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Stories from the Gender Garden: Transsexuals and Anti-Discrimination Law

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I. The Beginning

It was only a dream, but it seemed real at the time.

I stood in the middle of a forest and looked into a stream of water, much as Narcissus must have done. The water reflected as clearly as a mirror. When I saw my reflection, I said: "I am a flower."

The trees of the forest came alive and spoke. "You are a daffodil," they said. But I knew otherwise.

"No, a hyacinth," I said.

We could not agree. I was one or the other and we could not agree.

Then the god of light and wisdom appeared. The god said that I was both a daffodil and a hyacinth and I was happy.

But then the rule was written. The rule said: "A flower is special and cannot be harmed." The interpreters said that a daffodil was a flower and a hyacinth was a flower. At first, I felt protected and warm.

Then one day I was threatened by a great wind. I said to the wind: "I am a flower and you cannot harm me." The wind began to hum. Then the wind began to laugh. "You are not a flower," said the wind. "You are not a daffodil and you are not a hyacinth."

"Yes, I am. I am both daffodil and hyacinth."

And as the wind blew over me and trampled me to the ground, I heard it say: "Not a flower, not a flower, not a flower."

And the interpreters agreed with the great wind. "A daffodil/hyacinth is not A flower," said the interpreters. "If you are both, you are neither. You are not A flower and you are not protected. Only A flower is special."

I protested, but to no avail. If a daffodil is special and a hyacinth is special, then shouldn't a daffodil/hyacinth be even more special? Is it not worse to destroy both?
The dream is easy to explain. It is spring and, despite the recent snows in the Midwest, my daffodils are starting to bloom. The hyacinth was my favorite flower in childhood, but only the blue ones. I used to crush their blooms into pixie dust so that I could fly. Sometimes I was Peter Pan. Sometimes I was Superboy (but never Supergirl).

For months now I have immersed myself in the stories of female to male transsexuals (FTMs), "boychicks" who are considering some form of physical transition from femaleness to maleness, and butch lesbians who embrace their female bodies while also embracing forms of masculine gender expression. My reading has also included stories of male to female transsexuals (MTFs). In addition, I have read every case of discrimination against such people that has been reported in the federal or state reporters. Most discrimination cases involve MTFs, but there are a handful of cases in which FTMs are plaintiffs. The message from the courts to the plaintiffs is the same in both cases: Men are protected from discrimination and women are protected from discrimination, but you, as a transsexual, are not protected. You are not a "sex." You are something else.

The stories of butch lesbians, especially from the 1960s and 70s, contain similar themes of rejection. This period was the heyday of civil rights activism and the era of origin for anti-discrimination laws that focus on sex and gender. For butch lesbians, it was not the legal system that threatened their claims to masculine identity in a female body. Rather it was the feminist community, and in particular lesbians within that community, who began demanding that for lesbians to be true feminists they must be "woman-identified." Butch or masculine-identified women were suddenly "politically incorrect."²

Similarly, progressive lesbian communities of the 1980s and 90s have policed their borders by rejecting MTF transsexuals who claim lesbian identity in a post-op female body. The Michigan Womyn's Music Festival, for example, adopted a "womyn born womyn" rule in 1992 to protect their female-only space.³

It seems, then, that in American law and society, sex is either male or female. Gender is either masculine or feminine. Furthermore, masculine gender is expected to correlate to male sex, feminine gender to fe-

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1. "Because the proposition that lesbianism is an intensified form of female bonding has become a belief, thinking, acting, or looking like a man contradicts lesbian feminism's first principle: the lesbian is a 'woman-identified woman.'" Esther Newton, The Mythic Mannish Lesbian: Radclyffe Hall and the New Woman, 9 SIGNS 557, 557–58 (1984).


male sex. Persons who do not fit these categories are unprotected by the laws that prohibit discrimination on the basis of sex. And persons who blend masculine and feminine characteristics or one sex (e.g., female) with the opposite gender (e.g., masculine) risk rejection, not only by our legal institutions, but also by progressive communities.

Title VII protects employees against discrimination on account of sex. Numerous state statutes protect persons from sex discrimination in employment, housing, credit, and education. At least ten states and the District of Columbia have statutes that prohibit discrimination on the basis of sexual orientation. And Congress is considering once again the Employment Non-Discrimination Act, which would make employment discrimination on the basis of sexual orientation illegal in all states. With two exceptions, none of these statutory protections offers any protection to transsexual or transgendered individuals.

4. See, e.g., Sommers v. Iowa Civil Rights Comm'n, 337 N.W.2d 470, 473 (Iowa 1983) (holding that a transsexual in transition cannot claim discrimination on the basis of sex because "the common usage of the word sex denotes male or female, but not both").
6. Id. § 2000e-2.
7. See, e.g., MINN. STAT. § 363.03 (1996).
10. See, e.g., MASS. GEN. LAWS ANN. ch. 76, § 5 (West 1996).
13. The exceptions are Minnesota (by statute) and New York (by case law). The Minnesota human rights laws prohibit discrimination in employment on the basis of sexual orientation. MINN. STAT. § 363.03. "Sexual orientation" is defined as:

[H]aving or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness.

Id. § 363.01 (emphasis added).

A New York court, in Maffei v. Kolaeton Industry, Inc., provided protection to transsexuals under New York City law by interpreting "sex" to include transsexuals. 626 N.Y.S.2d 391, 395-96 (App. Div. 1995) (rejecting, as "unduly restrictive," the federal courts' position that Title VII's proscription against sex discrimination does not protect transsexuals). While the Maffei decision was ambiguous as to the applicability of New York state law to transsexuals, a reasonable interpretation of the decision, including its discussion of the more expansive nature of the state law as compared to Title VII, indicates that the court recognized protections for transsexuals under New York state law as well. See id. at 392-96; see also Rentos v. Oce-Office Sys., 95 CIV. 7908 LAP, 1996 WL 737215, at *9 n.3 (S.D.N.Y. Dec. 24, 1996) (interpreting the Maffei decision to protect transsexuals under New York state, as well as city, law). In Rentos, a federal court applying New York state and city law denied defendant's motion to dismiss, recognizing that the Maffei decision indicated that the transsexual plaintiff had a claim under these laws. See id. at *8-9 ("Any ambiguity as to
Why is it that our jurisprudence has developed a notion of sex, gender, and sexual orientation that completely excludes transsexual or transgendered persons? Are transsexual persons neither male nor female under the law, and thus undeserving of protections that are available for men and for women? Is our understanding of “discrimination on the basis of sex” so limited that it cannot accommodate the situation of a person who was assigned one sex at birth, but has developed a different gender identity throughout life? And how does our anti-discrimination jurisprudence accommodate the biologically intersexed person or hermaphrodite, whose sex and gender are blurred so as to defy classification in our binary system?

Perhaps the problem is not with our jurisprudential vision, but with our inability to visualize what it means to be transsexual or transgendered. And if, as it appears, some of our most progressive political communities experience difficulty with the blending of genders and sexes, then perhaps we need to do some additional consciousness-raising on the situation of transsexuals.

The purpose of this article is to enrich our understanding of transsexuals and transgendered persons so that we can better determine whether their experiences of discrimination ought to fall within existing legal categories or whether we need to create new legal categories. To this end, I will employ the method that feminist legal theorists of the 1970s and 80s used to develop new legal theories for the benefit of bat-

14. Although courts consistently interpret Title VII to exclude transsexuals from antidiscrimination protection, see Rentos, 1996 WL 737215, at *7 (“Every federal court that has considered the question has rejected the application of [Title VII] to a transsexual claiming employer discrimination.”), Title IX has recently been applied in a sexual harassment case in which the plaintiff was a transsexual, harassed because she appeared female to the harasser. See Miles v. New York Univ., 979 F. Supp. 248, 249 (S.D.N.Y. 1997) (“There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to [the harasser] and everyone else at the university, plaintiff was not a biological female.”). Title IX’s sex discrimination language is equivalent to the language in Title VII. Compare 20 U.S.C. § 1681(a) (1994) (Title IX language: “No person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program . . . .”), with 42 U.S.C. § 2000e-2(a) (1994) (Title VII language: “It shall be unlawful employment practice for an employer . . . to discriminate against any individual . . . because of such individual’s . . . sex.”). Thus, the two statutes should be interpreted to apply to similar discriminatory behavior. See Miles, 979 F. Supp. at 249–50 & n.4 (recognizing that “it is now established” that the sex discrimination language in Title VII and Title IX are interpreted in the same manner). In addition, the Supreme Court’s reasoning in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), a case in which a woman was discriminated against for not being feminine enough, signals the possibility for future application of Title VII to cases involving transsexuals. See Price Waterhouse, 490 U.S. at 240 (finding “because of such individual’s . . . sex” language in Title VII “mean[s] that gender must be irrelevant to employment decisions”). The Court’s discussion in Oncale v. Sundowner Offshore Services, Inc., 118 S. Ct. 998 (1998), also contains language which might support future claims by transsexual plaintiffs. See Oncale, 118 S. Ct. at 1002 (stating that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils”).
tered women and women in the workplace who were harassed. That method entails listening to and believing stories of the oppressed—"stories from the bottom," as Mari Matsuda would call them.\textsuperscript{15}

Part II of this article will outline briefly what I mean by feminist method. In Part III, I will describe what I mean by "differently gendered persons." Part IV focuses on the stories of differently gendered persons. After making some preliminary observations about those stories in Part V, I conclude in Part VI with some suggestions for legal reform in the area of anti-discrimination law.

II. FEMINIST METHOD

A. Consciousness-Raising as Feminist Method

As Chris Littleton explained years ago: "Feminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us."\textsuperscript{16} For me this is still the starting place for constructing feminist legal theories, listening to and believing women's stories. It means holding back the critiques and the judgments until the story has been heard in full—with empathy and understanding.

Some feminist theorists have described this process as akin to consciousness-raising.\textsuperscript{17} Imagine a group of women sharing with each other their stories and perspectives—stories and perspectives they have never shared before; for some out of fear, for some as a result of the indifference of available listeners. The process builds a new understanding of previously silenced experiences and the women sharing in the process gain insights about their own stories.

Consciousness-raising has been described as the "personal reporting of experience in communal settings to explore what has not been said."\textsuperscript{18} It enables "feminists to draw insights and perceptions from their own experiences and those of other women and to use these insights to challenge dominant versions of social reality."\textsuperscript{19}

This process of telling and hearing stories is credited with the formulation of legal theories dealing with sexual harassment, pornography,

\begin{itemize}
\item[15.] See Mari J. Matsuda, \textit{Looking to the Bottom: Critical Legal Studies and Reparations}, 22 HARV. C.R.-C.L. L. REV. 323 (1987); see also infra notes 36–37 and accompanying text (providing further discussion of Matsuda's term).
\item[19.] Bartlett, supra note 17, at 866.
\end{itemize}
battered women, and rape. It has also helped us to understand connections between sexism and racism.

