIII. See, e.g., Hernandez-Montiel v. I.N.S., 225 F.3d 1084 (9th Cir. 2000) (holding transgender youth entitled to asylum); Joseph Landau, "Soft Immutability" and "Imputed Gay Identity": Recent Developments in Transgender and Sexual Orientation-Based Asylum Law, 32 FORDHAM URB. L.J. 237 (2005); Rachel D. Lorenz, Note, *Transgender Immigration: Legal Same-Sex Marriages and Their Implications for the Defense of Marriage Act*, 53 UCLA L. REV. 523 (2005). Another universe of disputes and cases beyond the scope of this article are those relating to marriage and parental rights. See Minter, *supra* note 25, § III.

208. In *Cruzan*, discussed above, the plaintiff alleged that the school system's decision to allow her transgender co-employee to use the restroom associated with her post-transition gender constituted religious discrimination against the plaintiff. The court granted summary judgment to the defendant on this claim, holding that the plaintiff neither established notice to the school district nor an adverse employment action. *Cruzan v. Minneapolis Pub. Sch. Sys.*, 165 F. Supp. 2d 964, 967 (D. Minn. 2001).

209. *Doe ex rel. Doe v. Yunits*, No. 001060A, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000).

210. *Id.* at *3.

her very identity.”²¹¹ Further, the court determined that the plaintiff had a likelihood of fulfilling the *Texas v. Johnson* test²¹² by showing that her expressive conduct conveyed a “particularized message understood by others,” and that the defendants’ actions were meant to suppress that speech.²¹³

Turning to the issue of whether the plaintiff’s speech “materially and substantially interfere[d] with the work of the school,”²¹⁴ the *Yunits* court stated:

The line between expression and flagrant behavior can blur, thereby rendering this case difficult for the court. It seems, however, that expression of gender identity through dress can be divorced from conduct in school that warrants punishment, regardless of the gender or gender identity of the offender. Therefore, a school should not be allowed to bar or discipline a student because of gender-identified dress but should be permitted to ban clothing that would be inappropriate if worn by any student, such as a theatrical costume, and to punish conduct that would be deemed offensive if committed by any student, such as harassing, threatening, or obscene behavior.²¹⁵

The court also ruled that the plaintiff was likely to prevail on her “liberty interest” claim under Massachusetts law, noting that a liberty interest under the First Amendment has been recognized to protect a male student’s right to wear his hair as he wishes.²¹⁶

The *Zalewska* decision, discussed earlier, held that a transit regulation prohibiting the wearing of skirts did not implicate the type of expressive conduct required to invoke the free speech clause.²¹⁷ The court stated:

We realize that for *Zalewska*—as for most people—clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. From the nun’s habit to the judge’s robes, clothing may often tell something about the person so garbed.

211. *Id.*

212. *Texas v. Johnson* was a flag-burning case in which the Court held that the government may not prohibit the expression of an idea simply because society finds the idea disagreeable or offensive. 491 U.S. 397 (1989).

213. *Yunits*, 2000 WL 33162199, at *4.

214. *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)).

215. *Id.* at *5 (citing *Bethel v. Fraser*, 478 U.S. 675 (1986)). The court also rejected the defendants’ citation of instances where the principal became aware of threats by students to beat up the “boy who dressed like a girl” to support the notion that the plaintiff’s dress alone was disruptive, stating that, to rule in the defendants’ favor in this regard would grant contentious students a “heckler’s veto.” *Id.* at *5 (citing *Fricke v. Lynch*, 491 F. Supp. 381, 387 (D.R.I. 1980)).

216. *Id.* at *6 (citing *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970)).

217. *Zalewska v. County of Sullivan*, 316 F.3d 314, 319 (quoting *United States v. O’Brien*, 391 U.S. 367 (1968)).

Yet, the fact that something is in some way communicative does not automatically afford it constitutional protection. For purposes of the First Amendment, the Supreme Court has repeatedly rejected the view that “an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”²¹⁸

Observing that the message plaintiff intended to convey was not a specific, particularized message, but rather “a broad statement of cultural values,” the court said that action attempting to communicate such a “vague and unfocused” message is afforded minimal if any First Amendment protection.²¹⁹ It went on, however, to recognize the existence of “contexts in which a particular style of dress may be a sufficient proxy for speech to enjoy full constitutional protection.”²²⁰ Ultimately, the court concluded that the plaintiff’s activity did not have the legally requisite characteristics.²²¹

Plaintiffs have also alleged infringement of privacy interests. In *DePiano v. Atlantic County*,²²² discussed above, the court denied the defendants’ motion for summary judgment relative to their dissemination of photographs of the plaintiff, a correctional officer, dressed in women’s clothing.²²³

In addition, *Kastl* examined a claimed violation of rights to privacy in relation to the defendant’s restroom use policy; the court ruled that the defendant’s demand for information regarding the state of the plaintiff’s genitalia was neither necessary nor narrowly tailored to maintaining sex-based restroom designations (as to which the employer argued it had a compelling interest to preserve the safety and privacy of all users), reasoning that, were the information truly necessary to serve the employer’s objectives, the employer would have sought information from each person prior to granting restroom access.²²⁴

3. Medical Treatment and Disability Issues

This article earlier noted that transsexualism is recognized as a psychiatric disorder (known as “gender identity disorder” or “gender dysphoria” (hereinafter “transsexualism”)), attention to which may involve medical as well as psychiatric

218. *Id.*

219. *Id.* (quoting *E. Hartford Educ. Ass’n v. Bd. of Educ.*, 562 F.2d 838, 858 (2d Cir. 1977)).

