

Working With Clients to Develop Compatible Visions of What It Means to “Win” a Case: Reflections on *Schroer v. Billington*

Sharon M. McGowan*

“I haven’t gone through all this only to have a court vindicate my rights as a gender non-conforming man.” I remember quite vividly the day that Diane Schroer expressed this sentiment to me. It was April 2005, and she and I had not yet signed a retainer agreement establishing the contours of a legal relationship that has lasted over four years. Perhaps more than any other conversation that we had over the course of her employment discrimination case against the Library of Congress (“Library”), this statement from Ms. Schroer illustrated how much more can be at stake for a client, and particularly for a transgender client like Ms. Schroer, than simply winning or losing a legal claim. Some of the more challenging issues in the case, which I initially viewed as merely litigation strategy concerns, involved for Ms. Schroer fundamental questions about how her lawyer would present her life experience and, to some extent, defend the validity of her very identity to a court.

In this article, I recount my experience representing a transgender client, Diane Schroer, in her employment discrimination case against the Library.¹ In doing so, I hope to illustrate practical and ethical questions and challenges that can arise in any kind of litigation. For example, do the lawyer and the client have compatible visions of what it means to “win” the case, and what steps does the lawyer need to take at various points during the litigation to ensure that the lawyer’s actions are consistent with this vision? How and when can a lawyer protect a client’s privacy when engaging in high profile litigation? How should a lawyer respond when the court poses what seems to be the wrong question and suggests that the answer may be dispositive of the case? When should an advocate bring a claim that has a high risk of producing bad law not only in her own case but also for future

* Staff Attorney, ACLU Lesbian Gay Bisexual Transgender (LGBT) Project (“Project”). I am tremendously grateful to all of those who assisted me with this article, including Jared Davidson, Julie Greenberg, Patrick Kelly, Nick Wunder, Cara Suvall and her dedicated *Harvard Civil Rights–Civil Liberties Law Review* colleagues. Special thanks to Diane Schroer and Emily Hecht, not only for their support with this article, but also for all of the ways in which they have enriched my personal and professional life.

¹ The formal caption of the case, filed on June 2, 2005, is *Schroer v. Billington*, No. 05-1090 (D.D.C. filed June 2, 2005). I served as lead attorney in the case along with Ken Choe, Senior Staff Attorney with the ACLU’s LGBT Project; Art Spitzer, Legal Director of the ACLU of the National Capital Area; and James Esseks, the Litigation Director of the ACLU’s LGBT Project. I am tremendously grateful to each of them and thank them for their unique and invaluable contributions to the litigation of this case.

litigants based on her belief that, even in losing the claim, benefits might accrue to her client?

These are some of the more interesting and difficult questions that my colleagues and I faced in our case against the Library on Ms. Schroer's behalf. In addition to describing how these issues manifested themselves in our case, this article seeks to capture our thinking during the course of the litigation and recount some of the discussions that we had with Ms. Schroer along the way that influenced, but did not always dictate, our litigation decisions. Where appropriate, I also describe the state of the law at the time to help contextualize our choices.

Part I of this article narrates the events that precipitated Diane Schroer's decision to contact the ACLU. Part II focuses on two difficult questions we grappled with prior to filing Ms. Schroer's case.

In Part II(A), I discuss the first of these questions: how to plead Ms. Schroer's gender in our complaint. Part II(A)(1) briefly describes successful Title VII cases involving transgender plaintiffs litigated prior to our consideration of Ms. Schroer's case.² These earlier decisions offered hope of achieving a positive result for Ms. Schroer. However, the litigation strategy used in those cases gave us pause because it involved pleading the plaintiffs as gender nonconforming men who were victims of sex stereotyping, rather than as transgender women. Part II(A)(2) recounts the discussions that we had with our client about our concerns and the strategy that, we hoped, would balance these concerns against our desire to position our case within established sex stereotyping jurisprudence.

Part II(B) discusses the second critical decision: how to best explain to the court the experience of transsexuality³ and the important interests at stake when an individual undertakes a gender transition. In thinking through this question, we were cognizant of the broader debate, outlined in Part II(B)(1), about whether it is appropriate for transsexuality to be considered a mental health disorder, and whether a mental health framework is appropriate for pursuing claims on behalf of transgender clients.⁴ Part II(B)(2) de-

² See, e.g., *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). See generally *infra* discussion at Part II(A)(2).

³ For purposes of this article, I shall use the terms Gender Identity Disorder, gender dysphoria, and transsexuality interchangeably, unless otherwise indicated, to describe the experience of having a gender identity different from the sex assigned to an individual at birth.

⁴ Gender Identity Disorder ("GID") is a condition listed in AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 532-38 (4th ed., text rev. 2000). The four criteria that must be satisfied prior to diagnosing an individual with Gender Identity Disorder are: (1) "a strong and persistent cross-gender identification, which is the desire to be, or the insistence that one is, of the other sex"; (2) "persistent discomfort about one's assigned sex or a sense of inappropriateness in the gender role of that sex"; (3) the absence of a physical intersex condition; and (4) evidence of "clinically significant distress or impairment in social, occupational, or other important areas of functioning." *Id.* at 532-33. The World Health Organization's *International Classification of Diseases 10* (ICD-10), the international standard diagnostic classification for epidemiological, health management and clinical uses, also includes various categories of gender identity disorders. WORLD HEALTH ORG., INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (10th rev., 2d ed.

scribes our attempt to reconcile these views with the views of our client on these various questions and the somewhat novel due process claim that we raised in our case to best account for the various interests and concerns at stake.

Part III describes two challenging issues that arose after the case was already underway, and thus needed to be managed in the more dynamic environment of pending litigation.

In Part III(A), I discuss how, during the course of litigation generally and discovery in particular, we sought to preserve Ms. Schroer's privacy to the greatest extent possible with respect to particular medical decisions that she made regarding her transition. This part recounts the ways in which we found it more difficult to safeguard the privacy of Ms. Schroer's personal information regarding the status of her body than we anticipated and the decisions Ms. Schroer made that ultimately gave her greater agency over the dissemination of this information.

In Part III(B), I explain how we approached a question that we had not necessarily expected to litigate, but which was posed to us by the court, about the biological sources (if any) of gender identity and Gender Identity Disorder. Although we wanted to comply with the court's request, this question raised complex matters of science and law. It also implicated the larger struggle of transgender people for equality and dignity. In addition, our client had her own views about how the science should influence our advocacy.

Part IV offers some post-litigation reflections.⁵ In particular, in Part IV(A), I reexamine our decision not to seek a ruling on whether gender identity is part of one's biological sex and reflect on whether we may have missed an opportunity to develop law that could have significantly improved the lives of transgender people. In Part IV(B), I discuss our decision to continue pursuing our due process claim even after we knew that the court was open to considering our Title VII claim, a claim that would have been sufficient to make our client whole. Although our decision not to drop the claim resulted in a bad due process ruling with which we will need to contend in the future, I conclude that, on balance, the due process claim was a useful vehicle for presenting the important interests at stake for our client.

2004) [hereinafter ICD-10]. The diagnosis in the ICD-10 of greatest relevance for purposes of this article is "transsexualism," described as, "a desire to live and be accepted as a member of the opposite sex, usually accompanied by a sense of discomfort with, or inappropriateness of, one's anatomic sex, and a wish to have surgery and hormonal treatment to make one's body as congruent as possible with one's preferred sex." *Id.* at F64.0. The debate within the transgender and scientific community about the inclusion and description of GID within the DSM, which is currently under revision by the American Psychiatric Association, is beyond the scope of this article, but this article will delve into this question to the extent that it was part of the discussions that we had with Ms. Schroer.

⁵ The deadline for filing an appeal of the district court's rulings on liability and damages was June 30, 2009. The government's decision not to appeal was welcome news to the LGBT community. Nedra Pickler, *Obama White House Not Appealing Transgender Ruling*, ASSOCIATED PRESS, July 1, 2009, available at http://www.huffingtonpost.com/2009/07/01/obama-white-house-not-app_n_223984.html.

I finish this piece by offering some final thoughts about how the client relationship issues that we faced in our case, while taking a particular form in the context of litigating with a transgender client, are those that can emerge in advocacy involving transgender and nontransgender clients alike. My hope is that, by highlighting these issues, this article can assist practicing lawyers, lawyers in training, and the professionals training them to develop an ethic of lawyering that will not only advance the cause of civil rights but also promote the dignity and humanity of their clients.

I. BACKGROUND

Upon retiring from the military after twenty-five years of service, U.S. Army Colonel Diane Schroer applied for a position as a Specialist in Terrorism and International Crime with the Congressional Research Service (“CRS”) of the Library of Congress in the fall of 2004. The majority of Ms. Schroer’s military experience involved highly selective counterterrorism operations, and she spent the last seven and a half years of her military career with the United States Special Operations Command (“USSOCOM”), which “plans, directs, and executes special operations in the conduct of the War on Terrorism in order to disrupt, defeat, and destroy terrorist networks that threaten the United States.”⁶ Based on this experience, as well as her extensive academic credentials, including a master of arts degree in both history and international relations from the National War College, Ms. Schroer was highly qualified for the position with the Library.⁷

At the time she applied for the Terrorism Specialist position, Ms. Schroer was in the early stages of her gender transition⁸ and was still living full-time as David Schroer. Accordingly, she applied for the position using her then-legal name, David Schroer, and appeared for her interviews in traditionally male attire. After receiving an offer to join CRS, Ms. Schroer asked

⁶ *Schroer v. Billington*, 424 F. Supp. 2d 203, 205-06 (D.D.C. 2006).

⁷ *Id.*

⁸ See generally WORLD PROF'L ASS'N OF TRANSGENDER HEALTH, INC., THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS (6th ed. 2001) [hereinafter STANDARDS OF CARE], available at <http://wpath.org/Documents2/socv6.pdf>. There are numerous stages to an individual's gender transition, but what constitutes transition for any particular person is a highly personal and individualized determination. As described in the World Professional Association of Transgender Health's ("WPATH") STANDARDS OF CARE, gender transition for some individuals consists of all three stages of "triadic therapy." See *id.* at 3. This includes hormone therapy; commencement of the real-life experience, where an individual begins to live "full-time" in the gender role to which he or she is transitioning; and surgical intervention(s). See *id.* at 13-22. Pursuant to the STANDARDS OF CARE, individuals seeking to undertake a gender transition should have a relationship with a therapist to ensure that any other mental health conditions ("co-morbidities") are being properly managed. See *id.* at 11-13. As the STANDARDS OF CARE make clear, however, while "[m]any persons with GID will desire all three elements of triadic therapy[,] . . . the diagnosis of GID invites the consideration of a variety of therapeutic options, only one of which is the complete therapeutic triad. Clinicians have increasingly become aware that not all persons with gender identity disorders need or want all three elements of triadic therapy." *Id.* at 3.

her future supervisor, Charlotte Preece, to lunch. At that lunch on December 20, 2004, Ms. Schroer explained to Ms. Preece that she (Ms. Schroer) was a transgender woman, and that, consistent with her gender identity, she was about to begin living full-time as a woman.⁹ Rather than begin work as David and later transition to Diane, she expressed her intention to start work at CRS as Diane. The following day, Ms. Preece called Ms. Schroer to rescind the job offer, explaining that she thought Ms. Schroer was not a “good fit” for CRS.