There is a risk to this form of feminist method. For example, Andrea Stuart argues that "[e]ncounter groups and consciousness raising seem most pertinent to a privileged few, largely white and middle-class, who are lucky enough to be able to put to one side issues of race and class . . . ." Critics charge that consciousness-raising may produce a feminist "movement side-tracked by a peculiarly narcissistic dimension of 'the personal is the political.'" Others charge that the consciousness-raising "model 'works' mainly in a culture that prioritizes individual, rather than collectivist, strategies and solutions."

"Difference feminism" has emerged from this method, offering a critique of reality from the perspective of women, a perspective that is claimed to be different from that of men. To the extent difference feminism has relied on or even suggested the existence of a monolithic and coherent woman's standpoint, it has been criticized for its failure to include the voices and viewpoints of diverse women. Racial critiques and lesbian critiques have claimed that feminist standpoint theories too often ignore the realities and experiences of women of color and lesbians. Thus, according to these critiques, the truths such standpoint theories offer are only partial.

I have argued elsewhere that lesbian experience must be understood and included in feminist critiques. Legal solutions that ignore lesbian experience may contribute to the continued subordination of lesbians. Such solutions are not really feminist, for feminism means working against the subordination of all women. Relational or cultural feminist arguments that value the biological connection between mother and

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22. Id.
24. See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982) (discussing the existence and implications of distinctions between male and female modes of observation and communication).
27. Id.
child,\textsuperscript{29} for example, may serve to devalue the mother and child connection for the lesbian mother who is a "second parent."\textsuperscript{30}

Linda McClain has described the problems that may result from a misuse of feminist method. In a recent article, she says:

There has been a deep impulse in feminism, throughout its history, to engage in judgment or critical evaluation with a view to helping women. Arguably, the role of consciousness-raising as a feminist method yielding knowledge about women's lives reflects this impulse. But, as applied to other women, a stance of judgment may suggest an us/them or self/other relationship in which feminists attempt to interpret the experience and voices of other women. Particularly when differences such as race, ethnicity, and class exist, there are risks of incomprehension and misinterpretation, as well as solipsistic use of one's own experience as a measure or norm. The consequences are exacerbated when the interpreter is in a position of power (e.g., to prescribe policy agendas or to regulate the lives of the women under interpretation).\textsuperscript{31}

The task of feminist method is to listen openly to those women who are different from us, especially the most subordinated—to hear their stories as best we can and to check our theories against the interests of those we have listened to. In addition, we must be slow to generalize, slow to build grand theory—or at least willing to revise our theories continuously in light of new knowledge.

B. Narrative and Stories from the Bottom

Consciousness-raising implies dialog, the sharing of stories. My method in this article is not true consciousness-raising because I have not engaged in rap sessions or dialog groups with FTMs or other differently gendered persons. But like consciousness-raising, my method begins with the real life experiences of FTMs and other differently gendered persons. I have lurked on internet discussion lists dealing with FTM identity and immersed myself in autobiographies, personal statements, and interviews with FTMs and cross-dressers. In this article, I will offer legal theories based on the listening I have done. In addition, I will share


\textsuperscript{30.} The nonbiological second mother is rarely recognized as a parent for purposes of seeking visitation with a child she has raised jointly with the biological mother. \textit{See, e.g.}, Curiale v. Reagan, 272 Cal. Rptr. 520 (Ct. App. 1990) (partner of biological mother has no standing to claim visitation rights); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (partner of adoptive mother has no standing to claim visitation rights).

with readers some of the stories I have heard. Thus, this article embraces both the narrative and analytic traditions in legal scholarship.\textsuperscript{32}

Narrative has been used by critical race scholars\textsuperscript{33} as well as by feminist scholars\textsuperscript{34} to communicate the experiences of the subordinated to others. Different scholars make different claims regarding the value of narrative scholarship. Some claim that the narrative standing alone is sufficient if it causes others to engage in paradigm shifts regarding legal positions or theories. Some claim that some narratives have more value than others. And some claim that the truth of the narratives is irrelevant to their value. Stories have power as stories whether true or not.

I wish to avoid as much of this debate as possible.\textsuperscript{35} I make a simple claim: By listening to the stories of differently gendered persons, I learn something about their lives. I don’t claim truth or higher value for these stories. I retell the ones that resonate with me, the ones that have raised my consciousness. I retell these stories for a concrete purpose: to question the current judicial understanding of sex discrimination law, an understanding that has denied meaningful existence to persons who are not at all times clearly categorized as either male or female.

The stories I have chosen for this project are the stories of women who identify as men or as masculine, including butch lesbians and FTMs. I have chosen to focus primarily on FTM experience because, in the transsexual/transgender world, their stories are the “stories from the bottom.”

“Stories from the bottom” is a concept introduced by Mari Matsuda when she argued in a 1987 article:

[\textit{T]hose who have experienced discrimination speak with a special voice to which we should listen. Looking to the bottom—adopting the perspective of those who have seen and felt the falsity of the lib-}

\begin{enumerate}
\item See Jean C. Love, \textit{The Value of Narrative in Legal Scholarship and Teaching}, 2 \textit{J. Gender, Race, \& Justice} (forthcoming 1998).
\item See, \textit{e.g.}, Derrick Bell, \textit{And We Are Not Saved: The Elusive Quest for Racial Justice} (1987); Patricia J. Williams, \textit{The Alchemy of Race and Rights} (1991); Charles R. Lawrence, III, \textit{A Dream: On Discovering the Significance of Fear}, 10 \textit{NOVA L.J.} 627 (1986).
\item See, \textit{e.g.}, Martha R. Mahoney, \textit{Legal Images of Battered Women: Redefining the Issue of Separation}, 90 \textit{Mich. L. Rev.} 1 (1991); see also Patricia A. Cain, \textit{Feminist Legal Scholarship}, 77 \textit{Iowa L. Rev.} 19, 38 (1991) (calling for feminist scholars to translate experience to those who are strangers to the experience); Martha Minow, \textit{Words and the Door to the Land of Change: Law, Language, and Family Violence}, 43 \textit{Vand. L. Rev.} 1665, 1688 (1990) (stating that stories are used in the hope that they “can create a bridge across gaps in experience and thereby elicit empathetic understanding”).
\end{enumerate}
eral promise—can assist critical scholars in the task of fathoming the phenomenology of law and defining the elements of justice.\footnote{36}

Professor Matsuda’s claim was that “the victims of racial oppression have distinct normative insights.” I make a more modest claim. Victims of discrimination whose stories have not been heard will always teach us something about discrimination. Their perspective need not be more valuable or more “true” in order to teach us something. The purpose of feminist method is not to uncover truth, the view from nowhere. It is to uncover new perspectives, new views from lives and stories that have not been heard before. FTM stories can teach us something about gender discrimination—and they are stories that have been ignored, have gone unheard.

James Green, president of FTM International says:

The FTM population suffers greatly from marginalization, even within the cultural dialog on transgender and transsexualism. We have a hard time getting published—perhaps because no one takes us seriously, perhaps because we were once women, perhaps because we are simply invisible, not as threatening as people who cut off their penises.\footnote{38}

In his book, \textit{Female-to-Male Transsexualism}, Dr. Leslie Lothstein says:

When transsexualism was finally included as a disorder [by the American Psychiatric Association in 1980] there was no attempt to separate male from female transsexualism. Consequently, there were no guidelines for evaluating, diagnosing, and treating female transsexualism as a distinct clinical entity. If the disorder of transsexualism was ever mentioned in the major psychology and psychiatry texts, it was either given short shrift or the focus, however brief, was on male transsexualism.\footnote{39}

Gordene Olga MacKenzie, in her book, \textit{Transgender Nation}, reports that anthropologists have reported less on FTMs (sometimes called “amazons”) as compared with MTFs. She cites Paula Gunn Allen’s explanation that “fewer accounts of cross-gender women exist because women have always been considered less important than men.”\footnote{40}

\begin{thebibliography}{9}
\bibitem{37} Matsuda, \textit{supra} note 15, at 326.
\bibitem{38} Email from Jamison Green to Pat Cain (Feb. 3, 1998) (on file with the author); see also C. Jacob Hale, \textit{Consuming the Living, Dis(re)membering the Dead in the Butch/FTM Borderlands}, \textit{4 GLQ: J. Lesbian & Gay Stud.} 311, 329–30 (1998) (noting that MTFs have more power in community organizations than FTMs, as well as greater access to the media, and explaining how current discourses on transsexuality ignore the specifics of FTM experience).
\bibitem{40} Gordene Olga MacKenzie, \textit{Transgender Nation} 32 (1994).
\end{thebibliography}
In addition, feminist legal and non-legal scholarship has tended to focus more on the MTF than on the FTM. Janice Raymond, a feminist scholar, wrote an early scathing critique of what she calls “The Transsexual Empire,” arguing that with sex reassignment surgery, the medical profession has attempted to control the very definition of what it means to be a woman.41 By relying on overly essentialized notions of femininity, doctors require men who want to become women to conform to their idea of the ideal woman.42 Women who want to become men (FTMs) are at the margin of her analysis. They are viewed as tokens necessary to make the enterprise appear even-handed.43

Much feminist scholarship has focused on the meaning of “woman.” Scholars have debated whether MTFs should count as women. The issue arises most frequently in the context of debates over separate space for women, raising the question of who counts as a woman for those purposes.44 Rarely, however, do these discussions include questions about women who have become men.45

Feminist method is about uncovering silences. It is about learning from subordinate perspectives that have been ignored by the dominant discourse. Listening to the narratives of the differently gendered, and FTMs in particular, is feminist method. Retelling those stories in an attempt to raise consciousness and create paradigm shifts in gender discrimination law is feminist method applied.

C. Personal Perspective

It has become common for feminist legal scholars to identify their personal connections to the subject matter they have chosen to address in law review articles. Feminists who write about rape often identify as rape victims46 and feminists who write about domestic abuse often identify as abuse survivors.47 Others tell personal stories of childbirth,48 discrimination,49 or family disputes,50 when writing about related topics. Although I

42. Id.
43. Id. at 26-28.
45. But see Arriola, supra note 44, at 27 (raising question of whether lesbian partner of woman who becomes a man can still claim the label “lesbian”).
47. See, e.g., Mahoney, supra note 34, at 8.
49. See, e.g., Marc A. Fajer, Can Two Real Men Eat Quiche Together? Storytelling, Gender-role Stereotypes, and Legal Protections for Lesbians and Gay Men, 46 U. MIAMI L. REV. 511, 514
recognize that there are objections to these “personal footnotes,”50 I agree and support this feminist move in legal scholarship. My position is not based on a belief that the survivor of domestic abuse or rape or other sexual violence has a special claim to truth about the subject. Rather, my position is based on an ethical concern that when one is writing about topics that are closely connected to one’s personal experience, as a scholar, one is under a special responsibility to disclose the experiences or connections that might affect the author’s “voice.”