220. *Id.* at 320 (citing *Yunits*, 2000 WL 33162199). The court also ruled that plaintiff’s claimed liberty interest in appearance did not implicate a fundamental right, thus subjecting the transit rule to a “rational basis” standard of review. It found that the county had a rational basis to believe that skirts posed a safety concern, and that safety, professionalism, and a positive public image were legitimate county interests. *Id.* at 321–22.

221. *Id.* at 320–21.

222. No. Civ. 02-5441 RBK, 2005 WL 2143972, at *3 (D.N.J. Sept. 2, 2005).

223. In so ruling, the court cited *Powell v. Shriver*, 175 F.3d 107, 111 (2d Cir. 1999), in which the court held that the “excruciatingly private and intimate nature of transsexualism, for persons who wish privacy in the matter, is really beyond debate.” *DePiano*, 2005 WL 2143972, at *12.

224. *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *6 (D. Ariz. June 3, 2004).

treatment.²²⁵ Nevertheless, the Americans with Disabilities Act (ADA) and the Rehabilitation Act of 1973 each expressly exclude “transsexualism” and gender identity disorders not resulting from physical impairments.²²⁶

Both the inclusion of transsexualism as a psychiatric disorder in the DSM and its exclusion from protection against disability discrimination under federal law and some state statutes are controversial.²²⁷ Some advocates argue that disability discrimination protection should not be sought by transsexuals on the ground that characterization of the status as a disability is stigmatizing and results in its “medicalization” (thus requiring, to obtain protection, access to health care and a diagnosis, and potentially covering only transsexuals as a subgroup of transgender people).²²⁸

Other advocates, however, maintain that transsexuals should use all available avenues for the protection of their rights, disability laws should not carry a stigma, and transsexuals should not be concerned about association with another class of persons who are “different from a mythical norm.”²²⁹ In the latter camp are those incensed by transsexuals being excluded under the ADA along with felons and other wrongdoers.²³⁰

Commenting on these issues, one writer states:

[C]onceptualizing transgenderism as a mental disability and relying on the respectability of medicine in order to gain civil rights protection comes at a cost. In particular, the strategy almost entirely excludes people . . . who either cannot afford to obtain a psychiatric diagnosis and “treatment,” or who chose not to for personal or political reasons. Disability laws privilege people who can afford to buy the legal identity required for protection. This has particularly devastating consequences for low-income transgender people, who may comprise the majority of transgender people.

Arguably, the disability model also pathologizes transgender identities and dampens consciousness of transgenderism and the normalizing regime as a political issue. Courts ambivalent about the naturalness and equal humanity of transgender people seem to find the language of disability and medicine less foreign and unpalatable than identifying the discrimination transgender people experience as a form

225. See AMERICAN PSYCHIATRIC ASSOCIATION, *supra* note 25.

226. 42 U.S.C. § 12211(b)(1) (2000) (ADA); 29 U.S.C. § 705(20)(F)(i) (2000) (Rehabilitation Act).

227. See, e.g., Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 104–107 (2002).

228. As Levy states, “[m]ost transgenders have come to terms with the internal clash between their bodies and their gender identities. Transgenders or gender variants are less troubled by that contradiction and therefore, do not often show up in doctors’ offices for diagnosis and treatment.” Levy, *supra* note 23, at 165.

229. Vade, *supra* note 18, at 295 n.143.

230. Among the excluded conditions are pedophilia, exhibitionism, and voyeurism. One writer observes that these exclusions “[create] the false implication that gender identity disorders involve criminal activity and are thereby unworthy of protection.” Levy, *supra* note 23, at 150.

of sex discrimination.²³¹

Another observer comments:

The trans-population exists on a wide spectrum. On one end are those individuals who completely reassign their sex through [sex reassignment surgery], while on the other end of the spectrum are individuals who simply appear too feminine or masculine with respect to their anatomical sex. It is permissible, under certain circumstances, to argue disability discrimination for those trans-people who qualify due to their physical circumstances. However, it is detrimental and demeaning to advocate for the placement of the entire transgender population among disabled people. It is unlikely the majority of trans-people would even qualify. It is also questionable whether trans-advocates would desire the handicap classification; especially those who consider transgender discrimination to overlap sexual orientation discrimination. Would a gay man or a lesbian consider their circumstances a handicap?