Ms. Schroer was devastated by this news.¹⁰ In anticipation of beginning with the Library, Ms. Schroer severed professional ties with her previous employer and disclosed her plan to transition to personal and professional contacts.¹¹ After the Library rescinded the job offer, Ms. Schroer struggled to find work and had many sleepless nights worrying about how she would sustain herself.¹² Although friends referred work to her, the projects were either unfulfilling or presented no opportunity for professional development.¹³ More demoralizing, though, was the fact that Ms. Schroer, a highly independent and self-sufficient person, was reduced to relying on her friends for work so that she could survive.¹⁴

The Library’s reversal, however, represented more than just the loss of a particular position to Ms. Schroer. Ms. Schroer experienced a period of tremendous despair, during which time she had grave doubts about her ability to live a meaningful and successful life.¹⁵ As the court later acknowledged, it “cast doubt on the viability of living an open and productive life as a woman.”¹⁶ Her stress manifested itself in ways that were physically painful as well as psychologically taxing.¹⁷

In the days immediately after the Library’s decision, Ms. Schroer hoped that the Library’s actions were simply the mistake of a middle manager. She wrote a letter to the Library’s Equal Employment Opportunity Office protesting the decision and asking for a review. Shortly thereafter, she e-mailed the ACLU’s Lesbian Gay Bisexual Transgender Project (“Project”).¹⁸

⁹ See *id.* at 17 (“The act of fully adopting a new or evolving gender role or gender presentation in everyday life is known as the real-life experience. The real-life experience is essential to the transition to the gender role that is congruent with the patient’s gender identity.”).

¹⁰ *Schroer v. Billington*, Memorandum Order, No. 05-1090, 2009 U.S. Dist. LEXIS 43903, at *7 (D.D.C. Apr. 28, 2009) (citing Declaration of Diane Schroer).

¹¹ *Id.* at *8.

¹² *Id.*

¹³ *Id.* at *8-9.

¹⁴ *Id.* at *8.

¹⁵ *Id.* at *7-9.

¹⁶ *Id.* at *7.

¹⁷ *Id.* at *7-9.

¹⁸ In December 2004, the Project was still known as the Lesbian and Gay Rights Project. The Project changed its name in 2006 to reflect the fact that the Project has historically worked and continues to work on issues of concern to lesbian, gay, bisexual, and transgender people.

II. KEY PRE-LITIGATION QUESTIONS

As an impact litigation organization, the ACLU looks for cases that are factually “clean” and have a significant likelihood of producing a favorable ruling on an important legal issue. At this stage, we only had Ms. Schroer’s version of the events, but from what she told us, it appeared to be a straightforward case of discrimination due to the fact that Ms. Schroer was transgender. Everyone at the Project recognized how unfairly the Library had treated Ms. Schroer, but that fact alone did not mean that we would bring a case on her behalf. We would need to address a number of important questions before we could agree to represent her.

A. *Assessing the Strength of Our Title VII Claim*

Ms. Schroer first approached the ACLU about taking her case in the last week of December 2004. It was an eventful time in the development of Title VII jurisprudence concerning discrimination against transgender individuals. In the first two decades after the passage of Title VII, courts repeatedly rejected claims of sex discrimination by transgender people on the grounds that Congress had “a narrow view of sex in mind” when it added sex to the 1964 Civil Rights Act, and whatever else it may have meant to cover through the term “sex,” Congress did not “believe[] that transsexuals should enjoy the protection of Title VII.”¹⁹ Consequently, by the mid-1980s, a lawyer investigating the issue might have reasonably believed that transgender individuals who suffered discrimination due to their gender identity or transgender status had no claim under Title VII.

In 2003, the legal landscape changed significantly. In *Smith v. City of Salem*, the Sixth Circuit overruled a trial court decision to dismiss the complaint of a transgender fire fighter who claimed that his employer discriminated against him because of his failure to conform to social stereotypes associated with men.²⁰ The court’s ruling rested on the Supreme Court’s 1989 decision in *Price Waterhouse v. Hopkins*, which held that an adverse employment action taken by an employer for an employee’s perceived failure to conform to sex stereotypes, including stereotypical norms about how women and men should look and act, is a form of sex discrimination actionable under Title VII.²¹ Applying *Price Waterhouse* to the claims of the trans-

¹⁹ *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1086 (7th Cir. 1984). See also *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748 (8th Cir. 1982) (per curiam); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659 (9th Cir. 1977).

²⁰ *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). See discussion *infra* Part II(A)(1) for an explanation of my use of pronouns when discussing this case.

²¹ 490 U.S. 228, 250-51 (1989) (“In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender. . . . [W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”); see also *id.* at 256 (noting that it did not “require expertise in psychology to

gender plaintiff, the *Smith* court noted that “[s]ex stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as ‘transsexual,’ is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.”²² A second case from the Sixth Circuit, *Barnes v. City of Cincinnati*, confirmed that the sex stereotyping theory was a viable legal claim that transgender individuals could use to challenge adverse employment actions based on their gender nonconformity.²³

1. *How Applicable and Helpful Were Existing Sex Stereotyping Precedents?*

Had the courts not yet decided *Smith* and *Barnes*, there likely would have been greater resistance among my ACLU colleagues to bringing a case on Ms. Schroer’s behalf. However, even these Sixth Circuit decisions did not guarantee success in our case. First, as decisions from another circuit, neither *Smith* nor *Barnes* would bind a federal district court in the District of Columbia. Second, and more importantly, there were factual differences between our case and the *Smith* and *Barnes* cases. Specifically, in both *Smith* and *Barnes*, the plaintiffs were transgender women in the early stages of their gender transition. They had begun to exhibit more feminine characteristics, but were still presenting themselves as male in the workplace. By contrast, Ms. Schroer was not someone who experienced discrimination when she began gradually exhibiting more feminine features. Rather, she presented photographs of herself dressed as a woman to her employer and explained that she wanted to begin work as Diane rather than David, with a presentation that was consistent with the social conventions associated with women’s professional attire. In other words, Ms. Schroer was not gradually departing from male stereotypes in terms of her appearance. Hers was not a case of a man growing his hair or fingernails “too long,” or speaking in an increasingly feminine manner. Rather, from the employer’s perspective, Ms. Schroer was a man one day, and a woman the next. We believed that the decision maker’s discomfort with this transition by Ms. Schroer almost certainly stemmed, at least in part, from the decision maker’s stereotypical beliefs about who is a man and who is a woman. It was nevertheless unclear to us whether these factual differences between our case and those earlier decisions would preclude us from convincing a court that what happened to Ms. Schroer was sex stereotyping just as it had been in *Smith* and *Barnes*.

know that, if an employee’s flawed ‘interpersonal skills’ can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism”).

²² *Smith*, 378 F.3d at 575.

²³ 401 F.3d 729 (6th Cir. 2005).

Another fundamental question dealt with Ms. Schroer's personal identity. Smith and Barnes were both transgender women, but their complaints alleged that they were discriminated against because they were men who failed to conform to gender stereotypes associated with men.²⁴ Framing their allegations in this manner was strategically sound in light of rulings in cases like *Rosa v. Park West Bank & Trust Co.*, in which the First Circuit Court of Appeals, applying *Price Waterhouse* to another remedial statute—the Equal Credit Opportunity Act—ruled that a man denied a credit application because he was dressed in traditionally feminine attire stated a claim of sex discrimination.²⁵ Like the plaintiffs in *Smith* and *Barnes*, Rosa alleged that the bank discriminated against him by refusing to give him a credit application for failure to act and dress in a manner consistent with social norms and stereotypes associated with men.²⁶

We knew that the lawyers who had litigated these prior cases were deeply committed to promoting the rights of transgender people, and that they had framed their cases in the way most likely to fit within the *Price Waterhouse* theory. Nevertheless, arguing that Ms. Schroer was a man who failed to conform to social stereotypes associated with men felt uncomfortable to many of us at the Project, myself included. It felt as though we would be disavowing Ms. Schroer's identity *as a woman*, and accepting society's discriminatory conception that transgender women are just men who want to dress as women. Using a different framework for our case than was deployed in these previous cases, however, was an untested strategy.

Before filing a complaint, two important and interrelated questions had to be resolved. First, for purposes of pleading the elements of our Title VII claim, we needed to decide to which "protected class" we would allege that Ms. Schroer belonged. Second, and perhaps more importantly, who would make the final decision if Ms. Schroer reached a different conclusion than we did about the best course to pursue?

2. *What Gender Is Your Client for Purposes of Litigation and Who Decides?*

The Model Rules of Professional Conduct delineate decisions that are "client" decisions, and those that are "lawyer" decisions.²⁷ With respect to

²⁴ See *Barnes*, 401 F.3d at 737; *Smith*, 378 F.3d at 571-72.

²⁵ 214 F.3d 213, 215 (1st Cir. 2000).

²⁶ *Id.* at 215-16.

²⁷ See MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983) ("Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.").

certain decisions, the line is easy to discern. For example, whether to accept a settlement offer or whether to testify are two examples of clear “client” decisions.²⁸

The rule also authorizes lawyers to “take such action on behalf of the client as is impliedly authorized to carry out the representation.”²⁹ In other words, the lawyer does not need to confer with the client prior to making many decisions related to the litigation of a case. The lawyer does not, however, have a blank check once the retainer is signed. The rules impose a duty upon the lawyer to “reasonably consult with the client about the means by which the client’s objectives are to be accomplished,” as well as to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”³⁰ A lawyer must discuss with the client not only the “objectives of [the] representation,” but also the “means by which they are to be pursued.”³¹

What constitutes a “reasonable” level of consultation about “the means by which the client’s objectives are to be accomplished” can vary from client to client. The appropriate level will depend on a variety of factors, including, for example, the client’s educational background and comprehension. A client’s desire and ability to engage actively in these decisions may also depend on her emotional state and the other challenges she is facing at the time of the litigation. Undoubtedly, many clients want their lawyer to frame a case in whatever way the lawyer thinks will maximize their chances of success and either do not want or do not feel competent to offer their opinion about the best strategy.

In our case, by contrast, Ms. Schroer had both the capacity and the desire to engage in a relatively sophisticated conversation about important strategic decisions that we faced, and could weigh the advantages and disadvantages associated with the different ways in which we could frame her sex stereotyping claim. What I perhaps underestimated was how much I would come to value her feedback during moments like this in the litigation. Instead of simply fulfilling my obligation to keep my client informed, these conversations were extremely helpful to me in thinking through our arguments. Yet, it became clearer to me over time that how we presented Ms. Schroer’s life and identity to the court was more than just a strategic question. For her, it was also a highly personal matter implicating fundamental issues of identity and integrity. For these reasons, regardless of whether or not the letter of the rule required us to consult with Ms. Schroer regarding how we would frame our sex stereotyping claim in our pleadings, this decision was simply too important for us to make it without her input.

²⁸ *Id.*

²⁹ *Id.*

³⁰ MODEL RULES OF PROF’L CONDUCT R. 1.4(a)(2) & (b).

³¹ MODEL RULES OF PROF’L CONDUCT R. 1.2(a).

At this stage, I had worked with Ms. Schroer over the course of several months to help her navigate the administrative appeal process after the Library's decision, but I had not yet met her in person. Although there was the option of simply raising these questions with Ms. Schroer over the phone, our collective experience at the ACLU indicated that a face-to-face meeting would be a preferable setting for discussing these potentially sensitive matters. So, in April 2005, Ms. Schroer and I met for the first time.

Upon meeting Ms. Schroer, I was struck by her calm and quiet demeanor. When I explained that the ACLU looks for cases that have the potential to serve as vehicles for public education, I wondered whether Ms. Schroer would decide that the exposure attendant with being an ACLU client was not something for which she was willing to volunteer. Even so, I hoped and suspected that Ms. Schroer would recognize that her life story, and particularly her extraordinary military background, was rather unique, and that it could potentially change people's attitudes and opinions both about who transgender people are and about the rampant discrimination they face. Ms. Schroer's willingness to consider litigation with us also seemed to me to be heightened by the fact that the discriminating party in this case was the federal government. To Ms. Schroer, the Library's actions felt more like a breach of trust in light of her decades of service and dedication in the military, and thus stung in a more painful way than if the employer had been a private sector entity.

I explained to Ms. Schroer that, although the Project wanted to educate the public by sharing her story, we could not anticipate whether or not the media would be interested in her case or how much we could control that media. I also emphasized that we had no way of predicting whether we could win her case. Fortunately, Ms. Schroer's military background gave her ample experience in assessing situations with numerous, unpredictable contingencies. She understood that it was impossible to have all of the answers beforehand, and I suspect that she would have trusted me less if I had claimed such omniscience. She knew, as did I, that moving forward with litigation would, to some extent, involve a leap of faith.