With respect to the topic of this article, I claim no special knowledge, no special subjective access to truth, and no special ability at objective analysis. But I do have a connection or perspective with respect to the topic of butch lesbians and FTMs, and I believe it is worth reporting. The reader can then read my analysis through whatever lens is suggested by my connection and perspective.

I identify today as a lesbian and have often identified as a butch lesbian. When I was growing up in the 1940s and 1950s, I would have given anything to be transformed from female to male. I was very religious as a child and often prayed to God that He would miraculously transform me from female to male. My prayers were very specific in that I wished to wake up with a male body. My wishes seem to me now to have had nothing to do with sexual feelings, because the longings for a male body predated any memory of sexual arousal or awareness. I was athletic and hated the limitations placed on females in the 1950s regarding athletic options. I always identified with male heroes, whether in ancient myths or in modern cowboy stories. I thought many females were silly. At the same time, I had many female friends who were tomboys and who shared my love of athletics. Not surprisingly, I experienced a profound internal crisis when my body began to take a more female shape at age ten or eleven. Because people didn’t talk about such things as gender identity in those days, I never discussed any of these longings or feelings with anyone when I was growing up. Rather, I survived the experience in silence.

I embraced the concept of “women loving women” and the label “lesbian” as soon as I became aware of the existence of lesbians, which was sometime in my twenties. Despite my deep religious beliefs and experiences, I never viewed myself as a sinner because I loved women and I never felt that my religion required me to distance myself from


51. See, e.g., Mark G. Yudof, “Tea at the Palaz of Hoon”: The Human Voice in Legal Rules, 66 TEx. L. REV. 589, 598–600 (1988) (arguing such personal accounts are often irrelevant to the author’s legal scholarship).
lesbian love. To me, love has always been good, and honest love is above reproach. Such beliefs and attitudes seemed perfectly consistent with what I had learned about love in my church.\footnote{I grew up in the Southern Baptist Church. I can’t explain why I, unlike other Southern Baptists, developed a sense of love that included same-sex love. I always believed in the power of faith to move mountains and I always believed that honesty was the greatest virtue of all. Being true to myself, including being honest about the love I felt for women, was absolutely consistent with my own religious principles as I developed them while an active member of the First Baptist Church in my home town.}

I had never considered the possibility of using medical science to accomplish the goal of my unanswered prayers until I began this project. This project has made me confront that possibility. But it took very little time for me to realize that, somewhere between the ages of four and forty, I made peace with my female body and my masculine gender identity.

Given my personal perspective, my reaction upon hearing the individual stories that I uncovered in this project was to feel a deep sense of connection with the storytellers. I felt no need to distance myself in order to maintain my own identity. At the same time, I know that I have no special connection that makes FTM stories more transparent to me than to others. I may connect more easily with certain FTMs, and we may share some common life experiences, but I have learned that the differences of time, class, race, and geography are just as real here as in other narratives. Moreover, there is no meta-FTM narrative, despite the medical profession’s attempt to create one for diagnostic purposes.

During my work on this project, I have been accused by some of being a voyeur, of stepping into areas that I know nothing about. Such complaints come primarily from those who believe I have no special connection with FTM experience, some of whom even suggest that I am not sufficiently “butch” to claim that label. These charges, although disturbing at a number of levels, have helped to raise my own consciousness about the dangers of identity politics and of legal analysis based on identity categories. Although I firmly believe in a subject’s right to self-identification, I am also committed to projects that deconstruct fixed or rigid categories, even those embraced by the very subjects whose life experiences I honor and respect. As a listener in this project, therefore, I have endeavored to be open-minded and understanding, while at the same time questioning the basic premise of bipolar sex identity upon which FTM identity and narrative is based.

III. WHAT DOES IT MEAN TO BE DIFFERENTLY GENDERED?

In law, as well as in other disciplines, the term “sex” has come to mean biological sex and “gender” has come to mean that which is socially constructed. Thus, one’s sex is either male or female, and one’s
gender may be either masculine or feminine. This binary classification system is much too constrained to embrace all of reality. Some people are intersexed in that they combine both male and female biological traits. Sometimes the balance between male and female is sufficiently even that we cannot tell for certain whether a person is one or the other. Nonetheless, such intersexed people are assigned a single sex at birth. Thus, they begin their lives in the assigned sex role with expectations that gender will conform to the assigned sex. Later in life, it may turn out that some such persons develop secondary sex characteristics of the sex opposite to the one assigned. At that time, reassignment will be difficult, although surgical intervention can sometimes help.

Some people begin their lives in one biological sex (e.g., female), but with a strong gender identity of the opposite sex (e.g., male or masculine). Many butch lesbians fit within this category, as do some man-nish heterosexual women. With the help of modern medicine, some of these differently gendered people elect to go through treatments that will more nearly align their bodies (i.e., their biological sex) with their gender identity.

Some butch lesbians spend a lot of time working on their bodies to become more masculine in appearance. They work out at gyms and health clubs. Some even elect breast reduction surgery, often for good medical reasons, but buttressed by a desire to appear more butch or masculine. FTMs also work on their bodies and have surgeries. Some start with breast reduction and end up with double mastectomies. Most FTMs have hormone therapy treatments. That is, they take testosterone on a regular basis. Some individuals who identify as FTM avoid taking hor-

53. See discussion infra Parts IV.A.3, IV.B.2.b (presenting the stories of Thomas Hall and Lynn Edward Harris).

54. The term “butch” is more fluid than my use of it in the text might suggest. Within the lesbian community, butch and femme are terms that describe behaviors of individuals as well as relationships between two women. Although some might perceive the labels as fixed (i.e., a butch is always a butch), others perceive the labels as relative (e.g., in every couple one person is more butch than the other and a woman who is butch in one relationship might be perceived as femme in another relationship). For purposes of this article, my use of the term “butch” is closest in meaning to that offered by Gayle Rubin:

Butch is the lesbian vernacular term for women who are more comfortable with masculine gender codes, styles, or identities than with feminine ones. The term encompasses individuals with a broad range of investments in “masculinity.” It includes, for example, women who are not at all interested in male gender identities, but who use traits associated with masculinity to signal their lesbianism or to communicate their desire to engage in the kinds of active or initiatory sexual behaviors that in this society are allowed or expected from men.

Gayle Rubin, Of Catamites and Kings: Reflections on Butch, Gender, and Boundaries, in THE PERSISTENT DESIRE: A FEMME-BUTCH READER, supra note 2, at 466, 467.

55. For example, short of sex reassignment surgery, some butch lesbians will elect breast reduction surgery so that their bodies become more aligned with their gender identities. See Marj Plumb, Butch Identity, Breast Reduction, and the Chicago Cubs, GIRLFRIENDS 25, 27 (March 1998), excerpted from THE LESBIAN HEALTH BOOK: CARING FOR OURSELVES (Jocelyn White & Marissa C. Martinez, eds. 1997).
mones because they fear the consequences of taking a powerful drug like testosterone, which changes more than appearance.

Butch lesbians differ from FTMs in that they identify as women, both privately and publicly, despite the fact that they embrace some attributes of masculinity. This category would include persons identified as female at birth or later. 56

Many scholars identify transsexual persons as those who desire surgery in order to change their physical bodies so that the body will more closely align with gender identity. 57 Thus, the desire for sex reassignment surgery has come to be understood as the key factor that divides true transsexuals from other transgendered persons. The focus on surgery or the desire for surgery is troubling, especially as a defining line for FTMs. Breast reductions or mastectomies are surgical interventions, but are not solely thought of as sex reassignment surgeries because they are available to women for other purposes. 58 Many, perhaps most, FTMs decline to purchase genital reconstructive surgeries. 59 Thus, for many, hormone treatment is the primary medical intervention.

In this article, my focus is on women who were identified as female at birth, but who claim some degree of masculine identification, regard-

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56. I include in the category of masculine or butch women, persons who may have transitioned to a female body through sex reassignment surgery. I certainly do not intend to exclude MTF transsexuals from the category “woman” or the category “lesbian” as certain feminist organizations have tried to do. See, e.g., Boyd, supra note 3, at 143-45 (discussing exclusion of transsexual women from Michigan Womyn’s Music Festival).

57. See, e.g., Bernice L. Hausman, Changing Sex: Transsexualism, Technology, and the Idea of Gender 72-109 (1995) (examining case studies); Ken Morris & Candace Hellen Brown, The Alan Lucill Hart Story, 6 TNT: Transsexual News Telegraph 3, 14 (1996) (stating that “[i]t is not surgery which defines a transsexual, but the internal visualization and experience of the body as being of the opposite sex” and the resulting “desire to bring the body into conformity with the internal image”).

58. Breast surgery is included as genital surgery in the Standards of Care first published by the Harry Benjamin International Gender Dysphoria Association. See Harry Benjamin International Gender Dysphoria Association, Inc., Standards of Care: The Hormonal and Surgical Sex Reassignment of Gender Dysphoric Persons (1990) [hereinafter Benjamin Standards], reprinted in Gender Blending 305 (Bonnie Bullough et al. eds., 1997). The standards require a second opinion before surgery is authorized. Id. § 4.7.5 Standard 7, reprinted in Gender Blending, at 515. No second opinion is required for hormone therapy. Before genital sex reassignment is authorized, the patient must live full-time in the social role of the genetically opposite sex for a year. Id. § 4.9.1 Standard 9, reprinted in Gender Blending, at 515. No such 12 month requirement precedes breast surgery.

59. See Holly Devor, FTM: Female-to-Male Transsexuals in Society 447 (1997). There are several reasons why FTMs are more likely than MTFs to decline genital reconstructive surgery. First, FTMs are generally successful in changing their gender attribution from female to male without surgery. Apparently individuals feel less compelled to have surgery once they are recognized as members of the new gender. In addition, the quality of phalloplasty surgery in terms of both aesthetics and function is not high. Vaginoplasties are much more effective. Finally, the cost of phalloplasties is much greater, sometimes estimated as high as $150,000. See generally Claudine Griggs, S/HE: Changing Sex and Changing Clothes 81–86 (1998) (discussing the relative values of surgery).
less of whether they take extraordinary steps to align their bodies with masculinity. Since I rely on self-identification, neither surgery nor hormone therapy are prerequisites to claiming the FTM label. I will not generally distinguish between pre- and post-op transsexuals, although where the fact of surgery is relevant, I will mention it. I sometimes identify FTMs as in transition or fully transitioned. Full transition does not depend on the amount of surgery the FTM has completed. Again, I rely on self-descriptions, so that a subject who claims to be fully transitioned may or may not have had any surgery. Furthermore, my use of the category FTM probably includes persons that others would label as transgendered rather than transsexual.