Unless a trans-plaintiff willingly accepts the “disability” label and meets certain criteria within the statute, a wide majority of trans-plaintiffs will be unquestionably denied relief under a disability discrimination law. Trans-people need consistency, and arguments under the disability class are too unpredictable.²³²

With this backdrop in mind, decisions interpreting federal law, other aspects of which are discussed above, include *Johnson v. Fresh Mark, Inc.*,²³³ in which the court affirmed a ruling that the discharge of a pre-surgical transsexual woman after she refused to use men’s restrooms and refused to return to work did not violate the ADA.²³⁴

In *Kastl*, the court assumed *arguendo* that the plaintiff’s gender identity disorder was the result of a physical impairment and would fall within ADA coverage, but concluded that the plaintiff failed to allege that her disorder substantially limited at least one major life activity.²³⁵

In *Doe v. United Consumer Financial Services*,²³⁶ the court rejected the plaintiff’s ADA claim because the ADA plainly states that transsexualism is excluded from the definition of “disability” no matter how it is characterized,

231. Lloyd, *supra* note 31, at 185–86 (footnotes omitted).

232. Levy, *supra* note 23, at 165–66.

233. 337 F. Supp. 2d 996 (N.D. Ohio 2003).

234. *Id.* at 1001–02. The court rejected an argument that gender identity disorder results from a physical impairment and should thus not be excluded, finding that it is an excluded condition regardless of characterization. The court also found that the plaintiff failed to state a claim because she did not specify what major life activities were affected by her condition. Regarding an argument that the plaintiff had a protected disability as an intersexed individual, the court stated that the record lacked adequate evidence of notice of the condition to the employer. *Id.*

235. *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *6 (D. Ariz. June 3, 2004).

236. No. 1:01 CV 1112, 2001 WL 34350174 (N.D. Ohio 2001).

whether as a physical impairment, a mental disorder, or some combination of both.²³⁷

Finally, in *Rentos v. Oce-Office Systems*,²³⁸ the court held that the ADA did not protect a postoperative transsexual from discrimination.²³⁹

Decisions construing state disability discrimination laws²⁴⁰ include *Doe v. Bell*,²⁴¹ in which the court held that a policy that barred residents of an all-male foster care facility from wearing skirts or dresses did not discriminate against a resident with gender identity disorder, reasoning that the policy was neutral on its face and applied to all persons at the facility who wished to wear feminine clothing, regardless of whether they had the disorder.²⁴²

In *Enriquez v. West Jersey Health Systems*,²⁴³ the court held that gender dysphoria is a handicap under New Jersey's non-discrimination law.²⁴⁴

In *Lie v. Sky Publishing Corp.*,²⁴⁵ the court found "compelling" the fact that the Massachusetts legislature declined to amend the state disability nondiscrimination law to adopt the ADA's exclusion of protection for individuals with gender identity disorders, and thus held that the plaintiff had established a *prima facie* case of disability discrimination, including substantial limitation of major life activities.²⁴⁶

In *Conway v. City of Hartford*,²⁴⁷ the court held that transsexualism is not a physical disability within the scope of Connecticut's disability discrimination law, but denied the defendant's motion to strike a claim of disability discrimination on theory that gender dysphoria is a "mental disorder."²⁴⁸

In *Holt v. Northwest Pennsylvania Training Partnership Consortium, Inc.*,²⁴⁹ the court dismissed disability discrimination claims for failure to allege that transsexualism affects any bodily function or limits major life activities.²⁵⁰

237. *Id.* at *6.

238. No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. 1996).

239. *Id.* at *8.

240. For discussion of state disability discrimination laws, see Lloyd, *supra* note 31, at 182–86, and Minter, *supra* note 25, § II[1][b].

241. 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003).

242. *Id.* at 851.

243. 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001).

244. *Id.* at 376.

245. No. 013117J, 2002 WL 31492397 (Mass. Super. Ct. 2002).

246. *Id.* at *6–7. *See also* Jette v. Honey Farms Mini Mkt., No. 95 SEM 0421, 2001 WL 1602799 (Mass. Comm'n Against Discrim. Oct. 10, 2001) (finding that transsexuality is not explicitly excluded from coverage under Massachusetts law, and that because there was no evident legislative intent to exclude it, and legislature was aware of the federal exclusions, the legislature must have intended to include it). *But see* Doe ex rel. Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *7 (Mass. Super. Ct. Oct. 11, 2000) (finding that analysis of federal disability laws was instructive due to the absence of authority to support the notion that gender identity disorder was a protected disability under Massachusetts law).

247. No. CV 950553003, 1997 WL 78585 (Conn. Super. Ct. 1997).

248. *Id.* at *4–5.

249. 694 A.2d 1134 (Pa. Commw. Ct. 1997).

250. *Id.* at 1139.

Finally, in *Dobre*, discussed above, the court held that transsexualism did not qualify as a disability under Pennsylvania law because it was not a condition that was “inherently prone” to limitation of major life activities, and therefore the plaintiff could not state a claim that she was disabled or “perceived as” disabled on that basis.²⁵¹

In sum, due to their express exclusions, federal disability discrimination laws are uniformly interpreted not to afford protection to transgender persons, including transsexuals. The outcome under state laws vary, depending upon either the language of the statutes or state court or administrative agency inferences from the absence of express exclusions and/or other inferences of legislative intent.