Before Ms. Schroer could decide whether she was willing to have the ACLU represent her, it was critical to discuss how we might frame a sex stereotyping claim. I explained that the only successful cases until that point had described the transgender female plaintiff as a gender nonconforming man. I also acknowledged that she might find it distasteful to file a complaint in federal court describing herself as a gender nonconforming man. Not surprisingly, Ms. Schroer indicated that she was not interested in making her life an open book by filing a lawsuit with the ACLU if the best case scenario was a court ruling that vindicated the right of a gender nonconforming man to be free of discrimination. In her view, she had decided to transition—and thereby risk discrimination by actors like the Library—precisely so that she could finally live her life as a woman, and it was her female identity that she wanted a court to affirm.

I explained that another option available to us, one that to my knowledge had never been employed successfully, was to plead in the complaint that Ms. Schroer was a woman, but that the employer had perceived Ms. Schroer to be a man at the time of her application for the position. From this premise, we would build our argument that the Library's actions were the product of impermissible sex stereotyping. In addition to being untested, however, this approach carried with it other risks that became clearer to me over time.

One case that seemed to support this strategy was *Kastl v. Maricopa County Community College District*.³² In June 2004, a federal district court in Arizona rejected a motion to dismiss a Title VII and Title IX claim brought by a transgender woman who alleged that her employer's requirement that she use men's restroom facilities until she could provide proof of genital surgery, and her subsequent termination for failure to abide with that requirement, constituted discrimination because of her failure to conform to sex stereotypes. Of particular interest to us was that Kastl alleged that she was a "biological female incorrectly assigned to the male sex at birth."³³ The court denied the defendant's motion to dismiss her Title VII claim, ruling that, unless an employer could prove that the presence or absence of certain anatomy (typically associated with a particular sex) is a bona fide occupational qualification ("BFOQ") for a position, adverse action against an employee for his or her failure to have anatomy that is stereotypically associated with a particular sex is a form of sex discrimination forbidden by Title VII.³⁴

As it turned out, this ruling in *Kastl*, which gave us such cause for optimism, did not reveal the complicated procedural maneuvering that preceded it, and in August 2006, the district court granted defendant's motion for summary judgment. In the hopes of learning how we might avoid a similar fate, I delved more deeply into the pleadings in *Kastl*, which I obtained both from PACER and Kastl's lawyer. Closer investigation revealed that Kastl originally had pled that she was a transgender woman, but that, in response to this complaint, the defendant had filed a motion for a more definite statement, demanding that Kastl clarify her "biological sex." The court granted defendant's motion on the ground that defendant would be unable to "adequately address" Kastl's claims without this information, as the "[d]efendant's argument would obviously be different depending upon whether Rebecca Kastl is a biological male presenting as a woman, or whether the Plaintiff is alleging the presence (at birth) of female physical characteristics that distinguish Rebecca Kastl from other biological males."³⁵

³² No. Civ.02-1531PHX-SRB, 2004 WL 2008954, at *9-10 (D. Ariz. June 3, 2004) (order granting in part and denying in part defendant's motion to dismiss).

³³ *Id.* at *1.

³⁴ *Id.* at *2.

³⁵ *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB (D. Ariz. July 9, 2003) (order granting motion for a more definite statement) (on file with author).

More specifically, the court ruled that without this information, the defendant would be unable to respond to “Plaintiff’s allegations that Rebecca Kastl was excluded from the women’s restroom based on an impermissible stereotype.”³⁶

In response to this order, Kastl attempted to file an amended complaint, which contained extensive allegations that she was a woman, supported by quotations from the scientific literature regarding the multifaceted nature of sex and the etiology of transsexuality.³⁷ Defendant responded with a motion to strike the complaint on the ground that it failed to provide a “short and plain statement” of her claims.³⁸ The court granted this motion, and instructed Kastl that she had “one last chance” to amend her complaint with a clear statement about her biological sex, and that the court would not grant any additional motions for leave to amend.³⁹

At this point, Kastl filed an amended complaint in which she alleged that she was a “biological female.”⁴⁰ Specifically, she asserted that she “was raised as a male and lived as a male until her biological sex was correctly determined to be female.”⁴¹ It was this complaint that produced the favorable motion to dismiss ruling upon which we intended to rely in our briefing. On a Rule 12(b)(6) motion, the court insisted, all of plaintiff’s allegations—including her allegation that she was biologically female—would be accepted as true, and requiring a female to use male restroom facilities would state a claim of discrimination under Title VII and Title IX.⁴²

The proceedings in *Kastl* then took what I viewed as a disturbing turn that I recognized could have serious implications for our case. During discovery, the defendant insisted upon testing every allegation in Kastl’s complaint, including the allegation that she was a “biological female.” Consequently, the defendant demanded that Kastl submit to an independent medical examination (IME), including a blood draw, so that the defendant could conduct chromosomal testing to determine whether she was, in fact, a biological female. Kastl refused to submit voluntarily to a blood draw, which triggered a motion to compel from the defendant and a motion for a protective order from the plaintiff.⁴³ The court agreed with the defendant’s

³⁶ *Id.*

³⁷ Plaintiff’s Amended Complaint, *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB, 2006 WL 2460636 (D. Ariz. Aug. 22, 2006) (on file with author).

³⁸ Motion to Strike Complaint (Amended), *Kastl*, No. Civ.02-1531PHX-SRB, 2006 WL 2460636 (Aug. 14, 2003) (available on PACER).

³⁹ *Kastl v. Maricopa County Cmty. Coll. Dist.*, No. Civ.02-1531PHX-SRB (D. Ariz. Sept. 19, 2003) (order granting motion to strike) (available on PACER).

⁴⁰ Plaintiff’s Second Amended Complaint ¶ 32, *Kastl*, 2006 WL 2460636 (D. Ariz. Sept. 30, 2003) (on file with author).

⁴¹ *Id.* ¶ 1.

⁴² Order Granting in Part and Denying in Part Def.’s Mot. to Dismiss, *Kastl*, 2004 WL 2008954 (D. Ariz. June 3, 2004).

⁴³ Def.’s Mot. to Compel, *Kastl*, 2006 WL 2460636 (D. Ariz. Apr. 22, 2005); Plaintiff’s Motion for Protective Order, *Kastl*, 2006 WL 2460636 (D. Ariz. May 31, 2005).

position that Kastl placed her biological sex “in controversy,” and ordered her to submit to a blood draw.⁴⁴

The results of the chromosomal testing indicated that Kastl’s chromosomal makeup was the XY pattern typically associated with males.⁴⁵ Based on this evidence, and the fact that Kastl had male genitalia and was incapable of producing female hormones, the defendant moved for summary judgment, arguing that Kastl could not make out a prima facie case under Title VII because she was unable, in the face of this evidence, to establish that she was a biological woman, meaning—in the defendant’s view—that she was not a member of a protected class. The district court agreed and granted the defendant’s motion. The comments in the footnotes of the court’s ruling on summary judgment suggest that the court might have been open to considering Kastl’s argument that sex was more than merely a matter of chromosomes, genitalia, and hormones, and that her sex was, in fact, female, if Kastl had produced any scientific evidence in admissible form.⁴⁶ Specifically, the court remarked upon Kastl’s failure to demonstrate the existence of a disputed issue of material fact regarding whether she was a biological female during the events in the case, and noted that it was not inclined to reach out and create a disputed issue in light of the lack of any expert testimony or other admissible evidence from Kastl on the issue.⁴⁷

Had we known more about the procedural history of the *Kastl* case when considering our pleading options in 2005, we likely would have had greater reservations about alleging in our complaint that Ms. Schroer was a woman. On the other hand, at the time that we were making these key decisions, we were equally unaware that, in a 2001 case from Australia, a family court judge had ruled that a transgender man’s legal sex was male (for pur-

⁴⁴ Minute Entry, *Kastl*, 2006 WL 2460636 (D. Ariz. June 21, 2005); Order, *Kastl*, 2006 WL 2460636 (D. Ariz. June 27, 2005). Because the district court refused to certify its ruling on this issue for an interlocutory appeal, the Ninth Circuit dismissed Kastl’s petition for review. *Id.*; Order of Ninth Circuit, *Kastl*, 2006 WL 2460636 (D. Ariz. Oct. 28, 2005) (available on PACER).

⁴⁵ *Kastl*, 2006 WL 2460636, at *5. There are, of course, many chromosomal configurations other than XX and XY. See Julie Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 278-92 (1999). As courts have acknowledged, there are also chromosomal and hormonal conditions that can lead to a lack of congruence between an individual’s chromosomes and other aspects of their sex, such as genitalia and gender identity. See, e.g., *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (describing androgen insensitivity syndrome).

⁴⁶ *Kastl*, 2006 WL 2460636, at *6 n.7.

⁴⁷ *Id.* (“Plaintiff failed to disclose any experts by the close of discovery and she has not offered any expert testimony that would assist the trier of fact in determining whether Plaintiff was a biological female during the relevant time, an issue that could not be resolved in this case without expert testimony.”). On appeal, the Ninth Circuit affirmed the district court’s ruling on narrow grounds, holding that the plaintiff did not “put forward sufficient evidence demonstrating that [the discrimination] was motivated by Kastl’s gender.” *Kastl v. Maricopa County Cmty. Coll. Dist.*, 325 F. App’x 492, 494 (9th Cir. 2009). In this unpublished decision, the Ninth Circuit did not reach a number of the subsidiary issues that the plaintiff raised, some of which are discussed in or are related to this article, including questions about a plaintiff’s duty to plead her “biological sex” when presenting a Title VII claim.

poses of assessing whether he was validly married to his wife), based on the kind of scientific evidence that Kastl had indicated that she would provide in support of her claims.⁴⁸

When reading the various *Kastl* decisions and the opinions from the *Kevin* case with the benefit of hindsight, perhaps it should not have come as a surprise to us that the judge in our case would want to hear more about the nature of gender identity and its relationship to the legal and social concepts of sex. In Spring 2005, however, when we were weighing our options in Ms. Schroer's case, we did not have the benefit of any of this information. As a result, we were not thinking about our case as an opportunity to litigate the questions of what criteria should be used to determine a person's sex or to litigate the etiology of gender identity and transsexuality. Instead, we focused on surviving a motion to dismiss our Title VII sex stereotyping claim without having to concede that Ms. Schroer was a "gender nonconforming man."

We attempted to avoid this difficulty by alleging that Ms. Schroer had a female gender identity, and thus was a woman, but that she had likely been perceived to be a man by the hiring official at the time of her application based on her traditionally male name and appearance. We then alleged that the hiring official's decision was based either on Ms. Schroer's failure to conform with social stereotypes associated with women or her failure to conform with social stereotypes associated with men, or some combination of the two. As we had not yet had the chance to depose any Library employees involved in the decision to rescind Ms. Schroer's offer, we could not provide further detail about the particular ways in which Ms. Schroer's failure to conform to traditional sex stereotypes had influenced the Library's decision. But we felt confident that our sex stereotyping allegations covered all of the possible iterations, and thus would be sufficient to survive a motion to dismiss. Once discovery began, we believed that depositions of the decision maker(s) would reveal how sex stereotyping had operated in this case.⁴⁹

⁴⁸ *Re Kevin* (2001) 165 F.L.R. 404 (Austl.) (Chisholm, J.), *aff'd sub nom.*, Attorney-Gen. for The Commonwealth v. "Kevin and Jennifer" and Human Rights and Equal Opportunity Comm'n (2003) 172 F.L.R. 300 (Full Court of the Family Court of Australia affirming that post-operative transgender person (female to male) was a man at the time of his marriage). Particularly in the realm of transgender rights, advocates should remember that international tribunals, including national courts (e.g., Canada, Australia) and regional human rights tribunals (e.g., European Court of Justice, European Court of Human Rights), are sources of authority that, while not controlling, can often be directly on point, and thus highly persuasive to a decision-maker who is not overtly hostile to foreign law. See *infra* notes 136-41 and accompanying text for a fuller discussion of the *Kevin* decisions.

⁴⁹ *But see* discussion *infra* notes 97-100 and accompanying text.