Passing women present an analytical challenge as they are not easily assigned to either the category FTM or butch lesbian. Passing women were women who lived as men before there was any possibility for surgical intervention. Some of these women might well identify as FTM today, but there is no way to know for sure. Both FTMs and butch lesbians have claimed many of these women as part of their historical heritage. I include some of their stories in this article because, in whatever category they fall, they certainly qualify as “differently gendered” and their stories are “stories from the bottom.”

I also include in my “gender garden” persons of either biological sex who embrace both masculine and feminine gender identities. My term for describing such people is that they are “radically androgynous.” On a gender continuum from masculine to feminine, they are not necessarily at the center, the usual location under traditional notions of androgyny. Such traditional notions of androgyny conjure up images of unisex individuals, of persons who are neither male nor female. Such a notion is what gave androgyny a bad name in the early stages of the second wave of feminism. My concept of androgyny as a radical concept is intended to embrace both ends of my imaginary continuum of gender. A person’s gender identity may be any place on the scale at any given time. Some people may, throughout their lives, hover around one end of the scale. Others may jump all over the place, sometimes expressing their masculine identities and sometimes expressing their feminine ones.

60. The slide show “She Even Chewed Tobacco” focuses on a number of such passing women who have been claimed by the lesbian community and by the FTM community. For a textual description of the show, see The San Francisco Lesbian and Gay History Project, “She Even Chewed Tobacco”: A Pictorial Narrative of Passing Women in America, in HIDDEN FROM HISTORY: RECLAIMING THE GAY AND LESBIAN PAST 183 (Martin Duberman et al. eds., 1989).

61. But see generally CAROLYN G. HEILBRUN, TOWARD A RECOGNITION OF ANDROGYNY (1973) (presenting a feminist argument in favor of using the notion of androgyny to free individual human development from the limits imposed by polarized concepts of sex and gender).

62. The radically androgynous would include the “men in skirts” that Mary Anne Case is concerned about. See Mary Anne C. Case, DISAGGREGATING GENDER FROM SEX AND SEXUAL ORIENTATION: THE EFFEMINATE MAN IN THE LAW AND FEMINIST JURISPRUDENCE, 105 YALE L.J. 1 (1995). A good contemporary example of a male who sometimes expresses female identity is gender-bender Dennis
IV. STORIES FROM THE GENDER GARDEN

A. Stories from History

Throughout history there have been stories, real and fictional, of women who have chosen to live as men, to wear men's clothing, to "pass." Sometimes these women passed for short periods of time and sometimes their biological sex was only discovered after death. Such stories include the lives of so-called transvestite Saints, the lives of women who donned male clothing and fought for their countries as soldiers or sailors, and the lives of women who chose male identities to escape marriage or other female destinies. Although the category transsexual did not exist during these periods, some of these women undoubtedly would have classified themselves as FTMs if they had lived today.

1. Balkan "Sworn Virgins"

In the mountains of North Albania, close to the Yugoslavian border of Montenegro, tribal societies continue to exist in which there are strict hierarchies between men and women. Women have few rights independent of their fathers and husbands. A widow who has no surviving son, for example, would not be allowed to maintain her own home. To

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63. See, e.g., JONATHAN NED KATZ, GAY AMERICAN HISTORY: LESBIANS AND GAY MEN IN THE U.S.A. 232 (rev. ed. 1992) (telling the story of Murray Hall, a woman who posed as a man, married twice, was active in New York City politics, and whose true sex was not discovered until she died of breast cancer); LOUIS SULLIVAN, FROM FEMALE TO MALE: THE LIFE OF JACK BEE GARLAND 8 (1990) (describing the headlines of the San Francisco Chronicle as proclaiming "'Jack Bee' Was Woman" in 1936 when Garland died in a San Francisco hospital).

64. See, e.g., DEKKER & VAN DE POL, supra note 64. Their research uncovered 119 cases of females who attempted to pass as men during the seventeenth and eighteenth centuries in the Netherlands. Many of these cases were discovered because the women had attempted to pass as soldiers or sailors and their true sex was identified. Id.; see also KATZ, supra note 63, at 212–14 (telling the story of Deborah Sampson, who dressed as a man and fought in the Revolutionary War).

65. See DEKKER & VAN DE POL, supra note 64.

66. See, e.g., CATALINA DE ERAUSO, LIEUTENANT NUN: MEMOIR OF A BASQUE TRANSVESTITE IN THE NEW WORLD (Michele Stepto & Gabriel Stepto trans., Beacon Press 1996) (telling the story of Lieutenant Nun, born in the Basque town of San Sebastian in 1585, who escaped the convent at age 14 by donning male attire and sailing to the New World).

escape this fate, a daughter in a family with no sons might choose to become the "man" of the family. Alternatively, if a family had no male heirs, the parents or grandparent might declare that a daughter too young to make her own declaration would henceforth be raised as a boy. From that point forward, the girl child would dress as a man, carry weapons, and perform the ritual acts reserved for men. In exchange for this recognition of male privilege, the girl child would vow to remain unmarried and chaste for the rest of her life.

Mikas Milicev Karadzic, by all accounts, was born female in the late nineteenth century in the Balkans. When she was quite young, Milica (her female name) lost her father. He was killed in battle and her mother, left with no male in the house, dressed Milica in male clothes and renamed her Mikas. Mikas adopted his new gender identity readily and grew into a man, acted as head of the household, and performed the ritual and ceremonial acts assigned to men. He even voted as a man and was accepted in his male role by the chieftains of the surrounding clans. Although it appears that the male role was thrust upon him, probably more by the grieving grandmother than the mother, Mikas apparently grew into the role and refused to be known as female ever again. He became a soldier, was referred to either as husband’s brother or elderly man, and was buried as a man in male attire. Regarding physical attributes, Mikas claimed to have menstruated for a short period at age 13, but never again. Women who cared for Mikas in his old age said he had “ill-developed breasts.” He had no intimate relationships, although it is said that he used to talk to other men about his lust for women.

Rene Gremaux has uncovered the case histories of 120 such women who lived as men in the Balkans. They were not true “passing women” because they remained in their homes where the clanspeople knew that they were born female. Yet, either by choice or by force of circumstance, they took on the male role with the approval of male elders, usually at puberty, and they remained in that role throughout their lives, even after the necessity for being male had ended (e.g., after the widowed mother had died).

2. Maria van Antwerpen

Maria van Antwerpen was born in Breda in 1719 and orphaned at the age of 12. She worked as a maidservant for a while, and then in 1746 enlisted as a soldier under the name of Jan van Ant. One year later, she officially married a woman who was not aware of Maria’s true sex. While stationed with her army unit in Breda in 1751, Maria was recog-
nized by a previous acquaintance and, thus, her disguise was discovered. She was subsequently arrested and sentenced to a period of exile. Ten years later, she again disguised herself as a man and married another woman. She was arrested again in 1769. From the records of her arrests and trials, we learn of her reasons for her decision to live as a man.

Maria argued that “God, Nature, and Fate had predestined her cross-dressing.” She claimed that she should have been and was expected to be the seventh son of her parents. In her own words: “I take this as rule, that no one can escape his predetermined fate. It is impossible to control one’s first passions.” She said she was not like any other woman and therefore it was best to dress in men’s clothing. She also said she “was in appearance a woman, but in nature a man.”

Many of these statements sound much like the statements of modern FTM transsexuals. It is almost as though she was crying out, “I am a man trapped in the body of a woman.” In her autobiography, she explained her feelings as follows: “It often made me wrathful that Mother Nature treated me with so little compassion against my inclinations and the passions of my heart.” It is reported that even when she dressed as a woman, she wore male undergarments. She also reported that as a teenager a “shaft shot out of her body” when she menstruated, thereby claiming a biological cause for her actions. She was medically examined and found to be female.

3. Thomas or Thomasina Hall

The story of Thomas or Thomasina Hall is derived from court records in 1629 Virginia. Hall was brought before the court because he/she sometimes dressed as a woman and sometimes as a man. Although never charged with a crime, Hall had been reported to the authorities because villagers were confused as to whether Hall was a he or a she. Hall was born female according to the English records of her birth. She moved to the New World as an indentured servant in male attire, claiming male identity. But after settling in Virginia, he sometimes reverted to female clothes and female identity. The women appointed by the court to determine whether Hall was female searched him and found him to be male. Others were not convinced, so Hall was inspected again—this time by

71. Id. at 25.
72. Id. at 26.
73. Id.
74. Id. at 68.
75. Id. at 67.
men and women. The women agreed again that Hall was male, but the men were divided.

The court ultimately appears to have accepted Hall’s self-description as male and agreed to refer to him as “he.” Yet, at the same time, the court pronounced him both male and female and ordered him to wear female headgear and an apron over his male attire as, one might surmise, an outward expression of his dual status. It is unfortunate that we do not have any verified first person accounts by Hall himself. It is also unfortunate that court records were burned during the Civil War, making it impossible to further trace Hall’s history. It seems that his sex may have been physically ambiguous and that his gender was mixed.

The time and effort the community committed to determining the correct category for Hall—male or female—is consistent with society’s reluctance to accept the possibility of both categories in the same person. Their actions reflect their understanding that male and female are polar extremes—for both sex and gender. Hall could be one or the other but not both. The amazing ending to the story is that the court’s action is consistent with a recognition that Hall was both. It is not clear that the community embraced the court’s determination, but it does seem that a determination by the court was needed to end the conflict. Thus, there was a legal solution to the dilemma and Hall was legally assigned to a special category that had not existed before.