A review of health insurance coverage available for treatment of transgender medical issues, whether under private insurance or Medicaid, is beyond the scope of this article. In general, however, the literature suggests that insurance carriers typically exclude coverage for procedures relating to medical treatment of transgender health issues, although some employers offer health care plans that are more inclusive.²⁵² There is also a substantial line of cases holding that per se exclusions of surgical procedures associated with sex reassignment are unlawful.²⁵³

II. LEGISLATIVE TRENDS

As noted earlier, federal courts often cite the failure of attempts to amend Title VII to include sexual orientation as evidence of legislative intent to exclude gays and lesbians as protected classes of persons.²⁵⁴ A significant initiative of recent vintage is the proposed Employment Non-Discrimination Act, which would amend Title VII to prohibit workplace discrimination based on sexual orientation. One analyst notes that the bill would define sexual orientation as “homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived,”²⁵⁵ thus protecting persons based on their sexual orientation—a status unrelated to a person’s gender identity or gender expression. Thus, it would appear that transgender persons would be protected under the proposed legislation only if the basis of an employer’s discrimination is its perception that the gender expression is, or is perceived to be, gay, lesbian, or bisexual—not due to an individual’s transgender status. For this reason, transgender protection advocates wish to see the bill amended to include transgender persons as a protected class.²⁵⁶

251. *Dobre v. Nat’l R.R. Passenger Corp.*, 850 F. Supp. 284, 289–90 (E.D. Pa. 1993).

252. See, e.g., *Vade*, *supra* note 13, at 269 & nn. 54–55; *Ohle*, *supra* note 8, at 261–63; *Minter*, *supra* note 20, § V.

253. See cases cited in *Ohle*, *supra* note 15, at 261 n.132; *Minter*, *supra* note 25, § V & n.49; but see *Minter*, *supra* note 25, § V at n.50.

254. One writer cites 1975 as the year in which efforts to amend the statute began. Courtney Joslin, *Protection for Lesbian, Gay, Bisexual and Transgender Employees Under Title VII of the 1964 Civil Rights Act*, 31 HUM. RTS. 14 (Summer 2004).

255. *Coffey*, *supra* note 18, at 180 (quoting Employment Non-Discrimination Act of 1999, H.R., 2355, 106th Cong. § 3(9) (1999)).

256. See *id.*; see also *Ohle*, *supra* note 15, at 241–43. For a discussion of a federal legislative initiative designed to address sexual orientation issues in schools, see *Weiner*, *supra*

State laws reflect several approaches to this set of issues.²⁵⁷ A few states expressly prohibit discrimination on the basis of gender identity. Those that accord such protection variously do so as a matter of legislative drafting: some identify “gender identity” as a freestanding category; others list gender identity or transgender status as a subset under the definition of “sex” or “sexual orientation.” Statutes that afford protection to transgender persons typically confine their scope to specific sectors of activity, such as fair employment and housing, foster care, public contracts, schools, public accommodations, access to credit, or housing and real property. A significant number of state statutes address hate crimes motivated by transgender status, and therein provide for enhanced sanctions.²⁵⁸

Unquestionably, the most active legislative realm is at the municipal level. Ordinances are being amended to include transgender persons under existing definitions or classifications; others establish a new category of protection on the basis of transgender status, transsexualism, or manifestations of “gender identity and expression.”²⁵⁹ The scope of such initiatives again varies; examples of affected activities include employment practices, rental housing and real estate, city facilities and services, educational institutions, business establishments and public accommodations, and credit transactions.

As might be inferred from earlier discussion, advocates for transgender status protection do not agree on the optimal legislative strategy. Some maintain that the proliferation of protected class categories fails “to get at the underlying structure of the discrimination,” which derives from cultural norms and stereotypes.²⁶⁰ As one

note 15, at 217–18.

257. Questions such as comity between the states, and state requirements for legalization of gender changes, are beyond the scope of this article. *See, e.g.,* Vade, *supra* note 18, at 271 n.62 (listing states requiring surgery to change gender marker on birth certificates); Flynn, *supra* note 24, at 418 & n.148 (noting courts that rule that post-operative transsexuals remain legally defined by their anatomical sex at birth); *see generally* Julie A. Greenberg & Marybeth Herald, *You Can't Take it With You: Constitutional Consequences of Interstate Gender-Identity Rulings*, 80 WASH. L. REV. 819 (2005) (discussing constitutional implications of various approaches to determine legal sex).

258. For overviews and lists of state and local nondiscrimination laws relevant to these issues, see Minter, *supra* note 25, § II[3]–[6]; Coffey, *supra* note 18, at 168–69, 185–93; Levy, *supra* note 23, at 159–60 & nn.160–65; Lloyd, *supra* note 31, at 190–92 & nn.202–03; Vade, *supra* note 18, at 296 & nn.144–45; Dunson, *supra* note 15, at 486–94; and advocacy group websites such as the Transgender Law & Policy Institute, <http://www.transgenderlaw.org> (last visited Apr. 15, 2006) and those cited *infra*, notes 190 & 210.

259. For illustrative decisions addressing municipal ordinances, *see, e.g., Hartman v. City of Allentown*, 880 A.2d 737 (Pa. Commw. Ct. 2005) (challenging an ordinance prohibiting discrimination on basis of gender identity and sexual orientation); *Rentos v. Oce-Office Systems*, No. 95 CIV. 7908 LAP., 1996 WL 737215 (S.D.N.Y. 1996) (holding that transsexuals are protected from discrimination under city human rights laws); and *Maffei v. Kolaeton Industry, Inc.*, 626 N.Y.S.2d 391 (N.Y. Sup. Ct. 1995) (considering transsexual's rights under city administrative code). *See also* McGrath v. Toys “R” Us, Inc. 821 N.E.2d 579 (N.Y. 2004) (discussing attorney's fees award under New York City Human Rights Law); *Underwood v. Archer Mgmt. Servs., Inc.*, 857 F. Supp. 96, 98 (D.D.C. 1994) (concluding that transsexuality is not included in definition of “sex” for purposes of D.C. non-discrimination law).