B. *Beyond Sex Stereotyping: Weighing the Risks and Benefits of Raising Other Potential Legal Claims*

Although sex stereotyping was a sound theory for our Title VII claim, we had lingering concerns that a court viewing transgender issues only through this lens might not gain a sufficient understanding of what it meant to be transgender. Consequently, we began considering other claims that might provide us with a better vehicle for describing the experience of being transgender to a court with little or no familiarity with the concepts of gender identity, gender transition, and transsexuality beyond the negative images that appear in mainstream media. As we explored other options, however, it was evident that they came with significant political baggage.

1. *Litigating Transgender Discrimination Claims as Disability Discrimination*

Some advocates for transgender litigants have used the clinical description of transsexuality, Gender Identity Disorder (“GID”), a recognized mental health condition in the American Psychiatric Association’s Diagnostic and Statistical Manual, both as an explanation of the experience of being transgender and as a predicate for bringing disability discrimination claims, particularly in jurisdictions lacking clear protection against gender identity discrimination.⁵⁰ Many of these cases have produced outstanding results for individual clients.⁵¹ However, the use of these arguments has been controversial.

⁵⁰ See discussion *supra* notes 2-4.

⁵¹ See, e.g., *Doe v. Bell*, 754 N.Y.S.2d 846 (N.Y. Sup. Ct. 2003) (ruling that child welfare agency failed to make reasonable accommodation for child’s disability, Gender Identity Disorder, by not allowing her to wear gender-identity appropriate clothing). In a similar case from Massachusetts, *Doe v. Yunits*, the student’s lawyer framed her need to wear female clothing by claiming, among other things, that she had Gender Identity Disorder, and that being allowed to wear female clothing was a reasonable accommodation for her disability. No. 00-1060A, 2001 WL 664947, at *1 (Mass. Super. Ct. Feb. 26, 2001) (order denying defendants’ motion to dismiss). The trial court had originally rejected the disability claim. *Doe v. Brockton Sch. Comm.*, No. 2000-J-638, 2000 WL 33342399, at *2 (Mass. App. Ct. Nov. 30, 2000). However, a different judge, ruling on another motion in the case a few months later, accepted Doe’s disability claim on the ground that prohibiting the student from wearing gender-identity appropriate clothing would be as harmful to her health as preventing a diabetic student from taking insulin. *Yunits*, 2001 WL 664947, at *6. Some commentators have suggested that the court’s receptivity to the student’s challenge to the dress code in the Massachusetts case stemmed from the court’s belief that her need to engage in gender nonconforming behavior was critical to her “psychiatric health,” whereas courts have been generally hostile to similar challenges to highly gendered dress code requirements by nontransgender-identified students. Paisley Currah, *Gender Pluralisms Under the Transgender Umbrella*, in *TRANSGENER RIGHTS* 3, 9-10 (Paisley Currah et al. eds., 2006); Jennifer Levi, *Clothes Don’t Make the Man (or Woman), but Gender Identity Might*, 15 COLUM. J. GENDER & L. 90, 103 (2006) [hereinafter Levi, *Clothes*] (comparing the negative outcome in *Jespersen v. Harrah’s Casino*, 392 F.3d 1076 (9th Cir. 2004), with the positive outcomes in *Doe v. Yunits*, 2001 WL 664947, and *Enriquez v. West Jersey Health Systems*, 777 A.2d 365, 367 (N.J. Super. Ct. App. Div. 2001), and observing that “[i]t is likely that the incorporation of the medical information relating to the compelling

In particular, critics have argued that the use of clinical terminology and the language of disability law contributes to the regulation of transgender people by “medicalizing” their identity, as this framework implies the need for a “cure.” Others have suggested that using a mental health diagnosis to explain the very identity of transgender people produces social stigma and discrimination.⁵² Specifically, transgender advocate Franklin Romeo has warned, “[b]ecause the experiences of many gender nonconforming people do not match the diagnostic criteria of GID, and because, for all except the most privileged few, accessing trans-friendly health care is extraordinarily difficult, the medical model of gender does not serve the vast majority of gender non[conforming] people.”⁵³ Likewise, Dean Spade has argued that the GID diagnosis is “misused by some mental health practitioners as a basis for involuntary psychiatric treatment for gender transgressive people.”⁵⁴

The concerns expressed by these and other activists and scholars⁵⁵ weighed heavily on my mind as we were deciding how we might explain Ms. Schroer’s identity and experience as a transgender woman to a court. It struck me that any argument built upon the notion that transgender people’s gender identity—an integral part of their overall identity—is itself a disorder, or that a desire to live according to one’s gender identity is the manifestation of a mental disorder, might demean the experience of transgender people. Such arguments also had the potential to produce devastating consequences in terms of social stigma as well as the concomitant loss of autonomy and agency that is often associated with mental health diagnoses, which

reasons why someone would undergo that physical transformation moved the court in its analysis.”).

⁵² While I recognize the power of this critique, I find troubling the way in which it seems to accept that stigma is a natural corollary of mental health diagnoses. For those who are comfortable with the notion that gender dysphoria is experienced by some, but not all, transgender people, there would seem to be a natural alliance with the broader network of health advocates working to reduce the stigma associated with mental health issues more generally. I recognize, however, that many people take great offense at the suggestion that transgender identities are the manifestation of a mental disorder, and for them, there is a significant difference between sympathy for those with mental health conditions and acquiescence to being classified as a member of that group.

⁵³ Franklin H. Romeo, *Beyond a Medical Model: Advocating for a New Conception of Gender Identity in the Law*, 36 COLUM. HUM. RTS. L. REV. 713, 730-32 (2005).

⁵⁴ Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 34 (2003).

⁵⁵ See also Judith Butler, *Undiagnosing Gender*, in *TRANSGENER RIGHTS* 274, 275-76 (Paisley Currah et al. eds., 2006) (“[T]he [GID] diagnosis makes many assumptions that undercut trans-autonomy. It subscribes to forms of psychological assessment that assume that the diagnosed person is affected by forces he or she does not understand; it assumes that there is delusion or dysphoria in such people; it assumes that certain gender norms have not been properly embodied and that an error and a failure have taken place; it makes assumptions about fathers and mothers, and what normal family life is and should have been; it assumes the language of correction, adaptation, and normalization; it seeks to uphold the gender norms of the world as it is currently constituted and tends to pathologize any effort to produce gender in ways that fail to conform to existing norms (or to a certain dominant fantasy of what existing norms actually are).”).

are viewed as limitations on an individual's capacity to make decisions for him or herself.⁵⁶

Nevertheless, I also found myself greatly influenced by the views of Jennifer Levi and Ben Klein, who have written persuasively about how disability discrimination claims on behalf of transgender people can be a powerful tool for explaining the experience of transsexuality.⁵⁷ While recognizing the limits associated with viewing the experience of transgender people through the lens of the mental health diagnosis of GID, Levi and Klein argue convincingly that the goal of disability nondiscrimination provisions is not to pathologize the individual with a particular health condition or need, but rather to recognize that society has an obligation to accommodate the needs of individuals with unique health conditions in order to maximize their ability to participate in society.⁵⁸

In a related article, Levi has described the benefits of using the disability framework—emphasizing in particular the duty of employers to accommodate those with health conditions—to help courts understand the ways in which seemingly neutral job requirements and social rules are impossible for transgender people to satisfy.⁵⁹ The familiar disability discrimination framework gives judges a different way to understand how and why transgender people are unable to conform to the stereotypes and social norms associated with the sex assigned to them at birth:

A disability claim gives a court a construct for understanding why someone cannot conform to a gender stereotype and does so in language a judge can understand. That is, different health conditions are widely understood to change the way an individual might respond to a particular job requirement, making the judge without the health condition a poor arbiter of the job requirement's effects. By incorporating a medical claim associated with one's gender identity or gender expression, courts can distance themselves from the particular facts and circumstances of a case and take seriously

⁵⁶ In our case, one of the defenses that the government asserted in its answer and throughout the litigation was that Ms. Schroer either would not be able to satisfy the security clearance requirement for the Terrorism Specialist position or, in the alternative, would need to go through a more lengthy security clearance investigation due to the fact that she had a mental health diagnosis. Ultimately, after trial, the court recognized that this justification was pretextual, as the Library did not investigate in any meaningful way whether Ms. Schroer's diagnosis of Gender Identity Disorder actually impaired her capacity to hold a security clearance. *Schroer v. Billington*, 577 F. Supp. 2d 293, 300-02 (D.D.C. 2008). Nevertheless, this example demonstrates how the mental health diagnosis can often be a double-edged sword for plaintiffs.

⁵⁷ Jennifer Levi & Ben Klein, *Pursuing Protection for Transgender People Through Disability Laws*, in *TRANSGENDER RIGHTS* 74, 80-83 (Paisley Currah et al. eds., 2006).

⁵⁸ *Id.* at 78-79.

⁵⁹ Levi, *Clothes*, *supra* note 51, at 104.

the dysphoria experienced by a plaintiff's forced conformity to a gender norm.⁶⁰

This analysis led us to consider bringing a disability discrimination claim as a companion to our sex discrimination claim. The problem was that, because Ms. Schroer suffered discrimination by a federal employer, we only had federal claims at our disposal,⁶¹ and the federal Americans with Disabilities Act contains an irrational and discriminatory exclusion for any claims related to GID.⁶² Without a federal disability claim, we would have to find an alternative mechanism for explaining to the court how the decision to transition should be understood as equally important to an individual's well-being and personhood as the decision to address any other medical need. Finding a way to do so presented the second major challenge we faced in drafting our complaint.

2. *Framing the Decision to Undertake a Gender Transition as an Exercise of Constitutionally Protected Liberty*

In mulling over this question, we recalled how, in numerous past transgender cases that we at the ACLU considered, the problems faced by the transgender employee related less to whether an employer was treating men and women differently in ways that were legally impermissible, and more to whether the employer respected the gender identity of the employee when deciding which gender's rules applied. Gendered dress codes and access to sex-segregated facilities like restrooms are two examples of where this issue might arise in the workplace. Unlike pure animus-driven cases of employment termination or denial of access to housing or public accommodations, which we thought of as "equality" claims, these cases involved the right of

⁶⁰ *Id.*

⁶¹ We could not bring a federal equal protection argument based on either disability or medical condition due to the fact that, in *Brown v. General Services Administration*, the Supreme Court ruled that federal employment discrimination statutes provide the exclusive cause of action for claims covered by those statutes (e.g., race, sex). 425 U.S. 820 (1976). Likewise, due to sovereign immunity, we could not bring any claims under the D.C. Human Rights Law, which would have given us not only a disability discrimination claim but also a claim based on "personal appearance." D.C. CODE §§ 2-1402.11(a)(1) (prohibiting discrimination on the basis of, inter alia, "personal appearance"), 2-1402.02(22) (defining "personal appearance" as "the outward appearance of any person, *irrespective of sex*, with regard to bodily condition or characteristics, manner or style of dress, and manner or style of personal grooming") (2006) (emphasis added). At least one court had interpreted these provisions as providing transgender people with some protection against discrimination. *Underwood v. Archer Mgmt. Servs.*, 857 F. Supp. 96, 98-99 (D.D.C. 1994) (dismissing sex and sexual orientation discrimination claims brought by transgender plaintiff, but rejecting motion to dismiss discrimination claim regarding personal appearance). The D.C. Human Rights Law was amended in 2008 to include "gender identity and expression" as an explicitly protected category under the law. D.C. Law 17-177, 55 D.C. Reg. 3696 (June 25, 2008) (codified as amended at D.C. CODE § 2-1402.02(12A) (2006)).

⁶² 42 U.S.C. § 12211(b)(1) (2006) (excluding from the term "disability" the following: "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders").

transgender people to define who they were and how they would live their lives—issues that were grounded in constitutional guarantees of autonomy and liberty as much, if not more than, equality principles.

From this point of departure, we began thinking about how we might craft a claim that would produce the positive effects that Levi and Klein attributed to disability claims. Specifically, we looked to the liberty and autonomy guarantees encompassed by the Due Process Clause in an attempt not only to explain to the court what it meant for an individual to be transgender, but also to convey the gravity of the decision to transition from living as the gender assigned to a person at birth to the gender that was consistent with the person's gender identity.