4. Passing Women

Jack Bee Garland died in 1936 after living as a man for 40 years.77 Garland had been born in San Francisco in 1869 as Elvira Virginia Mugarrieta, the daughter of San Francisco’s first Mexican consul. Her sister reported that Garland had dressed as a man for numerous reasons including: creating the opportunity to visit the Spanish-American war front in the Philippines in 1899, because it fit her/his style, and because it enabled Garland to help the down-and-outers on the streets of San Francisco. Before moving to San Francisco and passing as a man, Garland lived in Stockton and used the name Babe Bean. In Stockton, her sex was publicly questioned and she seems to have intentionally maintained an ambiguous gender identity, straddling male and female. She was often referred to in the local press as a woman in male attire, but the newspaper also maintained the mystery by continuing to question whether she was male or female.78

There is no evidence that Garland passed as a man to enable him to maintain sexual or romantic relationships with women. His biographer, Louis Sullivan, claims Garland was a true FTM, who embraced a mas-

77. Jack Bee Garland’s story is taken exclusively from SULLIVAN, supra note 63.
78. Id. at 31 (quoting from the local newspaper that “[t]he mystery is still unsolved as to whether ‘Babe’ Bean is a boy or girl, a man or a woman”).
culine identity "in order to be a man among men." Sullivan quotes from Garland’s memoirs:

Many have thought it strange that I do not care to mingle with women of my own age, and seem partial to men’s company. Well, is it not natural that I should prefer the companionship of men? I am never happy nor contented unless with a few of “the boys.” They talk and act naturally—without the conceit or affectations so often practiced in the drawing-rooms. Could women see men as I have, they would love them all.80

Dorothy Lucille Tipton was born female in 1914.81 In the early 1930s, she began the transformation process which established her new identity as Billy Tipton, jazz musician. Billy died in 1989 at the age of 74. His three adopted sons and several of his five wives expressed astonishment at the revelation of Tipton’s biological sex after death. Tipton never had surgery or hormone treatment, but nonetheless passed as a male for over forty years, a feat all the more remarkable given his lifetime of travelling in close quarters with other musicians. He bound his chest, used a prosthesis, and claimed his privacy as protection against discovery. His mother stayed in touch with him until her death in 1971, but never revealed Tipton’s gender to his wives or children. Because Tipton left us no personal insight into his choices, we are left to guess the reasons. Some surmise that the explanation lies in the fact that maleness was a prerequisite for the vocation that Billy chose, jazz musician. At the same time, Billy rejected jobs that would have led to greater renown in the music world, apparently concerned that too much fame would subject him to the risk of being discovered female. Late in life, when he needed medical care, which he also rejected for fear of discovery, he explained to visiting cousins that he could not be truthful about his sex because transsexualism and cross-dressing were against the law and he feared arrest. Billy Tipton lived in constant fear of being “found out.” He confided to his cousin Madeline, “Some people might think I’m a freak or a hermaphrodite. I’m not. I’m a normal person. This has been my choice.”82

Unlike Jack Bee Garland, Billy Tipton had sexual relationships with women, several of whom he “married.” Although Billy’s first involvement was with a woman whom many labeled lesbian, Billy’s lifetime choice to live as a man did not seem to be motivated primarily by a desire to be sexually involved with women. In fact, according to his last wife, Kitty, she and Billy had no intimate sexual relationship. Nonethe-

79. Id. at 4.
80. Id.
82. Id. at 278.
less they were married for 18 years. They finally divorced over problems they had in raising their three adopted sons. After a major argument, Billy took the side of the children against his wife, and moved out of the family home with his sons. Playing husband and father were central aspects of Billy's overall identity as male. The roles do not appear to be a cover for a lesbian relationship.

By contrast, many passing women live as men in large part to enable pursuit of romantic or sexual relationships with other women. Alberta Lucille Hart appears to have been such a woman. Her story is reported in some detail by a Portland, Oregon psychiatrist whom she consulted in 1918. The story includes a number of incidents of deep emotional attachments to other females as she was growing up, coupled with fairly explicit "daydreams" about being with these women as a husband or boyfriend. She was an intelligent and industrious student, who went to Stanford medical school and became a doctor. The psychiatrist diagnosed her as homosexual, and for a while engaged in treatments (e.g., hypnosis) aimed at correcting that "problem." The patient, however, became concerned that any such treatment might diminish her masculine identity. "She had an utter loathing of the female type of mind."

The patient's solution was to ask for her doctor's assistance in enabling her to live as a man, which was in conformity with her true nature. The doctor appears to have required more than psychological evidence of masculinity before agreeing to this proposal. He physically examined her and found "deviations sufficiently marked to attract attention." He noted an enlarged clitoris, but gave no details. He also found that her breasts and hips were clearly female, but smaller than normal. Hart requested surgical removal of her uterus, in part to help her pass as male since menstruation was occurring. A hysterectomy was performed, she cut her hair, and assumed a male identity. She married a woman and practiced her profession, medicine, in a neighboring state. The psychiatrist concluded in his notes of the case:

"If society will but let her alone, she will fill her niche in the world and leave it better for her bravery in meeting the issue on the merits of the case as best she knew. Instead of criticism and hounding, she needs and deserves the respect and sympathy of society, which is responsible for her existence as she is."

If being transsexual means desiring surgery to help one's gender identity more readily conform to one's body, then Hart should qualify.

83. Id. at 252-59.
84. Alberta Lucille Hart's story is taken exclusively from Allen J. Gilbert, Homosexuality and its Treatment, 52 J. NERVOUS & MENTAL DISEASE 297 (1920), reprinted in KATZ, supra note 63, at 258.
85. Id. at 275.
86. Id.
87. Id. at 277.
The requested surgery, a hysterectomy, was requested for purposes of enabling her body to conform to her own idea of herself as male. But Hart also requested the surgery to assure that she would not have children. Somewhere along the line, someone had convinced her that her relations with women were deviant and she seems to have thought this judgment meant she should not have children. Whether Hart would have been a transsexual man or a butch lesbian in today’s culture is unclear, but she was clearly differently gendered in her own time. Her psychiatrist seems to have been won over by her strength of character and will. Living as a man was her choice and it seemed the best solution, given her determination to practice medicine and to be intimate with women.

B. Modern Stories

The stories that follow are stories told by FTMs in their own words, either in autobiographies, or in articles, or as reported by social scientists who have interviewed subjects. I have grouped the stories according to some common themes that emerge.

1. “I am biologically male.”

In the 1950s transsexualism gained its first modern hero in the form of Christine Jorgensen, a man who became a woman. In the 1950s transsexualism gained its first modern hero in the form of Christine Jorgensen, a man who became a woman. Others followed and their autobiographies engaged audiences around the world. Jan Morris, who was professional writer, wrote her own autobiography when she became a woman. The story of Renée Richards, a male to female who gained fame from her legal battle to play women’s tennis, is probably familiar to many Americans, especially since the story was made into a made-for-TV movie, Second Serve. Autobiographies by FTMs are less well known and less common.

a. The Story of Mario Martino

The earliest first person full-length autobiography appears to be that of Mario Martino, published in 1977 under the title Emergence. The autobiography contains no specific dates, but from the story I conclude that Mario, who grew up as Marie, was probably reaching puberty at about the time the Jorgensen story broke in 1953. That would make Mario about 55 years old if he is alive today.

88. See Christine Jorgensen, Christine Jorgensen Reveals (J Records 1953) (sound recording); see also Christine Jorgensen, Christine Jorgensen: A Personal Autobiography (1968).
Marie was raised Catholic in an Italian-American family. She went to a convent school where she fell in love with and had some minor physical relationships with other girls—which of course were discovered by the nuns and for which she was often expelled. She trained to be a nurse at a Catholic hospital and, as a novitiate, was known as Sister Mary Dominick. She left the convent at age 25, but continued her nursing career and her relationships with women. She had never been with a man.

Marie claimed that she didn’t know until age nine that she wasn’t a boy. Shortly after she left the convent she and some friends at the hospital were running urine tests on themselves to check hormone levels. Marie’s test was consistent with the hormones of a seventeen-year-old boy. She was elated. Her sense of herself as male had been confirmed by physical evidence.

She writes in the preface to her book:

My life was a series of distorted mirrors. I saw myself in their crazy reflections false to the image I had of myself. I was a boy! I felt like one, I dressed like one, I fought like one. Later, I was to love like one.

Unless you have actually experienced transsexualism, you cannot conceive of the trauma of being cast in the wrong body. It is the imprisonment of body and of soul . . . .

The most important event in her life as Marie (other than the discovery that her urine test could have been mistaken for a male’s) was her relationship with Becky. While Becky maintained initial reservations against Marie’s decision to become Mario, they overcame these difficulties. Becky, also a nurse, attended Mario during his recuperation. The most important event in Mario’s life was his marriage to Becky.

The marriage was not an easy event to plan. They wanted to be married in the Church by a priest and they found one who was supportive. Mario’s birth certificate had been changed to male and his nursing license had been changed as well. But now he had to deal with his hometown priest in order to acquire his baptismal certificate. Here the trouble began. The hometown priest refused to cooperate, the supportive priest could not be available at a later date, and the new priest who initially agreed to do the marriage did not know Mario’s story. When a co-worker called the new priest and explained Mario’s situation, the new priest telephoned Mario, called him a “despicable thing” who submitted to surgery for “immoral purposes,” and cancelled the wedding ceremony. With the help of friends, a Methodist minister agreed to substitute. Mario says of himself now: “Legally male, a happily married husband, I ask only to be accepted now as an average man.”

93. Id. at xi–xii.
94. Id. at 227.
95. Id. at xi.
Marie’s life was filled with disasters and, once she was in transition, her status as an outcast brought even more disasters. Even though he was a good nurse, Mario was ostracized by the other nurses as he was going through the process of becoming Mario. Mario’s co-workers had a harder time dealing with the transition period than with the final outcome. They could not deal with that “in between” stage of his being part male and part female. And yet, for Mario, that had been the problem all along: being part male and part female. The transition made Mario whole, bringing his maleness to the fore.

b. The Story of Lynn Edward Harris

Lynn Edward Harris was born in California with combined male and female sex characteristics. At birth, the genitalia appeared ambiguous, causing her parents and doctor to arbitrarily designate her as female. Outward manifestations of male characteristics, including the development of a budding penis at age five, a lowering of the voice between ages eleven and thirteen, and the need to shave daily by age fifteen, as well as internal questions of gender identity prompted Lynn to seek answers from the medical profession—but a doctor failed to even acknowledge her questions. Her mother refused to recognize the problem and insisted it was all mental. At age twenty-three, Lynn checked herself into a hospital for analysis and the congenital anomaly was discovered. Because she had been raised as a woman, Lynn continued to adopt female attire—but it never felt right to her. At the same time, she had no interest in going through surgery to change her body.

Finally, a friend suggested that she simply embrace a male identity. To do so, she began dressing as a man and stopped shaving. Then she requested a legal name change, changing her middle name to the male name “Edward.” She also requested a new birth certificate that would show her sex as male. Harris made these requests in a court petition, fully aware of the California statute that required her to undergo surgical treatment before a new birth certificate would be issued indicating a new sex. The California statute did not contemplate, as some other states do, that the sex may have been designated incorrectly at birth.

96. Lynn Edward Harris’s story is taken exclusively from Lynn Edward Harris, A Legal Path of Androgyny, in GENDER BLENDING, supra note 58, at 495.

97. California’s Health and Safety Code states:
Whenever a person born in this state has undergone surgical treatment for the purpose of altering his or her sexual characteristics to those of the opposite sex, a new birth certificate may be prepared for the person reflecting the change of gender and any change of name accomplished by an order of a court of this state ....
CAL. HEALTH & SAFETY CODE § 103425 (West 1996).