260. Weiner, *supra* note 15, at 217. Weiner writes:

[I]n schools, where gender norms have such power in molding gender identity, it is

commentator observes:

Far from being outliers on the edge of civil rights advocacy, transgender rights cases promise to play a central role in advancing a broad movement for equality that encompasses the rights of women, gay men and lesbians, and gender variant persons within its scope. . . . By contesting the social and jurisprudential reliance on biological sex as the fixed marker of gender identity, trans litigation holds the potential to defuse the power of gender as a mechanism for discrimination.”²⁶¹

Based on judicial precedent, however, others argue that more generic protection, such as reliance on the terms “sex” or “gender,” will continue to generate rulings that deem transgender status outside the scope of protected classifications.²⁶²

In sum, advocates seeking protection for transgender persons through the legislative process have pursued multiple avenues. Some seek expansion of existing classifications, such as sex, gender, or sexual orientation, to cover articulations of gender identity. Increasingly, state and local initiatives seek to establish a separate category of protection for “gender identity and expression,” with definitional variations in those terms.²⁶³ As discussed in the next section, paralleling those trends are efforts on the part of campus activists to amend college and university non-discrimination statements to include protection for “gender identity and expression” or a variant thereof.

III. IMPLICATIONS FOR COLLEGES AND UNIVERSITIES

At last examination, the authors identified over fifty colleges and universities, both public and private, granting non-discrimination policy protection to gender identity or gender identity and expression.²⁶⁴ Although some policy revisions are

crucial to attack the whole system of sex/gender/sexual orientation inequalities, instead of just one piece of it, so as not to risk perpetuating that system and its inequalities indefinitely. While judges may be slow to interpret current law holistically, removing the urgency of doing so through sexual orientation-specific legislation would make advocacy for such interpretation virtually impossible.

Id. at 219. See also, Farrell, *supra* note 28, at 646 (“[C]ourts must recognize that the wrong of sex discrimination is that individuals are forced into gendered roles, and a remedy for sex discrimination must reach all instances in which gender norms and hierarchies are enforced against individuals who transgress them—including norms touching upon sexuality. Thus, aspects of individuals that we now delineate as gender or sexuality are inherently a part of sex.”).

261. Flynn, *supra* note 24, at 419–20.

262. See, e.g., Dunson, *supra* note 15, at 499–502 (suggesting that adding “gender identity” to existing anti-discrimination laws serves a dual purpose, explicitly to protect transgenders and explicitly to recognize the transgender community as a separate and identifiable class of people, not just a subset of the larger class of “gendered” people, i.e. every member of society); see also Levy, *supra* note 23, at 161–63 (finding that sexual orientation is inherently distinguishable from issues of gender identity).

263. See generally Coffey, *supra* note 18, at 186–87 (discussing non-discrimination legislation in San Francisco and Rhode Island).

264. Although the existence and status of policies should be verified with the respective institutions, see the list and hyperlinks accessible by means of the Gender Public Advocacy

responsive to changes in state or local law, overall these policy amendments represent a significant trend.

Some of the foreseeable practical implications of these developments—largely the province of administrators, and not legal counsel—are summarized below. From a legal perspective, whether policy amendments are made voluntarily or to comply with state or local legislation, college and university counsel will be asked to assess associated new liability exposure. This exposure may include not only additional bases for internal grievances, but contractual or quasi-contractual liability for failure to accord whatever protections are explicitly or implicitly promised by such amendments. Where institutional policies are amended in response to changes in ordinances or state laws, colleges and universities may also be called upon to respond in administrative or judicial proceedings to alleged civil rights violations.

This liability exposure may be avoidable if colleges and universities institute proactive measures conventionally effective in civil rights contexts. First, institutions can augment anti-discrimination and diversity training to address gender identity and expression—training that encompasses established *Price Waterhouse* principles as well as transgender issues. It is also important to establish comprehensive protocols for addressing the needs of employees and students who are in gender transition, as well as the needs of those who interact with such individuals, such as co-workers and fellow students.²⁶⁵

There are numerous practical implications of affording new protections through policy changes. Readily identifiable issues include the following:

Forms and Recordkeeping: Employees and students are routinely asked on institutional forms to identify themselves by name and “sex.” Transgender persons may adopt a name different than their birth names, and may in fact transition during the period of their employment or enrollment. Colleges and universities may therefore wish to consider under what conditions institutional records and documents will (and can legally) be changed to reflect a person’s gender self-identification.²⁶⁶

Coalition, <http://www.gpac.org/youth/eeocampuses.html> (last visited Apr. 29, 2006), and the Gender Equality National Index for Universities & Schools, <http://www.gpac.org/genius> (last visited Apr. 18, 2006). Another list is available through the Transgender Law & Policy Institute, <http://www.transgenderlaw.org/college/index.htm> (last visited Apr. 18, 2006).