Our first task was to figure out how we would articulate the elements of such a due process claim in our complaint. We first included a series of factual allegations about Ms. Schroer's life prior to her application with the Library. From there, we developed a section with the heading, "Plaintiff's Course of Medical Treatment for Gender Dysphoria." In this portion of the complaint, we alleged that Ms. Schroer's sex was classified as male at the time of her birth, and therefore she was given a traditionally male name by her parents and socialized as a male, but that over time, Ms. Schroer and the medical professionals working with her determined that the gender designation assigned to her at birth did not conform with her gender identity.⁶³

We then explained to the court what we meant by the terms "gender identity," "gender dysphoria," and "Gender Identity Disorder."⁶⁴ We emphasized that gender identity is something that is established early on in life, and for people whose gender identity does not match their anatomical sex at birth, this conflict can cause "psychological distress and intense feelings of discomfort."⁶⁵ We pointed out that attempts to change an individual's gender identity to conform to his or her anatomy have been unsuccessful and detrimental to the individuals involved.⁶⁶

Next, we identified the Harry Benjamin International Gender Dysphoria Association ("HBIIGDA") as the leading professional association for surgeons, doctors, medical researchers, and others who specialize in the medical treatment of people with gender dysphoria.⁶⁷ We noted that HBIIGDA has promulgated recognized standards of care for individuals dealing with gender dysphoria, and that this treatment "often consists of three components: hormone therapy, living full-time presenting in the gender corre-

⁶³ Complaint ¶¶ 13-14, *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (No. 05-1090).

⁶⁴ *Id.* ¶ 15 ("Gender identity is a person's internal psychological identification as a man or a woman. 'Gender dysphoria,' also known as 'gender identity disorder,' is a medical condition in which a person's gender identity does not match his or her anatomical sex at birth.").

⁶⁵ *Id.* ¶ 16.

⁶⁶ *Id.* ¶ 17.

⁶⁷ *Id.* ¶¶ 18-19. HBIIGDA changed its name to the World Professional Association of Transgender Health (WPATH) in 2009.

sponding with the person's gender identity, and sex reassignment surgery."⁶⁸ We concluded this section of our complaint with two final factual allegations. First, we alleged that Ms. Schroer had a clinical diagnosis of gender identity disorder, and that she was under the care of medical and mental health professionals consistent with the HBGDA Standards of Care.⁶⁹ Second, we asserted that gender dysphoria is a treatable medical condition that does not have any negative impact on a person's ability to be a productive member of society generally.⁷⁰ As part of this last allegation, we stated specifically that Ms. Schroer's gender dysphoria did not have any negative impact on her fitness for the duties of Terrorism Research Analyst.⁷¹

After laying out these factual predicates, we outlined the due process principles implicated by these facts. First, we asserted that the Due Process Clause protects an individual's right to make certain private decisions without government penalty.⁷² Second, we alleged that among the private decisions protected by the Due Process Clause are decisions related to medical treatment and the determination of one's gender identity.⁷³ We then stated that, at the time of the underlying events in this case, Ms. Schroer, with the assistance of medical professionals, was undertaking a course of medical treatment to address her gender dysphoria and to bring her body into conformity with her gender identity, but that the lack of consonance between her gender identity and her body was unrelated to her ability to perform the duties of the job for which she applied.⁷⁴ Finally, we alleged that, by rescinding its offer of employment and otherwise refusing to hire Ms. Schroer because of her decisions regarding her course of medical treatment for her gender dysphoria without constitutionally sufficient justification, the Library violated Ms. Schroer's rights guaranteed by the Due Process Clause.⁷⁵

3. *Defending Our Substantive Due Process Claim*

Just as we had anticipated the government's motion to dismiss our Title VII claim, we were not surprised when the government moved to dismiss our due process claim. In its papers, the Library argued that Ms. Schroer could not establish that she had a protected liberty interest in her decision to undergo gender reassignment surgery, and that there was "no constitutional privacy interest implicated in a person's decision to undergo a medical procedure to change their sex."⁷⁶

⁶⁸ *Id.* ¶ 20.

⁶⁹ *Id.* ¶ 23.

⁷⁰ *Id.* ¶ 24.

⁷¹ *Id.*

⁷² *Id.* ¶ 59.

⁷³ *Id.* ¶ 60.

⁷⁴ *Id.* ¶¶ 61-62.

⁷⁵ *Id.* ¶¶ 63-64.

⁷⁶ See Def.'s Reply to Pl.'s Mot. in Opp'n to Def.'s Mot. to Dismiss at 2, *Schroer v. Billington*, 424 F. Supp. 2d 203 (D.D.C. 2006) (No. 05-1090). The government's first motion to

From the outset, we insisted that the government had framed the due process question improperly.⁷⁷ In making our argument, we took cues from the Supreme Court's 2003 decision in *Lawrence v. Texas*.⁷⁸ In that case, the Court made clear that the proper question was not whether there was a "right to engage in homosexual sodomy," as the Court had erroneously stated in *Bowers v. Hardwick*.⁷⁹ Rather, the question was whether there was a liberty interest in terms of choosing one's sexual relationships; if there was, then the right to form an intimate same-sex relationship would fall within that protected liberty.⁸⁰ Likewise, in defending our due process claim, our first goal was to convince the court that the appropriate question was not whether there was a protected constitutional right to undertake a gender transition, but whether the Due Process Clause protected the right of an individual to exercise his or her liberty interest in making important medical decisions without undue interference from the government, with one of the decisions that a person might make being the decision to undertake a gender transition.

In order for this argument to work, however, we needed to establish that personal decisions about medical treatment fell within the privacy, autonomy and liberty interests protected by the Due Process Clause. To support this proposition, we relied principally on the Supreme Court's holding in *Whalen v. Roe* that the substantive due process guarantee protects against violations by the government of an individual's right to privacy, which has two components: (1) an "interest in avoiding disclosure of personal matters," and (2) an "interest in independence in making certain kinds of important decisions."⁸¹ Focusing on the second prong of *Whalen*, we asserted that medical decisions are among the most important decisions a person can make, and cited for support, among other cases, a series of Supreme Court decisions regarding the right to refuse forced medication,⁸² and the reproduc-

dismiss misunderstood the basis of our due process claim and argued that there could be no due process violation because Ms. Schroer did not have a protected property interest in the job or liberty interest in terms of reputational injury. After reviewing our opposition to its motion, the Library seemed to grasp the nature of our due process claim, and presented the arguments outlined above in its reply brief.

⁷⁷ A fuller recitation and examination of the arguments we made in defense of our due process claim are unnecessary for purposes of this article, and will be left for another day. For those who would benefit from the full analysis, copies of all of the substantive briefs filed by the ACLU in Ms. Schroer's case are available under the heading "Legal Documents" on the ACLU's website at <http://www.aclu.org/lgbt/transgender/24969res20050602.html>.

⁷⁸ 539 U.S. 558 (2003).

⁷⁹ 478 U.S. 186, 191 (1986), *overruled by Lawrence*, 539 U.S. 558 (2003).

⁸⁰ *Lawrence*, 539 U.S. at 574 ("Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right.").

⁸¹ 429 U.S. 589, 599-600 (1977).

⁸² See *Sell v. United States*, 539 U.S. 166 (2003); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Washington v. Harper*, 494 U.S. 210 (1990); *Cruzan v. Mo. Dep't of Health*, 497 U.S. 261 (1990) (right to refuse life-saving treatment). We also pointed to *Winston v. Lee*, in which the Supreme Court held that a suspect could not be forced to submit to surgical intrusion absent a "compelling need." 470 U.S. 753, 766 (1985).

tive liberty cases.⁸³

Both because medical decisions are deeply personal choices and because they implicate beliefs about the meaning of life, death, pain, and suffering, courts have recognized that the “right of privacy” includes “the freedom to care for one’s health and person.”⁸⁴ Turning then to Ms. Schroer’s case, we emphasized that her decision to undergo a medically indicated transition from male to female was fundamentally no different than other serious medical decisions, and therefore should be likewise entitled to the Due Process Clause’s protection against undue burdens by the government.

Having situated Ms. Schroer’s decision to transition as among the medical decisions protected by the liberty guarantee of the Due Process Clause, we then recited the case law establishing that the government was required to justify its decision to withdraw its offer of employment, a form of penalty, based solely on the fact that she had exercised her protected liberty.⁸⁵ Although the Supreme Court’s application of this principle is perhaps best known in cases involving the free speech rights of public employees,⁸⁶ the case law made clear that other constitutional liberties were similarly entitled to protection from unjustifiable government interference.

For example, in *Eckmann v. Board of Education*,⁸⁷ a government employer fired a school teacher because she exercised her constitutionally protected right to bear a child out of wedlock. Applying the test articulated in *Mount Healthy City Board of Education v. Doyle*,⁸⁸ the *Eckmann* court found that the teacher’s decision, “[w]hile . . . not protected by a specifically enumerated constitutional right,” was “covered by ‘substantive due process.’”⁸⁹ Accordingly, the court ruled that the “plaintiff had a substantive due process

⁸³ See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (liberty interest in reproductive health choices); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (privacy right to access and use contraception).

⁸⁴ *Andrews v. Ballard*, 498 F. Supp. 1038, 1047-48 (S.D. Tex. 1980) (citing, inter alia, *Doe v. Bolton*, 410 U.S. 179, 213 (1973) (Douglas, J., concurring)); see also *Garlic v. FDA*, 783 F. Supp. 4, 5 (D.D.C. 1992) (“decisions regarding medical treatment are essentially personal, and therefore may affect an individual’s right to liberty or privacy”) (citing, inter alia, *New York State Ophthalmological Soc’y v. Bowen*, 854 F.2d 1379, 1391 (D.C. Cir. 1988)); 16B C.J.S. Constitutional Law § 1041 (2007) (“[T]he constitutional right of personal privacy protects the making of decisions vital to health care A decision to obtain or reject medical treatment is one which profoundly affects a person’s development or life, and it is a constitutional right encompassed by the right of privacy.”).

⁸⁵ See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (discussing line of Supreme Court cases affirming this principle).

⁸⁶ *Id.* (applying these constitutional protections “regardless of the public employee’s contractual or other claim to the job”). The Supreme Court’s ruling in *Perry* logically followed from its ruling in *Pickering v. Board of Education*, 391 U.S. 563 (1968), which held that a government employee may not lose his job based on his exercise of his rights of free speech absent a showing that the speech impedes his performance of his duties or otherwise disrupts the workplace. *Id.* at 572-73.

⁸⁷ 636 F. Supp. 1214, 1217 (N.D. Ill. 1986).

⁸⁸ 429 U.S. 274 (1977).

⁸⁹ *Eckmann*, 636 F. Supp. at 1217.

right to conceive and raise her child out of wedlock without unwarranted state (School Board) intrusion.”⁹⁰ Similarly, in *Drake v. Covington County Board of Education*, the court found that a school district’s decision to fire a woman from her teaching job because she had had an abortion was subject to strict scrutiny because it infringed her constitutionally protected right to privacy under the Due Process Clause of the Fourteenth Amendment.⁹¹

In each of these cases where the government, acting as employer, penalized an employee because of how he or she exercised a constitutionally protected liberty interest, courts demanded a showing by the government that the conduct triggering the penalty was related to the employee’s ability to perform his or her job.⁹² Relying on this body of case law, we argued that the Constitution likewise restricted the right of the Library to refuse to employ Ms. Schroer because she, in consultation with her doctors, made the constitutionally protected decision to undertake a gender transition from male to female, a medically appropriate course of treatment for her health condition that in no way negatively affected her ability to perform the job.