98. For example, Hawaii expressly addresses the problem of incorrect designation by allowing a change in sex designation on a birth certificate if:
(4) Upon receipt of an affidavit of a physician that the physician has examined the birth registrant and has determined the following:
Harris argued before the court that her sex was male and that the birth certificate was a fraud. She/he requested a legal remedy for the "ambiguity, lack of continuity and presumed fraudulence associated with my present gender status." The petition was granted although it is unclear from Harris's account whether the judge ruled only on the name change or both the name change and sex change.

At any rate, presuming that he now had the power of the court decision on his side, Harris wrote to the Department of Vital Statistics, requesting a new birth certificate. The Department of Vital Statistics sent back a "new" certificate with the "new" name, but the sex indicated on the certificate remained female. When Harris complained, the Department sent a copy of the California statute. Harris countered with the argument that the statute only applied in cases where a person changed from one sex to the opposite sex and since he was both male and female he could not identify what "opposite sex" could mean in his case. Thus, the statute simply did not apply to him. Furthermore, there was no general requirement that one go through surgery in order to correct the sex on a birth certificate. Finally the Department relented and issued a new certificate indicating that his sex was male.

Harris describes his legal victory as follows:

Justice was done. To win as I did, having both the facts and the law on my side, was an ultimate victory . . . . The court in its wisdom had profoundly empowered and enabled me to actualize my potential and destiny with authenticity as I, a true hermaphrodite, am living life and perceiving it.\textsuperscript{100}

It is easy to understand the sense of victory in having one’s claimed identity recognized by a court without having to jump through the surgery hoop required by the statute. But one can only ask: How much of a victory is it and how authentic is it to live within the category “male” if one is really both male and female?

c. Other Stories

Holly Devor’s recent study of FTMs uncovered some cases of individuals who had been designated female, but who, when surgery was finally performed, turned out to have some male characteristics in their reproductive systems.\textsuperscript{101} Devor questions whether it is appropriate to call

\begin{itemize}
  \item [(A)] The birth registrant’s sex designation was entered incorrectly on the birth registrant’s birth certificate; or
  \item [(B)] The birth registrant has had a sex change operation and the sex designation on the birth registrant’s birth certificate is no longer correct; provided that the director of health may further investigate and require additional information that the director deems necessary . . . .
\end{itemize}

\textsc{Haw. Rev. Stat.} \S 338-17.7(a)(4)(A), (B) (1993).


100. \emph{Id.} at 502.

these persons FTMs or whether they belong in a different sex/gender -category altogether. 102

Aaron, one of her subjects, calls his sex ambiguous, and says of FTMs: “How can they stop being female if they never been? They can stop looking female. They can stop acting female . . . But they can’t stop being something they’ve never been.” 103 Peter, another of her subjects, also denies ever having been female:

I don’t think that I ever thought that I truly was [female] but, at some point in time, I said you’re not even going to get to call me this . . . I’m getting to the point where I hate the word “transsexual.” It’s a label, and I don’t like it. I also don’t like “F-to-M.” It implies that there really was something else that I don’t really feel . . . . 104

2. “I am a man, not a lesbian.”

Many FTMs have lived some part of their lives as lesbians, even embracing the label lesbian. Since FTMs are usually attracted to women, they have much in common with lesbians and find lesbian communities offer some solace and opportunity to be who they are. Nonetheless, FTMs maintain their differences from lesbians, sometimes to the verge of appearing homophobic.

At a meeting of FTM International, 105 a member explains how he chose to tell his father about his transition: “I told him, ‘The good news is, I’m not a lesbian.’” 106

Other accounts echo this sense of difference.

When I got involved with gay women and found out how frigging different I was it was obvious. Up until that point I thought that other gay females were the same as me, they wanted to be male. And when I found out that was not true that no matter how masculine they acted, they had female identities, I realized I didn’t quite fit in here, but I fit in closer here than I ever had. 107

I knew about lesbians but it just didn’t occur to me that’s what it was . . . . What I knew about lesbians was that two women can be together and it’s okay if they are lesbian. . . . It was something they did on the coast in the big cities, more liberal people did. I just didn’t consider myself that liberal, that open minded . . . . To get into being

102. Id.
103. Id. at 449 (statement of Aaron).
104. Id. at 448 (first and second alterations in original) (statement of Peter).
105. FTM International is a San-Francisco based education and support group. The group includes around a thousand members who range from FTMs who are only taking hormones to those who have completely transitioned with the help of surgery. See FTM International Homepage (visited Nov. 21, 1998) <http://www.ftm-intl.org>.
107. GENDER BLENDING, supra note 58, at 96 (statement of Aaron).
a lesbian, like, you have to march for things and you gotta go to ca-
cuses, you gotta hate men, you gotta dress butch, and you gotta get in
to all that stuff, and I didn’t want to do that. I didn’t want to get into
all that stuff.  

James Green, a fully transitioned FTM and president of FTM Inter-
national, describes his relationship with the lesbian community during
the time he was still a woman: “I was excluded from lesbian events even
before I started the transition. I was just too male—not butch but male. I
crossed some line somehow, and everyone, the other women, felt that
there were things about me, despite my female body, that were just not
female.”

Another transitioned FTM says:

I thought, Well, maybe I’m a lesbian. Could be—I know I’m attracted
to women. I went to consciousness-raising meetings, and I’d listen
and feel like a fraud. One girl said, “What makes each of us feel like a
real woman?” And while they went around the room answering, I
thought, Nothing—absolutely nothing on earth makes me feel like a
woman.

I’m just a plain old heterosexual man. . . . I’m not a professional
transsexual. I don’t think of myself as a transsexual anymore. I was
one, I made that transition, now I’m just a man.

Tony Barreto-Neto stated: “People may have seen me as a lesbian,
but, in my mind, I was a straight, heterosexual man.”

In a letter to Dr. Lothstein, Barbara L. writes:

I was asked to leave college because they thought I was gay. I
never even became involved with anyone, but because I was attracted
to women, they believed I was. I know I am not a latent homosexual
or a transvestite, but a transsexual. I feel male and I am.

In his autobiography, Emergence, Mario Martino tells of his rela-
tionship with Becky, pre-transition, when Mario was Marie. Love be-
tween two women was initially difficult for Becky, probably in large part
due to her Catholic upbringing. Although Marie insists that she always
thought of herself as male, this claim became stronger in response to
Becky’s misgivings about lesbianism. Marie says to Becky: “[Y]ou and I
are not lesbians. We relate as man to woman, woman to man.” Then
Marie further rationalizes: "Any resemblance to lesbianism on our part was due to my lack of the proper organs. Never did I use my vagina during lovemaking—always I attached and wore my false penis."

The rejection of the lesbian label can be explained in several different ways. It would not, for example, be in the least surprising to discover that society's homophobic attitudes have permeated even the lives of the differently gendered. In addition, for any female who is male identified and desirous of either hormone treatment or surgery, rejection of homosexual identity is necessary. The clinics and professionals that act as gatekeepers to the availability of medical treatment have clearly constructed case profiles which applicants are expected to fit. Several scholars, most recently Bernice Hausmann in her controversial book, *Changing Sex*, have argued that transsexuals know more about the medical condition known as Gender Identity Disorder than most doctors. Transsexuals must convince their doctors that they are entitled to such surgery. Doctors determine suitability based on psychological testing and interviews. Transsexuals who wish to qualify for surgery learn how to tell their stories so that they will fit the requisite profiles.

From my reading of the literature, the insistent rejection of homosexual desires and the distancing of one's self from gay identity appears more prevalent in the MTF population than in the FTM population. There are several possible explanations for this phenomenon. Many FTMs identify as male or transgendered without ever having surgery. Hormone therapy may be sufficient. If this is true, then the FTM population is less dependent on the medical profession and less likely to mediate their stories with an eye toward claiming the right to surgery.

Nonetheless, stories abound from FTMs who distance themselves after transition from their previous lesbian identities. Yet, this is not al-

114. *Id.* at 134.

115. *See* BENJAMIN STANDARDS §§ 4.1.1–4.11.1, 5.1–5.2.4, *reprinted in Gender Blending*, *supra* note 58, at 505–20; *see also* Rubin, *supra* note 54, at 476 (arguing that, especially in the past, transsexuals "had to be able to persuade a number of professions that they were determined to be completely 'normal' members of the target sex").

116. *See, e.g.,* HAUSMAN, *supra* note 57, at 110–40 (discussing the role of transsexuals in the diagnosis of gender identity disorders and arguing that the role of the doctor is essentially mechanical in nature).

117. The Diagnostic and Statistical Manual of Mental Disorders defines transsexualism as: The essential features of this disorder are a persistent discomfort and sense of inappropriateness about one's assigned sex in a person who has reached puberty. In addition, there is persistent preoccupation, for at least two years, with getting rid of one's primary and secondary sex characteristics and acquiring the sex characteristics of the other sex . . . . Invariably there is the will to live as a member of the other sex. *Id.* at 2 (quoting AMERICAN PSYCHIATRIC ASS'N, *Diagnostic and Statistical Manual of Mental Disorders* 74 (3d ed. 1987)).

118. *Id.* at 143.

119. *Id.*
ways the case. Bruce, one of the subjects in Holly Devor’s study, retains a strong attachment to his previous lesbian identity:

I’m a lesbian man. . . . I’m very committed to the lesbian movement. I’m very committed to women. And to their struggle in this life. I just happened to be born with tits . . . . But I can’t have tits. . . . I never used to look in the mirror. Now I shave every day. . . . I would like to be able to not have to be a man. I would like to be able to be a lesbian without tits. But I can’t.120

3. “People think I am male and it is dangerous for me if they find out I am female.”

a. Brandon Teena

Brandon Teena, born female but passing as a male, made quite a hit with a number of females.121 Once discovered to be a she by her lovers, Brandon represented to her lovers that she was a pre-op transsexual and that she would have surgery as soon as she could afford it. Some of these lovers still refuse to admit that Brandon was female. After moving from Lincoln, Nebraska to a smaller, less tolerant town in Nebraska, Brandon started a relationship with another young female. The people in the town thought Brandon was male. When her anatomical sex was discovered by two males she had hung out with, their response was to rape and beat her. Within a week Brandon was dead and the two males arrested for murder.