265. See *infra* notes 196 & 210; see also, Esra A. Hudson & Laura T. Johnson, *Gender Identity Issues: Transgender, Transsexual, and Transitioning Employees*, paper presented at NACUA Spring CLE Workshop, San Francisco, Cal., Mar. 15–17, 2006. These protocols will ideally address issues including the primary point of contact, or case manager, responsible for assisting the transitioning employee or student; the schedule for implementing changes in the workplace or student life environment, including records change issues; any individualized accommodations; and available campus resources. See HUMAN RIGHTS CAMPAIGN FOUNDATION, *TRANSGENER ISSUES IN THE WORKPLACE: A TOOL FOR MANAGERS* (2004), available at <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf>. Although most change-advocates recommend engaging co-workers in some manner with respect to transitioning employees, colleges and universities must also be mindful of statutory and common law privacy interests in relation to medical treatment and status issues. See *id.* at 17 (Policy Recommendations: Ensure Employee Privacy).

266. See *supra* note 257, regarding state laws and birth name changes associated with

Health Insurance and Medical Treatment: As noted above, many private insurance plans exclude coverage for surgical and/or medical treatment related to sexual reassignment.²⁶⁷ Consideration should be given to the implications of the coverage of existing plans in light of possible claims of entitlement under newly applicable law or as a quasi-contractual matter under a revised non-discrimination policy statement. Administrators may also wish to explore, as a business decision, whether to seek to expand plan coverage where insurance carriers and plan administrators are willing to do so as a matter of contract negotiation.²⁶⁸

As to medical treatment, one advocacy organization notes that some colleges and universities are beginning to require or strongly encourage health and counseling center staff to undergo training on transgender issues. In addition, some centers are instituting options described elsewhere in this section, such as private, gender-neutral restrooms and changing rooms, and use of preferred names on medical records. At least one university also offers women's health examinations outside of the women's health services facility.²⁶⁹

Restrooms: Employers and the courts seem especially to struggle with questions involving restroom issues associated with transgender persons.²⁷⁰ Transgender employees and students may be subjected to harassment or violence when using restrooms that conform to their gender identity and its expression but not to their ostensible appearance or physiology. Non-transgender employees and students may experience discomfort sharing such facilities with transgender individuals.²⁷¹ Although requiring transgender persons to utilize restrooms

elective sexual reassignment, as well as issues relating to full faith and credit between the states. Regarding approaches in use at several colleges and universities, see description in Transgender Law & Policy Inst., *Ways that Colleges and Universities Meet the Needs of Transgender Students*, <http://www.transgenderlaw.org/college/guidelines.htm> (last visited Apr. 29, 2006). See also Hudson & Johnson, *supra* note 265.

267. See *supra* note 252 and accompanying text.

268. Coverage issues include, without limitation, psychotherapy, hormone therapy, cosmetic and appearance treatments (e.g., voice therapy, electrolysis), and gender reassignment surgery.

269. See description in Transgender Law & Policy Institute, *supra* note 266.

270. Transgender advocates commonly recommend that employers/schools allow persons to use the restroom appropriate to their gender identity (and not require medical verification of the applicable "sex" post-transition, which may constitute an invasion of privacy if not harassment). However, litigation and anecdotal evidence suggest that this approach does not always protect the safety of such persons or allay complaints from co-workers or fellow students. Advocates also recommend that plans for new construction include gender-neutral, single-stall restrooms, and, where appropriate, private changing facilities and single-person showers. See generally Lisa Mottet, *Access to Gender-Appropriate Bathrooms: A Frustrating Diversion on the Path to Transgender Equality*, 4 GEO. J. GENDER & L. 739 (2003); Vade, *supra* note 18, at 304 nn.205–06 (citing Jenifer M. Ross-Amato, *Transgender Employees and Restroom Designation—Goins v. West Group, Inc.*, 29 WM. MITCHELL L. REV. 569, 588–90 (2002); CURRAH & MINTER, *supra* note 23, at 58–60).

271. See, e.g., *Norwood v. Dale Maint. Sys., Inc.*, 590 F. Supp. 1410, 1421 (N.D. Ill. 1984) (rejecting female washroom attendant's claim of sex discrimination following employer's denial of her application for men's room attendant position, citing "fundamental concern" over exposure of one's body in presence of member of opposite sex); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122, 1133 (S.D. W. Va. 1982) (holding, on similar rationale, that male gender was a *bona fide* occupational qualification for position of janitor in men's bathhouses). Some

allocated to disabled persons creates its own controversies, institutions may wish to consider designating certain restrooms unisex and/or single-occupancy.²⁷²

There are several reported decisions addressing restroom issues, but general legal principles have yet to emerge. In *Hispanic AIDS Forum v. Estate of Bruno*,²⁷³ the court held that the plaintiff failed to state a claim on behalf of its transgender clients under state and city human rights laws, reasoning that such individuals were not selectively excluded from bathrooms, but rather were excluded from certain bathrooms—as were all tenants—based on their biological sex.²⁷⁴ The court cited *Goins, infra*, as “instructive” for the proposition that the defendants’ designation of restroom use, applied uniformly on the basis of biological gender (rather than biological self-image), was not discrimination, although the court implied that selective exclusion of transgender individuals might trigger one or both discrimination laws under review.²⁷⁵