We emphasized that careful judicial scrutiny of the challenged government action did not automatically mean liability.⁹³ To illustrate this point, we offered both examples where courts found intrusions by public employers on their employees’ liberty to be constitutionally impermissible and examples where courts deemed the government’s action justified.⁹⁴ These cases, we argued, demonstrated not that the government’s actions were necessarily unconstitutional, but rather that the government had to demonstrate that the interests it was furthering by rescinding Ms. Schroer’s offer of em-

⁹⁰ *Id.* at 1218; see also *Whitmore v. Bd. of Ed.*, No. 90-C-20143, 1991 U.S. Dist. LEXIS 19166, at *7 (N.D. Ill. May 20, 1991) (holding that female employee who was terminated by school board because she decided to bear a child out of wedlock stated a claim “that Defendants deprived her of a recognized substantive due process right”).

⁹¹ 371 F. Supp. 974, 978-79 (M.D. Ala. 1974).

⁹² See, e.g., *Thorne v. City of El Segundo*, 726 F.2d 459, 469 (9th Cir. 1983) (requiring that police department show that its decision to deny applicant a job due to her sexual relationship with a police officer was “justified by legitimate interests” and was “narrowly tailored to meet those legitimate interests”); *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969) (noting that the Due Process Clause may place limits on “the Government’s discretion where a dismissal involves an intrusion upon that ill-defined area of privacy which is increasingly if indistinctly recognized as a foundation of several specific constitutional protections”).

⁹³ We also did not specify the precise level of scrutiny triggered under our analysis. Rather, we simply noted that, whether subject to strict scrutiny, under which government action is justified only where it is narrowly tailored to further a compelling interest, or a lesser level of heightened scrutiny, under which government action is justified only where the government interest at issue is significant and tailored enough that it outweighs the individual interest at issue, government actions that burden the exercise of the constitutionally protected liberty interest in making medical decisions are subject to heightened scrutiny.

⁹⁴ Compare *Via v. Taylor*, 224 F. Supp. 2d 753, 762 (D. Del. 2002), and *Reuter v. Skipper*, 832 F. Supp. 1420, 1423-24 (D. Or. 1993) (finding government action against employee unjustified), with *Swank v. Smart*, 898 F.2d 1247, 1252-53 (7th Cir. 1990), and *Krzyzewski v. Metro. Gov’t of Nashville*, No. 75-415-NA-CV, 1976 WL 735, at *6-8 (M.D. Tenn. Oct. 20, 1976) (finding employer’s action adequately justified).

ployment were sufficiently weighty, and its actions sufficiently tailored to promote those interests, to justify the burden upon Ms. Schroer's liberty.⁹⁵

There was some debate among members of our legal team whether presenting a due process claim in what was "really" a Title VII case was strategically unwise. Raising a due process claim might signal to the court that we did not believe our Title VII claim was viable. There was also recognition that the court might not adopt our framing of the due process question, and might instead apply the conventional *Washington v. Glucksberg* analysis.⁹⁶ A court using the *Glucksberg* test would likely find that there was no history and tradition of protecting decisions around gender transition and thus dismiss our due process claim without requiring the government to justify its actions. Creating negative due process case law in defense of what some viewed as a superfluous claim in the case could undermine our ability to use due process arguments in our future transgender advocacy.

While recognizing these legitimate concerns, a majority of us were convinced not only that our due process argument was correct, but also that its framework provided an opportunity to talk about how the decision to undertake a gender transition implicates liberty and autonomy, which are important constitutional values. In our view, this case was as much about Ms. Schroer's right to define herself without government penalty as it was about her right to be free of discrimination because of sex. While the Title VII claim would allow us to discuss the nondiscrimination principles at issue in the case, a due process claim would be a more effective way for us to talk about the autonomy and liberty concerns that were equally implicated by the Library's actions. As a result, we decided to stand by this claim in our complaint. The only compromise that we made in terms of our defense of this claim was that we presented the argument last in our brief in opposition to the government's motion to dismiss.

When the court issued its decision denying the government's first motion to dismiss, we could not tell what the court thought of our due process argument because the decision did not address the claim at all. By reading between the lines of the decision, it seemed to us that our discussion of gender dysphoria as a health condition, and our framing of the decision to transition as a medical one, had a positive effect in terms of the court's understanding of the important interests at stake in this case. In particular, we were heartened by the court's extensive recitation of our allegations about

⁹⁵ In addition to the cases mentioned at *supra* notes 82-83, we also cited cases pitting an individual's interest in freedom from restraint against the government's interest in the efficient operation of a home for the mentally ill, *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982), and an individual's due process right to travel against the government's interest in national security, *Aptheker v. Sec'y of State*, 378 U.S. 500, 506-15 (1964), in support of our argument that the government had to justify adequately its burden on individual exercises of liberty by demonstrating the importance of the government's interest, and the relative precision of the method adopted by the government to promote that interest.

⁹⁶ 521 U.S. 702, 720-21 (1997).

gender identity and gender dysphoria,⁹⁷ and were optimistic that the court would ultimately recognize that our client's decision to transition involved important questions of self-definition and liberty.

In other ways, however, the court's recognition that Ms. Schroer's case involved her right to define herself as a woman, and live as a woman, appeared to present an obstacle in terms of our ability to convince the court that this case also involved impermissible sex stereotyping. As the court noted in its decision, Ms. Schroer was not someone who was simply looking to deviate from social stereotypes associated with masculinity.⁹⁸ Rather, she identified as, and wished to live as, a woman. In many ways, she sought to embrace the social stereotypes associated with femininity.⁹⁹ The court's recognition that Ms. Schroer was not simply a gender nonconforming man led to a dismissal without prejudice of our sex stereotyping claim. It appeared to us that the court believed that an employer's discomfort with someone who is transgender precluded an argument that the employer's actions were also motivated by impermissible considerations about proper behavior, conduct and appearance by men and women based on sex stereotypes.¹⁰⁰

Fortunately, in the course of discovery, we obtained statements from individuals involved in the Library's decision-making process that demonstrated how sex stereotyping influenced its decision, and therefore, we were able to amend our complaint to resuscitate those claims.¹⁰¹ But at that first critical stage in the case, the court focused on the fact that Ms. Schroer lost her position with the Library because of her intention to live as a woman. Because none of the adverse Title VII decisions from the 1970s and 1980s involving transgender litigants was decided in the D.C. Circuit, none of them bound our court in terms of answering the question whether discrimination against someone because of their gender identity or transsexuality was discrimination because of sex. Free from the constraints of any adverse precedent, the court asked the parties to build a record "that reflect[ed] the scientific basis of sexual identity in general, and gender dysphoria in particu-

⁹⁷ *Schroer v. Billington*, 424 F. Supp. 2d 203, 210-11 (D.D.C. 2006).

⁹⁸ *Id.*

⁹⁹ *Id.* at 211.

¹⁰⁰ *Id.*

¹⁰¹ Specifically, the decisionmaker stated that when she saw the photos of Ms. Schroer in female attire, in her view, Ms. Schroer looked like a man in a dress. The decision-maker also said that she did not believe that Ms. Schroer would be credible testifying before Congress because people would think that experiences on Ms. Schroer's resume were only experiences that a man could have. Statements like these, we argued, demonstrated that the Library's decisions had been based on impermissible sex stereotypes, even though there were certain ways Ms. Schroer was being penalized for being perceived as a man who did not conform to male stereotypes based on her appearance, and in other ways was suffering because she would be perceived as a woman who did not conform to female stereotypes in terms of her background and experience. The court recognized that these allegations were sufficient to state a claim of sex stereotyping, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007), and once these allegations were proven at trial, that they were sufficient to sustain a finding of liability under Title VII. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008).

lar” so that he could consider this question with the benefit of a fuller record.¹⁰²

III. MID-LITIGATION DECISIONS

We were pleased to survive the government’s motion to dismiss, but knew that we were still in a very tenuous position. Although we were excited that the court was open to hearing evidence about the nature of gender identity, we were somewhat surprised by how the court framed the question. As mentioned previously, we did not anticipate the extent to which this case would involve litigation over issues of the etiology of gender identity and GID, but these were questions with which we now needed to grapple.

We also found ourselves trying to strike a balance between developing an adequate record in support of our claims and not disclosing more private information about our client’s personal transition-related decisions than absolutely necessary for purposes of the case. Although the first question was probably more important in terms of the overall case, this second issue took on a level of urgency as we began to receive written discovery requests from the government and the date of Ms. Schroer’s deposition approached.

A. *Preserving Your Transgender Client’s Right to Keep Information About Her Body Private*

One challenge that virtually all advocates for transgender clients face is the presumption that the status of your client’s genitals is, or should be, a matter of public record. In many cases, the discrimination arises after the client discloses to her employer, either voluntarily or under duress, which elements of transition she has completed and which she has not. In other cases, however, employers or businesses accused of discrimination demand through discovery information about the status of transgender individuals’ bodies, even where the relevance of such information to the claims is questionable.¹⁰³

¹⁰² Schroer v. Billington, 424 F. Supp. 2d 203, 213 (D.D.C. 2006).

¹⁰³ One of the more extreme examples of such conduct by a defendant occurred in an ACLU case, *Hispanic AIDS Forum v. Estate of Bruno*, where the defendant served interrogatories seeking information about the “anatomical sex” of the transgender individuals involved, both at the time of their birth and at the time of the incidents at issue in the case. 759 N.Y.S.2d 291, 293 (N.Y. Sup. Ct. 2003). The court rejected this request as improper on the ground that there was no dispute that the individuals were transgender, and the status of their anatomy was irrelevant in light of the plaintiff’s concession that transgender women were seeking to use the women’s room. *Id.* at 295. More recently, an employer allegedly required an employee to produce photographic evidence of the appearance of her genitals after surgery as a condition of continued employment after issues arose about her use of the workplace female locker room. Timothy Cwiek, *Trans Woman: Employer Asked for Photos*, PHILADELPHIA GAY NEWS, Aug. 14, 2009, available at http://www.epgn.com/pages/full_story/push?article-Trans+woman-+Employer+asked+for+photos%20&id=3178538-Trans+woman-+Employer+asked+for+photos.

In our view, the only aspects of Ms. Schroer's transition that were relevant to the case were those steps that she had taken leading up to her lunch with her employer. These steps were counseling, hormone therapy, and the commencement of the "real life experience" of living full-time as a woman.¹⁰⁴ Ms. Schroer had mentioned to her future employer at the Library that she planned to have facial feminizing surgery prior to starting in the position, and so, to the extent that the Library may have mistakenly believed that her surgery plans would have affected her ability to start work by a particular date, we did not intend to object to any questions from the Library about her facial surgery. Any decisions that Ms. Schroer made months and years after the Library's withdrawal of her job offer, on the other hand, were in no way relevant to the question of whether the Library's actions in December 2004 violated Title VII.

Accordingly, in our written responses to the Library's discovery requests regarding Ms. Schroer's transition, we limited our answers to events occurring in January 2005 or earlier. In addition, we entered into a protective order with the government at the outset of discovery to ensure that any information revealed over the course of the litigation regarding Ms. Schroer's private medical history would not be part of the public record. In preparation for her deposition, Ms. Schroer and I discussed the fact that the Library's lawyers would likely ask her about this information, but we indicated to her that we would object, and that she should not answer.

At her deposition, the Library did, in fact, ask Ms. Schroer about genital surgery. We did not object at first to the Library's questions because they only asked Ms. Schroer to explain the protocol that she was following in terms of her transition, which involved a discussion of the various stages outlined in the Standards of Care.¹⁰⁵ At later points in the deposition, however, the Library asked Ms. Schroer in various ways whether she had completed all of the stages outlined in the Standards of Care, including genital surgery.¹⁰⁶

We objected, explaining to the Library's counsel that any decisions Ms. Schroer had made or had not made regarding surgery after the Library withdrew its job offer were irrelevant to the question of whether the Library's actions violated the law.¹⁰⁷ At first, the Library had a difficult time articulating why it needed to know whether Ms. Schroer had genital surgery, and simply asserted that "it was a question likely to lead to the discovery of admissible evidence," the standard response to a deposition question. In the course of our exchange, however, the Library asserted that it had the right to

¹⁰⁴ See *supra* note 8 and accompanying text for further discussion of what these stages of transition involve.