Brandon’s story has struck a strong chord with the transgendered community, especially with young FTMs who identify with Brandon’s attempt to pass as male. Brandon had fought for inclusion in the local community as male. The fact that he was murdered by two males, members of the gender group he wished to join, strikes some as a particularly unsettling betrayal. Also, it is unclear whether Brandon’s female anatomy would have been discovered had he not been arrested by the local police, who, once they had discovered his anatomical gender, “outed” him to members of the local community.122 Thus, there is also a betrayal by public servants who are entrusted with protecting the vulnerable from harm. Transgender activists have rallied for an investigation into the responsibility of the local police in contributing to Brandon’s murder and for possible infringements of his civil rights.123

120. DEVOR, supra note 59, at 448 (statement of Bruce).
121. For a thorough account of the story of Brandon Teena, see Roger Worthington, Deadly Deception: Teena Brandon’s Double Life May Have Led to a Triple Murder, CHI. TRIB., Jan. 17, 1994, Tempo, at 1.
123. Gabriel, supra note 122.
When I say I am a gender outlaw in modern society, it's not rhetoric. I have been dragged out of bars by police who claimed I broke the law when I dressed myself that evening. I've heard the rap of a cop's club on the stall door when I've used a public women's toilet. And then there's the question of my identity papers.

My driver's license reads Male. The application form only offered me two choices: M or F. In this society, where women are assumed to be feminine and men are assumed to be masculine, my sex and gender expression appear to be at odds. But the very fact that I could be issued a license as a male demonstrates that many strangers "read me" as a man, rather than a masculine woman.

In almost thirty years of driving I've heard the whine of police sirens behind my car on only three occasions. But each time, a trooper sauntered up to my car window and demanded, "Your license and registration—sir." Imagine the nightmare I'd face if I handed the trooper a license that says I am female. The alleged traffic infraction should be the issue, not my genitals. I shouldn't have to prove my sex to any police officer who has stopped me for a moving violation, and my body should not be the focus of investigation. But in order to avoid these dangers, I broke the law when I filled out my driver's license application. As a result, I could face a fine, a suspension of my license, and up to six months in jail merely for having put an M in the box marked sex.

And then there's the problem of my passport. I don't feel safe traveling with a passport that reads Female. However, if I apply for a passport as Male, I am subject to... felony charges.125

4. "I am a third sex."

Many transsexuals want more than anything to pass in the role of the opposite sex. If they identify as transsexual at all, they do so pre-op or during transition. However, with the growth of the transgender movement, more individuals are embracing their transsexual or transgender identities.126

FTM and MTF transsexuals often embrace both their maleness and femaleness and express a longing to be identified as both, rather than

125. Anyone who knowingly makes a false statement in an application for a passport violates federal law and is subject to a fine, imprisonment, or both. 18 U.S.C. § 1542 (1994 & Supp. II 1996).
126. In a recent survey, admittedly skewed towards people who are more likely to be open about their transsexuality, over half of the respondents self-identified as transsexual and over ten percent identified as transgenders. See Dallas Denny & Jan Roberts, Results of a Questionnaire on the Stanards of Care of the Harry Benjamin International Gender Dysphoria Association, in GENDER BLENDING, supra note 58, at 326, 327 tbl. 1.
either/or. Kate Bornstein, by contrast, an MTF, expresses a desire to be neither as opposed to one or the other: "I know I’m not a man—about that much I’m very clear, and I’ve come to the conclusion that I’m probably not a woman either . . . ."

Many of the FTMs in Holly Devor’s study express dual identities that embrace both femaleness and maleness. Bruce, for example, says: “So I feel like I’m a third gender.” He hopes for the day when it will be okay to have both male and female identities in the same person. But for now, “I have to be a transsexual man because there is no place for me as a third gender.”

Thirty-three percent of the FTMs in Devor’s study said that they believed transsexual people went through a stage of being both male and female. Many of them said that they retained some of the feminine part of themselves even after they had transitioned. But the transition process is a slow one, not something that occurs overnight. And it is in this slow transition that transsexuals learn how to be both male and female. Bill, for example, says: “One can be both a man and a woman. I think most transsexuals experience this state in some part of transition. . . . I think it is accomplished through an acceptance of ambiguity, or role flexibility. . . . I have been and still am both.”

And Bruce, another Devor FTM, says:

I’ve been growing into becoming a man. I didn’t just all of a sudden decide to be one . . . . There’s a whole personality change that takes place. There’s a bonding that takes place with men . . . .

. . . An F to M stops being a woman when they deny who they are. See, I think the reality is, you are born physically a woman. You come into the world as a woman . . . . and I think that you need to come to terms with that part of you, and then move on . . . . I don’t think I’ll ever stop being a woman.

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127. For a discussion of this point, see Pat Califia, Sex Changes: The Politics of Transgenderism, at ch. 8 (1997).
128. Kate Bornstein, Gender Outlaw: On Men, Women and the Rest of Us 8 (1994); see also Califia, supra note 127, at 245–77.
129. See Devor, supra note 59, at 447–58.
130. Id. at 448 (statement of Bruce).
131. Id.
132. Id. at 456.
133. Id. at 457 (“I have been and still am both . . . . [But] I am only comfortable with myself as having female components since I have fully lived and expressed myself as a male. . . .” (alterations in original) (statement of Bill)).
134. Id. at 457 (statement of Bill).
135. Id. at 457 (first, second, fourth, and fifth alterations in original) (statement of Bruce).
V. SOME OBSERVATIONS

There is no single identifiable meta-narrative for persons who identify as FTMs. Nor do all aspects of the alleged meta-FTM narrative constructed by medical professionals apply only to FTMs. Butch lesbians share childhood experiences that are similar to FTMs. Butch lesbians identify with male heroes, embrace athletics, and are active tomboys. Butch lesbians may pass as men, not on a permanent basis, but for economic or safety reasons.136 Butch lesbians are female, even though they may temporarily embrace masculine identities or attributes.

Some FTMs, even after hormones and therapy, embrace the female part of themselves. Those that do not, remain cognizant of the female-ness of their bodies. A female who has become a male may still retain female sexual organs.137 Furthermore, although many FTMs elect “top” surgery, very few elect “bottom” or genital reconstructive surgery. Probably more frequently than MTFs, FTMs live with bodies that exhibit some maleness and some femaleness.

The laws of each state vary regarding legal change of sex on birth certificates.138 In many states, however, the sex on one’s driver’s license is determined by the applicant’s self-identification. Thus it is possible for the same person to be identified as female on one document and male on another.

In order to obtain sex reassignment surgery, the Benjamin Standards require that the applicant live successfully in the role of the desired sex for at least one year.139 Thus, the medical profession requires anatomical females to pass as males before their bodies can be surgically altered to fit their male identities. During this period of transition, transsexuals live in an “in-between state” that is part male and part female.

After transition, some FTMs continue to embrace their prior female identities. Some FTMs identify as transsexual, which means that they acknowledge their prior lives as females. Even though able to pass successfully as men, these people are unwilling to forsake the reality of their lives as women. The integrity of such self-identification and the respon-

137. See, e.g., DEVOR, supra note 59, at 472 (statement of Ken).
139. BENJAMIN STANDARDS § 4.9.1 Standard 9, reprinted in GENDER BLENDING, supra note 58, at 515 ("Genital sex reassignment shall be preceded by a period of at least twelve months during which time the patient lives full-time in the social role of the genetically other sex.").
sibility for a continuous sense of self in the world are values worth protecting, both for the individual and for the society with which the individual interacts. The only way to become one sex is to deny the reality of the prior life.

These observations are intended to emphasize that it is difficult and, perhaps, undesirable for transsexuals to become one sex by eliminating all traces of the other sex. Also, they are intended to call into question the bipolarization of sex and gender identity, which requires that we view a single individual as belonging for all time at one bipolar extreme to the exclusion of the other.

VI. LEGAL CONCLUSIONS: DISCRIMINATION ON THE BASIS OF SEX

A. Current Status: Legal Protections in the Workplace for Transsexuals

Title VII prohibits employers from discriminating on the basis of sex.140 State laws modeled on Title VII contain similar prohibitions.141 None of these laws specifically include or exclude transsexuals.142 Municipal laws add additional protections against workplace discrimination. Some of these laws include discrimination against transsexuals, either under court interpretations of the word “sex”143 or because they have been amended to include transsexuals as a protected class.144

140. In addressing employer practices, Title VII states:
   - 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
     (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.


142. But note that Minnesota’s Human Rights law, adding sexual orientation as a protected category, specifically included protection for transsexuals as well. See MINN. STAT. § 363.01 (1996) (defining “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”). It is unique in that regard. See also Rentos v. Oce-Office Sys., No. 95 CIV. 7908 LAP, 1996 Wt 737215, at *8-*9 (S.D.N.Y. Dec. 24, 1996) (holding that New York State human rights law prohibiting discrimination on the basis of sex includes discrimination against transsexuals).


144. See, e.g., IOWA CITY, IOWA, REV. ORDINANCES 95-3697 (outlawing discrimination on the basis of “gender identity” which is defined as “a person’s various individual attributes as they are understood to be masculine and/or feminine”).
Early litigation by transsexuals claiming protection under Title VII resulted in a series of court holdings in which the term “sex” was interpreted to exclude transsexuals. Some courts reasoned that the word “sex” includes male and female, but not transsexuals who were both. Others reasoned that employers who discriminated against transsexuals were discriminating not because of the plaintiff’s sex, but because of the plaintiff's decision to change sex. Still another held more simply that discrimination against someone who was a transsexual simply did not constitute discrimination on the basis of sex, but rather on the basis of transsexualism.

Every court that has considered whether Title VII should cover discrimination against a transsexual qua transsexual has decided the issue against such an interpretation of the statute. One recent case, however, indicates that transsexuals are not completely omitted from Title VII. In *Miles v. New York University*, the plaintiff alleged sexual harassment by a male professor, claiming that he harassed her because she was a woman. The court held that the plaintiff’s claim could not be dismissed on the basis that she was a transsexual, rather than a biological, female. One wonders, however, whether an alternative defense, “I sexually harassed her because transsexuals turn me on,” would survive a motion to dismiss quite as readily. Since all courts have agreed that discrimination against transsexuals qua transsexuals is not covered, it is only a short step away to find that harassment against transsexuals qua transsexuals is similarly not covered.

In sum, there is virtually no protection under Title VII for transsexuals who transition on the job, or for transsexuals who fail to pass after transition, or for transsexuals who identify as transgendered rather than as male or female.