The *Sturchio v. Ridge* case, discussed above, involved a U.S. Border Patrol employee who asserted that she had been subjected to a hostile workplace in violation of Title VII. The court declined to find a discriminatory hostile or sex-stereotyping work environment where, *inter alia*, the defendant required the plaintiff to use the men’s restroom where unisex restrooms were not available.²⁷⁶

In *Kastl*,²⁷⁷ discussed at length above, the court held that an allegation that the employer violated Title VII by requiring a biological female believed to possess stereotypically male traits to provide proof of genitalia or face consignment to the men’s restroom stated a claim.²⁷⁸

transgender advocates suggest that an objecting co-worker, and not the transgender employee, be offered the use of a single-person restroom.

272. The New York University Office of Lesbian Gay Bisexual Transgender Student Services, for example, publishes a single occupancy restroom list “to ensure safety and comfort for the transgender community.” Single Occupancy Restroom List, <http://www.nyu.edu/lgbt/restroom.htm> (last visited Apr. 17, 2006). Moreover, under compliance guidelines to prohibit gender identity discrimination issued in 2003, the City and County of San Francisco Human Rights Commission “strongly urges” that all single-use bathrooms be designated gender neutral (or “unisex”) and that all places of public accommodation provide a gender neutral bathroom option. CITY & COUNTY OF SAN FRANCISCO HUMAN RIGHTS COMM’N, COMPLIANCE RULES AND REGULATIONS REGARDING GENDER IDENTITY DISCRIMINATION (2003), http://www.sfgov.org/site/sfhumanrights_page.asp?id=6274 [hereinafter SAN FRANCISCO COMPLIANCE RULES]. See also BASIC RIGHTS EDUCATION FUND, FAIR WORKPLACE PROJECT, http://www.basicrights.org/downloads/fwp/fwp_main.pdf (last visited Apr. 29, 2006) (including options for single-seat unisex restrooms and giving a transitioning employee an “in use” sign for the restroom door).

273. 792 N.Y.S.2d 43 (N.Y. App. Div. 2005).

274. *Id.* at 47.

275. *Id.* at 47–48.

276. *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899, at *16. (E.D. Wash. June 23, 2005).

277. *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2004 WL 2008954 (D. Ariz. June 3, 2004).

278. In so ruling, the court stated that the defendant’s argument that segregating restroom use by genitalia is permissible because doing so cannot be sex discrimination simply created a factual dispute regarding the nature of its restroom policy, while noting that whether the policy involved segregation of use by “sex” or genitalia was not for the court to decide at the motion to dismiss

Finally, in *Goins v. West Group*,²⁷⁹ the court concluded that “absent more express guidance from the legislature,” the employer’s designation of employee restroom use based on biological gender was not sexual orientation discrimination under the state human rights law.²⁸⁰

Student Housing: Colleges and universities typically make residence hall assignments based on a student’s sex at birth, and designate single-sex dorms, floors, hallways, or rooms. Transgender students, including those who are in transition or who may have completed transitions, thus may not have safe, suitable, or comfortable housing options under traditional approaches. Institutions have adopted a variety of strategies (with various degrees of success) with which to approach gender and student housing, including gender-neutral hallways, all-gender or “gender blind” residence halls, and mixed-gender suites.²⁸¹ In general, institutions characterized by the Transgender Law & Policy Institute as having “model” transgender-related housing policies typically ask students to articulate their specific needs to residential life programs, which then seek to accommodate those needs on a case-by-case basis insofar as possible.

Locker Rooms: Locker rooms may present intimidating situations for transgender persons who fear compromising their privacy and/or threats to personal safety when using the facilities. Again, institutions may wish to designate private unisex facilities to address such issues.²⁸² It is often recommended that, in planning new facilities, provision be made for private changing rooms and showers.²⁸³ Other suggestions include creation of a private area within the facility, such as a bathroom stall with a door, an area separated by a curtain, or a physical education instructor’s office; or establishment of a separate changing schedule, such as access to a locker room before or after use by other students.²⁸⁴

stage. *Id.* at *3.

279. 635 N.W.2d 717 (Minn. 2001).

280. *Id.* at 723. State law defined sexual orientation to include “having or being perceived as having a self-image or identity not traditionally associated with one’s biological maleness or femaleness.” *Id.* at 722 (quoting MINN. STAT. § 363.01, subd. 41a (2000)). The plaintiff had argued that state law prohibited the defendant-employer’s policy of designating restroom use according to biological gender and required instead that such designation be based on self-image of gender. The parties had agreed that plaintiff consistently presented herself as a woman. *Id.*

281. See, e.g., Transgender Law & Policy Inst., *supra* note 266; see also Ohio State University, Transgender Guide & Resources, <http://multiculturalcenter.osu.edu/glbts/page.asp?ID=96> (last visited Apr. 29, 2006) [hereinafter OSU Guide]; University of California Riverside, Housing Policies Related to Gender Identity/Expression, <http://out.ucr.edu/transpolicy.html> (last visited Apr. 17, 2006); Ithaca College, Res Life Room Assignments, <http://www.ithaca.edu/reslife/roomassignments.htm> (last visited Apr. 17, 2006).