¹⁰⁵ Deposition of Diane Schroer at 19-20, 27-28 (on file with author).

¹⁰⁶ *Id.* at 28-30.

¹⁰⁷ *Id.*

know whether the Library's actions actually interfered with Ms. Schroer's plans to "complete" her transition.¹⁰⁸

We stood fast by our objection, even when the Library indicated that it would raise the matter with the court. We knew that we had strong case law to support our argument that Ms. Schroer did not need to prove that she was prevented outright from making decisions about her transition in order to establish that the Library's actions amounted to a constitutionally impermissible burden on her liberty.¹⁰⁹ Consequently, we felt confident that the Library's argument that, in order to defend against our due process claim, it needed to know whether or not the loss of the position actually prevented Ms. Schroer from going forward with any plans she had regarding genital surgery, was unconvincing. If necessary, we were prepared to defend our position to the court.

Before the Library raised the issue with our judge, events outside our litigation overtook the situation. In spring 2007, the Illinois legislature was debating a bill that would have made it less difficult for transgender individuals to change the gender marker on their birth certificate. In particular, the legislature was considering an amendment to Illinois law that would have eliminated the requirement that a transgender person provide proof of genital surgery performed by a U.S.-licensed surgeon as a prerequisite to obtaining a new birth certificate with a corrected gender designation.

The debate on the floor of the legislature was shocking to those who witnessed it and heard about it later.¹¹⁰ The Republican floor leader joked that he would have a sex change so that he could smell better and stop having to shave.¹¹¹ The Democrat presiding over the proceedings called for a vote in a falsetto voice.¹¹² The measure was defeated 32-78.¹¹³

¹⁰⁸ I put "complete" in quotes to emphasize that surgery is not necessary for many transgender people who are undertaking a gender transition. The STANDARDS OF CARE explicitly reflect this reality, *see* discussion *supra* note 8, as have other statements from WPATH. *See, e.g.,* WPATH, WPATH CLARIFICATION ON MEDICAL NECESSITY OF TREATMENT, SEX REASSIGNMENT, AND INSURANCE COVERAGE IN THE U.S.A. 3 (2008) ("[N]ot every patient will have a medical need for identical procedures; clinically appropriate treatments must be determined on an individualized basis with the patient's physician.").

¹⁰⁹ As demonstrated by the case law discussed briefly in Section II(B), *supra*, and more fully in our briefs, government penalties for the exercise of a constitutionally protected liberty are just as much a constitutionally impermissible burden on liberty as preventing the person from exercising the liberty in the first place.

¹¹⁰ A colleague of mine from the ACLU of Illinois, who had been cautiously optimistic about the amendment's chances of success, expressed to me his disbelief, and the disbelief of his colleagues, both over particular substantive comments made during the floor debate and the overall tone of the discussion. *See also* Mark Brown, *Legislation Is No Laughing Matter: House Leaders Yuck It Up Over Bill on Changing Gender on Birth Certificates*, CHI. SUN-TIMES, Apr. 25, 2007, at 8.

¹¹¹ Brown, *supra* note 110.

¹¹² *Id.*

¹¹³ As this article goes to press, the ACLU LGBT Project and the ACLU of Illinois are engaged in litigation against the Illinois Department of Public Health over this domestic-surgeon requirement. *Kirk v. Arnold*, No. 09-CH-3226 (Cir. Ct. Cook County Ch. Div. filed Apr. 7, 2009), available at http://www.aclu.org/pdfs/lgbt/kirk_v_arnold_1stamendedcomplaint.pdf.

As someone with an Illinois birth certificate, Ms. Schroer was directly affected by this legislation. In particular, as Ms. Schroer was considering her transition options she had been aware that, if she wanted the Illinois Department of Public Health to grant her request for a new birth certificate, she could not consider surgeons in Canada or Thailand, but rather had to limit herself to surgeons licensed and practicing in the United States.¹¹⁴

In response to this display of immaturity and hostility by the Illinois legislature, Ms. Schroer contacted her college roommate, Mark Brown, a reporter with the *Chicago Sun-Times*. Brown had already written some sympathetic pieces about Ms. Schroer's case, so we approached him about writing another article to call attention to the Illinois legislature's shameful behavior. He agreed, and as part of the article he recounted information that Ms. Schroer shared with him about how her own decisions regarding when to have surgery, why, and with which doctor, had been affected by this arbitrary and irrational law.¹¹⁵

Prior to her speaking with her reporter friend, Ms. Schroer and I discussed the fact that once she shared this information with him for him to use in his article, we would be waiving any objection to the government's line of questions about her decisions regarding genital surgery. The information would now be in the public domain, and therefore we could no longer object on the grounds that this was private medical information.¹¹⁶ Ms. Schroer understood the consequences of her decision, but her anger and frustration over how flippant and disrespectful the Illinois legislature had been to the experience and suffering of transgender people made this trade off worth it to her.

We do not know whether the court would have sustained our objection to this line of questioning by the government, and, looking back over the deposition transcript, I can identify places where I wish I had been more effective in preventing the Library from pushing Ms. Schroer to disclose information about her decisions regarding genital surgery. In the end, our dispute with the government over this issue was averted because Ms. Schroer decided to share her story about her transition-related decisions on her own terms. But we found it difficult at times to defend our client from irrelevant, prying decisions about what choices Ms. Schroer made with regard to her transition, and I suspect that other transgender advocates will

For more information about this litigation, see Kirk v. Arnold – Case Profile, www.aclu.org/lgb/transgender/38491res20090127.html (last visited Nov. 4, 2009).

¹¹⁴ Although there are excellent surgeons in the United States, many transgender people prefer to use surgeons in Canada and Thailand due to their specialized surgical methods and the lower costs of surgery relative to the United States. See generally Transsexual Women's Resources, Sex Reassignment Surgery, <http://www.annelawrence.com/twr/srsindex.html> (last visited Oct. 18, 2009) (listing various surgeons in the United States, Canada, Thailand, the United Kingdom, and other locations and providing links to websites providing examples of surgical results).

¹¹⁵ Brown, *supra* note 110.

¹¹⁶ Our other objection to this line of questioning on relevance grounds would not have been a sufficient basis for instructing Ms. Schroer not to answer at her deposition.

continue to face these issues. Nevertheless, this was, in our view, a fight absolutely worth fighting, both in terms of defending an interest of tremendous importance to our client, and in terms of defending the dignity of transgender people more generally and their right to maintain the privacy of personal information about themselves and their bodies.

B. Answering the Question of Whether Gender Identity Is Part of One's "Biological Sex"

In response to the court's March 2006 ruling denying the government's motion to dismiss, the parties began developing a record, primarily through the testimony of two experts, about gender identity, transsexuality, and Gender Identity Disorder. The government retained an expert, Dr. Chester Schmidt from The Johns Hopkins University, who, at his deposition, testified (as we expected he would) that a person's "biological sex" was their chromosomal makeup, and that because a person's chromosomes can never change, a person's biological sex can never change.¹¹⁷ At times during his deposition and at trial, Dr. Schmidt suggested that other factors like hormones and genitalia might also be part of what constitutes a person's biological sex, but since those characteristics could be changed, Dr. Schmidt's ultimate view was that a person's chromosomes were what constituted his or her biological sex.¹¹⁸

Our expert, on the other hand, Dr. Walter Bockting of the University of Minnesota, testified that the community of scientific experts in the field of sex, gender, and gender identity recognized nine elements that comprised one's sex: chromosomal sex, gonadal sex, fetal hormonal sex (prenatal hormones produced by the gonads), internal morphologic sex (internal genitalia, i.e., ovaries, uterus, testes), external morphological sex (external genitalia, i.e., penis, clitoris, vulva), hypothalamic sex (i.e., sexual differentiations in brain development and structure), sex of assignment and rearing, pubertal hormonal sex, and gender identity and role.¹¹⁹ For most people, all aspects of sex are in alignment, and therefore a lay person may not necessarily think about all of the component parts of sex when describing themselves as male or female. The existence of transgender and intersex people, however, demonstrates that there can be a lack of consonance among the various aspects of a person's sex. Dr. Bockting agreed with Dr. Schmidt that one's chromosomes cannot be changed, but pointed out that scientific study had also con-

¹¹⁷ See Deposition of Chester W. Schmidt, Jr., M.D. at 250, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2008) (No. 05-1090), 2007 WL 2125149.

¹¹⁸ Tr. of Bench Trial at 402-03, *Schroer*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05-1090).

¹¹⁹ *Id.* at 208. Dr. John Money, with his colleague Anke A. Ehrhardt, outlined these nine elements of sex in his seminal work, *MAN & WOMAN, BOY & GIRL: DIFFERENTIATION AND DIMORPHISM OF GENDER IDENTITY FROM CONCEPTION TO MATURITY* (1972). See also JOHN MONEY, *SEX ERRORS OF THE BODY AND RELATED SYNDROMES: A GUIDE TO COUNSELING CHILDREN, ADOLESCENTS, AND THEIR FAMILIES* (2d ed. 1994).

cluded that attempts to change one's gender identity have been unsuccessful and in many cases were very harmful to the individual involved. Accordingly, he testified that, whenever there is a lack of congruence among the various elements of sex, the goal of gender specialists is to bring the other elements of sex into conformity with one's gender identity, thus confirming the primacy of gender identity relative to the other aspects of sex.¹²⁰

Part of the discussion at trial involved whether or not there was a definitive biological explanation for how one's gender identity develops, and, relatedly, whether or not there was a known etiology for GID. Dr. Bockting discussed the significant research regarding sexual differentiation of the brain and the studies currently underway that are attempting to ascertain whether a fetus's exposure to hormones during gestation can influence brain development in a manner that is more likely to result in gender dysphoria.¹²¹ Dr. Bockting testified that, although there is a scientific consensus that gender dysphoria is the product, at least in part, of biological influences, no definitive biological source of gender dysphoria has yet been determined with scientific certainty.¹²² In his testimony, Dr. Schmidt predicted that, if and when a cause for gender dysphoria is finally identified, it would probably reflect a combination of both biological and psychosocial influences, but stated his belief that currently there is no known definitive biological explanation for GID.¹²³

At the conclusion of the trial, we could not be certain what conclusions the court would reach after hearing the evidence the parties had presented about the "scientific basis" of gender identity and gender dysphoria. We hoped that the court would agree with our expert that, as a matter of scientific understanding, gender identity was one of the many elements that constituted a person's sex. We remained concerned, however, that the court might believe that gender identity needed to have a definitive biological etiology in order to rule that discrimination on the basis of gender identity was discrimination because of sex for purposes of Title VII. Consequently, in our post-trial brief, we attempted both to convince the court that gender identity was, in fact, part of one's biological sex, and that a definitive biological etiology was not necessary in order for gender identity to be part of "sex" as a matter of law.

With respect to this latter point, we cited numerous examples outside of the Title VII context to demonstrate the fallacy of the Library's position that

¹²⁰ Tr. of Bench Trial at 212-13, 445-46, *Schroer*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05-1090).

¹²¹ *Id.* at 215-19. In particular, Dr. Bockting discussed the pioneering brain studies of Dr. Zhou and his colleagues. See, e.g., Frank P.M. Kruijver et al., *Male-to-Female Transsexuals Have Female Neuron Numbers in a Limbic Nucleus*, 85 J. CLINICAL ENDOCRINOLOGY & METABOLISM, 2034, 2034-41 (2000); Jiang-Ning Zhou et al., *A Sex Difference in the Human Brain and Its Relation to Transsexuality*, 378 NATURE 68, 68-70 (1995).

¹²² Tr. of Bench Trial at 442-43, *Schroer*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05-1090).