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150. *Miles*, 979 F. Supp. at 249. The case was brought under Title IX, which prevents discrimination “on the basis of sex” in the context of educational programs or activities that receive federal financial assistance. *See* 20 U.S.C. § 1681(a) (1994). However, the court noted that the Title IX “on the basis of sex” term should be interpreted in the same way as similar language in Title VII. *See Miles*, 979 F. Supp. at 250 n.4.
151. *Id.* at 249-50. As stated by the court: “There is no conceivable reason why such conduct should be rewarded with legal pardon just because, unbeknownst to [the professor] . . . plaintiff was not a biological female.” *Id.* at 249.
B. Critique of Current Title VII Doctrine

The refusal of federal courts to extend Title VII's protection to transsexuals is unduly restrictive. One early decision by the Court of Appeals for the Ninth Circuit continues to be cited as controlling or persuasive by other courts. In Holloway v. Arthur Andersen & Co., the court refused to allow a MTF transsexual who transitioned on the job and was then fired to bring a Title VII claim for sex discrimination. The court reasoned that a "plain meaning" approach to statutory construction required that the term "sex" be given its traditional meaning. As further evidence that Congress intended only the traditional meaning of "sex," the court noted that attempts to amend Title VII to include "sexual orientation" discrimination had failed. Applying a "plain meaning" analysis, the court reasoned that Title VII's "prohibition against sex discrimination in employment is to ensure that men and women are treated equally, absent a bona fide relationship between the qualifications for the job and the person's sex." In this one sentence, the court declared, without serious question, that there can only be two sexes—male and female.

1. There Are More Than Two Sexes

If Title VII must be read to protect only on the basis of biological sex, then courts must recognize that there are more than two sexes. As Professor Anne Fausto-Sterling has argued, according to current scientific knowledge, there are at least five, and perhaps more, sexes. These include male, female, and three types of intersexed persons—so-called

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152. 566 F.2d 659 (9th Cir. 1977).
153. Holloway, 566 F.2d at 661.
154. Id. at 662.
155. Id. at 662 n.6 (citing nine bills from 1975–77 which sought to add Title VII protection based upon sexual orientation, all of which were defeated). Holloway was decided in 1977. At that time, perhaps, judges were not familiar with the delineation between transsexualism and sexual orientation. The need to add "sexual orientation" to Title VII's list of protected classes to effectuate protection of homosexuals was necessary because courts had held that "sex discrimination" did not include discrimination against homosexuals. See Smith v. Liberty Mutual Ins. Co., 395 F. Supp. 1068, 1101 (N.D. Ga. 1975). Although scholars have argued that homophobia and sexism are closely linked, courts have remained unwilling to expand the meaning of "sex" to include "sexual orientation." See Wrightson v. Pizza Hut of America, Inc., 99 F.3d 138, 143 (4th Cir. 1996) ("Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality.") (quoting DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329–30 (9th Cir. 1979))). The argument that "sex discrimination" includes discrimination against transsexuals is a totally separate argument from the argument regarding sexual orientation. Nonetheless, the Holloway court dismissed the argument in less than a paragraph. See Holloway, 566 F.2d at 662.
156. Holloway, 566 F.2d at 663.
157. See generally Anne Fausto-Sterling, The Five Sexes: Why Male and Female Are Not Enough, SCIENCES, Mar.—Apr. 1993, at 20–24. But see John Money, Sex Errors of the Body and Related Syndromes: A Guide to Counseling Children, Adolescents, and Their Families 6 (1994) (arguing that it does not "make sense to talk of a third sex, or of a fourth or fifth, when the phylogenetic scheme of things is two sexes. Those who are genetically neither male nor female but incomplete are not a third sex. They are a mixed sex or an in-between sex.").
true hermaphrodites (herms), male pseudohermaphrodites (merms), and female pseudohermaphrodites (ferms). According to John Money, as many as four percent of all births may produce some variety of these intersexed persons. Although most such newborns are assigned a sex that is either male or female and are medically treated to help their bodies conform to the assigned sex, their natural biological sex is mixed.

Sex reassignment surgery has also worked to create more than two sexes. The biological male who undergoes surgery to become a woman usually has a vaginoplasty. If physical appearance of genitalia were to define femaleness, then post-op MTF transsexuals would typically qualify as female. Since FTMs often forego phalloplasties, it is more difficult to classify them as male on the basis of physical appearance of genitalia. But to classify them as female would deny their reality. As opposed to the situation in the past, when most transsexuals were committed to relatively complete sex changes, an increased number of individuals, both MTF and FTM, elect medical intervention involving less than a complete change. Such persons go through life with bodies that we might describe as "intermediate," somewhere between male and female.

Every person has a sex. Title VII protects on the basis of sex and is intended to protect every person, regardless of what the person’s sex is. Such an interpretation of Title VII is consistent with our liberal interpretation of anti-discrimination law. Title VII ought to protect discrimination against transsexuals not only in cases where they can prove that discrimination occurred because they were perceived to be either male or female, but also in cases in which the employer claims that discrimination occurred because the employee failed to fit within the neat binary classification of male or female.

2. “Sex” Should Be Interpreted to Include Gender Expression

Although there is virtually no legislative history regarding the meaning of “sex” when it was added to Title VII, it must have meant more than biological sex. The image that senators had in mind when they discussed the addition of sex was that it would require employers to hire women with feminine roles and identities (e.g., wives and mothers traditionally filled these roles). This phenomenon, in part, is due to changing attitudes and practices within the medical community. See id.

158. Fausto-Sterling, supra note 157, at 21.
159. Id.
160. See Rubin, supra note 54, at 476. This phenomenon, in part, is due to changing attitudes and practices within the medical community. See id.
161. Id.
162. See, e.g., Armbruster v. Quinn, 711 F.2d 1332, 1336 (6th Cir. 1983) (“To effectuate its purpose of eradicating the evils of employment discrimination, Title VII should be given a liberal construction. The impact of this construction is the broad interpretation given to the employer and employee provisions.” (citations omitted)); cf., e.g., McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 278–79 (1976) (“[Title VII’s] terms are not limited to discrimination against members of any particular race.”). These and other cases recognizing the breadth of Title VII protections act to reject a strict bipolar (black/white) approach to racial discrimination.
tionally assigned to private sphere roles). Some of them expounded on the difficulties that would ensue as women moved from the private sphere to the public sphere of work. And yet the bill passed. To give effect to the bill, employers cannot require women to behave as men in the workplace. Feminine values must be protected. To that end, Title VII's coverage has been expanded by legislative amendment to cover pregnancy and it has been interpreted to cover sexual harassment.

"Sexual harassment" has recently been interpreted by the Supreme Court to include same-sex harassment. Accepting the fact that Congress did not enact Title VII for the primary purpose of regulating same-sex sexual harassment, the Oncale Court nonetheless applied Title VII to a male on male sexual harassment claim, stating: "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." If Title VII was intended to make it possible for females with feminine sensibilities to work comfortably in the public sphere, then the statutory protections must be interpreted to cover expressions of feminine gender by transsexuals, whether or not the expression of such femininity by transsexuals was the principal concern of Congress. FTM, whom the law may identify as male post-transition, but who retain and express their sense of the feminine, must be protected in order to carry out the purpose of Title VII's ban on sex discrimination. Similarly, MTFs, who express their femininity during transition even though their bodies may be more biologically male, must be protected.

3. MTF Transsexuals Must Be Protected in Order to Ensure Protection of Women, and FTM Transsexuals Must Be Protected in Order to Ensure Protection of Both Men and Women

When a transsexual transitions on the job, a decision to fire the individual often includes assumptions about the inappropriateness of the

164. See id.
165. The Pregnancy Discrimination Act of 1976, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)), amended the definitions section of Title VII by adding subsection (k) which states, in part: "The terms 'because of sex' or 'on the basis of sex' include... because of or on the basis of pregnancy...."
166. The sexual harassment cases in particular have shown that Title VII was intended to change the workplace from the male bastion that it was prior to Title VII to something different, a place in which females with feminine sensibilities could work comfortably. See, e.g., Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1994) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.") (internal citations and quotation marks omitted)).
168. Id. at 1002.
newly gendered person holding the same job as was held by the previously gendered person. *Ulane v. Eastern Airlines* is a prime example of this situation. Ulane was attempting to keep her job as an airline pilot, a job which at the time of the case was held almost exclusively by men. The decision to fire Ulane was likely prompted as much by a fear of female pilots as by a fear of transsexual pilots.

The situation presented in *Ulane* is not a unique one. Barbara Renee James lost her job in the electrical sales division of a hardware store when she transitioned from male to female. And Jane Doe lost her job as a Boeing engineer when she transitioned on the job. It is probably not coincidental that a number of litigated cases involve MTFs in jobs that have been historically held by men.

Legal protection of MTFs who transition on the job, and who want to continue holding jobs that have been identified as male jobs, is necessary to assure legal protection for persons born female who wish to hold those jobs. A primary purpose of Title VII is carried out if “sex” is read to include “MTF transsexuals.”

There is no evidence in the form of reported cases of a similar trend involving FTMs. In fact, in the only two FTM anti-discrimination cases that I found, the trial court judges both ruled in favor of the plaintiffs on the motion to dismiss the complaint. However, it would not be surprising to find that women in “female” jobs who transitioned to being male had a harder time with their employers than other FTMs in more “androgy nous” jobs. The story of Mario Martino suggests, for example, that despite “her” excellent credentials and experience as a nurse, co-workers avoided “him” and joked about “him” while he was in transition. Eventually, he changed jobs. Legal protection of FTMs who wish to remain in or retain jobs that are traditionally thought of as “feminine” serves to protect persons born male who also wish to hold such jobs.

The stories from the Balkans show us that male roles that are traditionally honored and respected can be carried out by women passing as men with the blessing of the community, so long as there are no males

169. 742 F.2d 1081 (7th Cir. 1984).
170. *Ulane*, 742 F.2d at 1082-83.
173. See text supra accompanying note 168.
175. See discussion supra Part IV.B.2.a.
available.¹⁷⁶ Our own post-World War II history tells us that the same is true of our culture. Rosie the Riveter was held in high esteem until the male troops came home. Legal protection of women who pass as men in order to hold masculine jobs,¹⁷⁷ or of FTMs who transition in "masculine" jobs, will help women who wish to hold such jobs. Thus, the purposes of Title VII are better served by a statutory interpretation that includes transsexual and transgendered persons within its protections.

VII. CONCLUSION

Current anti-discrimination law, in particular Title VII, prohibits discrimination on the basis of sex. Most courts have interpreted this language to exclude discrimination against transsexuals. A recent district court opinion in New York suggests that Title VII may apply to transsexual plaintiffs, provided the discriminator does not know that the plaintiff is transsexual.¹⁷⁸ Such interpretations of sex discrimination law are too limited. Transsexuals, even those who pass successfully in their new gender roles, cannot be viewed as solely male or female. Their stories teach us that individual gender identity is too fluid to force all persons into the bipolar scheme that current Title VII jurisprudence seems to presume. Title VII’s sex discrimination jurisprudence must be reconceptualized to account for the reality of individuals who are both male and female, whether at the same moment in time or at different moments over time.

¹⁷⁶ See discussion supra Part IV.A.1.
¹⁷⁷ See, e.g., FEINBERG, supra note 124, at 12–13 (discussing her experience passing as a male museum guard).