282. Another question for college and university administrators to ponder before the need for decision arises is how best to address requests for varsity and intramural athletic team memberships from transgender students. Conference and other external rules may affect institutional options.

283. See, e.g., OSU Guide, *supra* note 281 (noting new recreation center includes private changing rooms with showers). See also SAN FRANCISCO COMPLIANCE RULES, *supra* note 272 (discussing “sex-specific facilities with unavoidable nudity”).

284. See NAT’L CENTER FOR LESBIAN RIGHTS & TRANSGENDER LAW CENTER, LGBT LEGAL ISSUES FOR SCHOOL ATTORNEYS, Attachment F, <http://www.transgenderlawcenter.org/>

Dress Codes: Another set of practical issues involves dress code standards. Although challenges to such standards are often unsuccessful,²⁸⁵ college and university campuses typically do not establish codes for students and most employees. Additionally, in the wake of decisions analyzing gender expression issues under the rubrics of free expression and equal protection, it is possible that constitutional as well as statutory and policy rights will be implicated by restrictions specific to transgender persons. Minimally, as to public institutions, the law requires that code standards be non-discriminatory in impact and serve a legitimate business purpose (such as safety).

CONCLUSION

The legal, political, religious, and cultural controversies that ensued in the 1960s regarding sex and the role of men and women in American society continue. In the midst of ongoing disputes regarding gender stereotyping and sexual orientation issues, a significant and far-reaching battle rages regarding the cultural norms that underlie matters of gender identity and expression.

College and university counsel should be aware of legislative and judicial developments in this area. In addition, so as to assist administrators in resolving the difficult and often emotional practical issues that arise in their wake, review of advocates' "best practice" approaches may yield insight into wishes and expectations of transgender persons, if not always ideal solutions.²⁸⁶ It is hoped

pdf/lgbt_school_law_101.pdf (last visited Apr. 29, 2006); HUMAN RIGHTS CAMPAIGN FOUNDATION, *supra* note 265.

285. See Farrell, *supra* note 28, at 655 n.173. See also *Jespersen v. Harrah's Operating Co.*, 392 F.3d 1076 (9th Cir. 2004), *reh'g en banc granted*, 409 F.3d 1061 (9th Cir. 2005) (deciding that although appearance standards that apply differently to women and men do not constitute discrimination on the basis of sex, imposition of more stringent appearance standards on one sex than the other constitutes sex discrimination and must be BFOQ, even where such standards regulate only "mutable" characteristics, e.g., weight; however, court declined to apply *Price Waterhouse* rationale of gender stereotyping in the context of appearance and grooming standards cases); *Zalewska v. County of Sullivan*, 316 F.3d 314, 319–20 (1968). (holding that regulation prohibiting wearing of skirts did not implicate type of "expressive conduct" required to invoke free speech clause; claim that a liberty interest in appearance was violated did not implicate a fundamental right and was thus subject to rational basis review, and county had rational basis to believe skirts posed a safety concern; and rule did not violate Equal Protection Clause); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2005 WL 1502899, at *16 (E.D. Wash. June 23, 2005) (holding that Title VII does not apply to grooming and dress standards unless the standards impose unequal burdens on one sex, and that employer's prohibition against wearing dresses due to nature of job, including safety issues, did not place greater burden on one sex than another).

286. See, e.g., NAT'L CENTER FOR LESBIAN RIGHTS/TRANSGENDER LAW CENTER, LGBT LEGAL ISSUES FOR SCHOOL ATTORNEYS, *supra* note 284; CURRAH, *supra* note 270; HUMAN RIGHTS CAMPAIGN, TRANSGENDER AMERICANS: A HANDBOOK FOR UNDERSTANDING, available at <http://www.hrc.org>; HUMAN RIGHTS CAMPAIGN FOUNDATION REPORT, TRANSGENDER ISSUES IN THE WORKPLACE: A TOOL FOR MANAGERS (June 2004), <http://nmmstream.net/hrc/downloads/publications/tgtool.pdf>; GENDER PUBLIC ADVOCACY COALITION, WORKPLACE FAIRNESS, <http://www.gpac.org/workplace/WorkplaceFairness.pdf>. See generally RONNI L. SANLO, GENDER IDENTITY AND SEXUAL ORIENTATION: RESEARCH, POLICY, AND PERSONAL PERSPECTIVES: NEW DIRECTIONS FOR STUDENT SERVICES (2005); Transgender Law & Policy Inst., *supra* note 266. See also NYC COMM'N ON CIVIL RIGHTS,

that compassion and common sense will minimize conflict and promote good outcomes for all parties involved in this rapidly-evolving context.

GUIDELINES REGARDING "GENDER IDENTITY" DISCRIMINATION, A FORM OF GENDER DISCRIMINATION PROHIBITED BY THE NEW YORK CITY HUMAN RIGHTS LAW (Dec. 2004), *available at* http://nyc.gov/html/cchr/pdf/trans_guide.pdf; SAN FRANCISCO COMPLIANCE RULES, *supra* note 272; MARY ANN HORTON, CHECKLIST FOR TRANSITIONING IN THE WORKPLACE, TRANSGENDER AT WORK (2001), <http://www.tgender.net/taw/tggl/checklist.html>.