¹²³ *Id.* at 376, 395.

only chromosomal aspects of sex were included within the meaning of the legal concept of sex.¹²⁴ Moreover, the fact that federal and state agencies allow transgender people to change their legal sex on passports, birth certificates, and driver's licenses every day without requiring proof of chromosomal reconfiguration was further evidence that sex did not equal chromosomes as a matter of law.¹²⁵

With respect to the Library's alternative argument that "sex" only included aspects of one's sex that were "biological," we emphasized that, both as a matter of science and as a matter of law, "sex" was a multifaceted concept. While some of the component parts of one's sex were purely biological in origin, others were not. As a matter of science, Dr. Bockting testified that there were certain recognized aspects of sex, like social sex role, that did not have a definitive biological etiology.¹²⁶ As a matter of law, we pointed to the sexual stereotyping case law, which did not inquire into matters of chromosomes or genitalia, but rather were based on an individual's gender expression and social sex role without any inquiry on the part of the court about any biological origins of these aspects of sex.¹²⁷

We did not want to concede, however, that gender identity was *not* part of one's biological sex, in the event that the court viewed the answer to this question as dispositive of the issue of whether gender identity was part of one's sex for purposes of Title VII. Consequently, we argued that the court

¹²⁴ See, e.g., *In re Lovo-Lara*, 23 I. & N. Dec. 746, 752 (B.I.A. 2005) (rejecting government's argument that chromosomal configuration was dispositive of a person's sex when determining whether a couple's marriage should be considered a same-sex or a different-sex union for immigration purposes); *Maffei v. Kolaeton Indus., Inc.*, 626 N.Y.S.2d 391, 396 (N.Y. Sup. Ct. 1995) (emphasizing that "all courts agree [that] the anti-discrimination statutes are remedial and thus to be interpreted liberally to achieve their intended purposes," and therefore gender identity should be deemed part of "sex" for purposes of the City's antidiscrimination law).

¹²⁵ Almost all states allow a person to change his or her legal sex after providing sufficient documentation of sex reassignment. See Julie Greenberg, *Defining Male and Female: Interspecificity and the Collision Between Law and Biology*, 41 ARIZ. L. REV. 265, 309 nn.346-55 (1999) (summarizing the state of the law in 1999 regarding state policies on changing sex). Although there is no one federal policy addressing the question of an individual's sex, the federal policies relating to this question likewise reflect that an individual can change his or her sex. For example, the Social Security Administration allows transgender people to change their gender marker in their Social Security records, SOCIAL SECURITY ADMINISTRATION PROGRAM OPERATIONS MANUAL SYSTEM: RM 00203.215, and the State Department allows individuals to change their sex on their passport, Spencer Bergstedt, *Estate Planning and the Transgender Client*, 30 W. NEW ENG. L. REV. 675, 684 nn.44-47 (2008). See generally Julie Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 931-32 nn.77-81 (2002).

¹²⁶ Transcript of Bench Trial at 208-10, *Schroer v. Billington*, 525 F. Supp. 2d 58 (D.D.C. 2007) (No. 05-1090).

¹²⁷ See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that harassment of male employee based upon the perception that he is effeminate is discrimination "because of sex"); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."), *vacated on other grounds*, 523 U.S. 1001 (1998).

should credit the testimony of our expert, Dr. Walter Bockting, that the best science available definitively eliminated the possibility that *only* psychosocial influences produce gender identity,¹²⁸ and that the scientific inquiries underway were looking at how, not whether, biological forces influence the development of gender identity.¹²⁹ We noted that, even though Dr. Schmidt would not characterize the science as conclusive, he testified to his expectation that the research would eventually establish that a combination of biological and psychosocial influences contributes to the development of gender identity.¹³⁰

Our main emphasis was on convincing the court that the question of whether there is a precise biological explanation for gender identity was a red herring in our case. Scientific experts do not depend on a biological etiology for gender identity as a precondition for recognizing the importance of gender identity as part of sex.¹³¹ We also highlighted pragmatic considerations and urged the court not to disregard the fact that, as a matter of law and social understanding, a person's sense of feeling male or female is part of what he or she is referring to when discussing his or her sex.

The Library's arguments pointed to the conclusion, endorsed by its expert at trial, urged that Diane Schroer was, is, and will always be, a man.¹³² In an argument that was as much humanitarian as legal, we argued that such a conclusion would not only be at odds with federal and state policies that allow transgender individuals like Ms. Schroer to change their legal sex, but also would contradict the view of everyone who interacted with her on a daily basis. We attempted to assure the court that it need not, and in fact should not, endorse such an artificial view of reality.

Ultimately, though, we tried to signal to the court that it did not need to reach the question of whether or not gender identity was part of one's biological sex. Rather, we sought to create a safety valve by reiterating to the court that, whether there is a known definitive biological determinant of gender identity or not, as a matter both of law and of scientific fact, one's gender identity is part of one's sex.

To some extent, this litigation position was in tension with our own client's views on the subject. Throughout the litigation, Ms. Schroer would share with me news reports about scientific research developments in the field of sexual differentiation of the brain. I would share these reports with Dr. Bockting to determine whether we could use these studies and reports to bolster our arguments, but in most cases, the stories were either reiterating the findings of reports we had already included in our presentation to the court or were describing hypotheses that were still being tested with the

¹²⁸ Tr. of Bench Trial at 219-22, *Schroer*, 525 F. Supp. 2d 58 (D.D.C. 2005) (No. 05-1090).

¹²⁹ *Id.* at 442-43.

¹³⁰ *Id.* at 411-12, 414-15.

¹³¹ *Id.* at 445-46.

¹³² *Id.* at 424-25.

necessary degree of scientific rigor. Ultimately, however, Ms. Schroer agreed with our view that any positive ruling from the court that hinged on the verifiability of particular scientific truths could be vulnerable on appeal and therefore did not object to the strategy we adopted in our post-trial briefing.

In its ruling after trial, the court acknowledged the extensive expert testimony about the origins of gender identity and Gender Identity Disorder, but determined that it could rule on the legal issues presented in the case without deciding between the experts on the questions of etiology that the court itself had posed.¹³³ The court concluded that the Library violated Title VII using straightforward statutory interpretation principles by analogizing our case to a case of religious discrimination. Had the Library hired Ms. Schroer when she was a member of one faith, but withdrawn the position upon learning that she was converting to another religion, such action would clearly constitute religious discrimination. Using this logic, the court reasoned that the Library's decision to rescind its offer upon learning that Ms. Schroer was transitioning from one *sex* to another was sex discrimination.¹³⁴ The ruling was clear, easy to follow, and did not require the court to take a position on whether or not gender identity is part of one's biological sex.

The decision of the court to avoid this question was undoubtedly good for the case, and good for Ms. Schroer. Throughout the litigation, we recognized that any favorable decision for our client from the trial court might result in an appeal, and as we discussed with Ms. Schroer, a ruling that hinged on a determination by the court that gender identity was part of a person's biological sex might have felt like an especially "appealable" issue. Moreover, although the court's resolution of the factual dispute over whether gender identity was part of one's biological sex is the kind of finding that should generally be treated with deference by an appellate panel, the relevance of the answer to that scientific question to the question of whether gender identity was part of sex for purposes of Title VII remained a legal question, and thus would not be entitled to deference on appeal.

Therefore, from our perspective, the court's decision not to opine on whether gender identity was part of one's biological sex took one potential appealable issue out of the mix. The fact that the court based its Title VII ruling on both the sex stereotyping and "change of sex" theories gave us even greater confidence that we could defend this ruling for our client on appeal if necessary.

¹³³ *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008) ("The testimony of both experts—on the science of gender identity and the relationship between intersex conditions and transsexuality—was impressive. Resolving the dispute between Dr. Schmidt and Dr. Bokting as to the proper scientific definition of sex, however, is not within this Court's competence. More importantly (because courts render opinions about scientific controversies with some regularity), deciding whether Dr. Bokting [sic] or Dr. Schmidt is right turns out to be unnecessary.").

¹³⁴ *Id.* at 306-07.

IV. POST-LITIGATION REFLECTIONS

Even after securing an outstanding result for our client, there are always “what if?” moments at the end of litigation. In this section, I explore two questions that linger in my mind about this case and that I expect to encounter again in future cases involving transgender clients.

A. *Should We Have Pushed the Court to Rule that Gender Identity Is Part of Sex?*

Although I am comfortable that we made the right decision in terms of our case, and in defending the interests of our client, by signaling to the court that it need not rule on the question of whether gender identity is part of a person’s biological sex, I still cannot help but wonder whether we lost an opportunity to secure a legal ruling on that question that would have been tremendously useful in later advocacy efforts.

My residual doubts were heightened somewhat after meeting Rachael Wallbank, an outstanding lawyer from Australia, during the 2009 biennial conference of the World Professional Association of Transgender Health in Oslo, Norway. Wallbank litigated the *Kevin* case, which involved the validity of the marriage of a couple involving a transgender husband and non-transgender wife, before an Australian family court judge.

I was especially excited to meet her because she had presented evidence similar to the evidence we had presented in *Schroer*, but secured the result that had eluded us. In her case, the state argued that a person’s legal sex was determined by their chromosomal makeup, but their argument was a purely legal one, relying on the now-overruled English decision in *Corbett v. Corbett*, which held that, for purposes of assessing the validity of a transsexual person’s marriage, the chromosomal composition of the person would determine her sex and thus her ability to marry her partner.¹³⁵ Unlike in our case, the state did not put forth any expert testimony to contradict the testimony from Wallbank’s experts that an individual’s gender identity was a product of a person’s “brain sex.”¹³⁶ After hearing all of the testimony, the judge concluded that, on balance, it was more likely than not that gender identity is a product of biological influences, including brain development, and that transsexuality was a natural variation of gender that, like intersexuality, demonstrated that gender was a spectrum rather than a rigid binary.¹³⁷ While

¹³⁵ *Corbett v. Corbett*, (1970) 2 All E.R. 33.

¹³⁶ *Re Kevin* (2001) 165 F.L.R. 404, 458 (Austl.) (“In my view, the expert evidence in this case affirms that brain development is (at least) an important determinant of a person’s sense of being a man or a woman. No contrary opinion is expressed. All the experts are very well qualified. None was required for cross-examination nor was any contrary evidence called.”).

¹³⁷ *Id.* at 472-73 (“I have found on the balance of probabilities that Kevin’s sense of being a man is based on some biological characteristics of his brain. My conclusion in this case does not depend on this factual finding. However, the finding, and more generally the understanding that the medical evidence provides, tend to reinforce the conclusion that the law, like

the court's determination that Kevin's legal sex was male "[did] not depend on this factual finding,"¹³⁸ the court offered an extensive analysis about the scientific support for the argument that gender identity was a part of one's biological sex.

On review, the Full Court of the Family Court affirmed the trial judge's ruling.¹³⁹ The full court reiterated that the trial judge's decision did not depend on a finding that "brain sex" was the decisive factor in determining an individual's sex.¹⁴⁰ The court nevertheless commented that "it was open to his Honour to make this finding" that, in the case of a transsexual person, "that individual is born with a brain that recognizes him or herself as a member of the sex opposite to that whose physiological indicia he or she bears," and that this phenomenon "was probably of biological origin within the brain."¹⁴¹

The significance of such findings by a court becomes clear when you examine the ways in which transgender people continue to suffer discrimination in their daily lives. Even in jurisdictions where gender identity discrimination is explicitly prohibited by the law, courts have *sua sponte* crafted exceptions to these laws with respect to gender-segregated facilities such as restrooms. The courts reason that, whereas discrimination against someone in terms of hiring and firing is proscribed by gender identity provisions, it is not gender identity discrimination to restrict an individual's access to the facility that corresponds with his or her "biological sex." For example, in *Goins v. West Group*,¹⁴² a transgender woman sued her employer when it refused to allow her to use the female restroom at her place of employment. Minnesota law contained an explicit prohibition on discrimination due to gender identity and expression as part of its prohibition on sexual orientation discrimination.¹⁴³ Nevertheless, the court found that the employer's refusal

medicine, should treat words such as 'man' and 'woman' as referring to the reassigned sex of post-operative transsexuals.").

¹³⁸ *Id.*

¹³⁹ Attorney-Gen. for the Commonwealth v. "Kevin and Jennifer" and Human Rights and Equal Opportunity Comm'n (2003) 30 Fam. L. R. 1.

¹⁴⁰ *Id.* at 15.

¹⁴¹ *Id.* A fuller examination of the *Kevin* decisions is beyond the scope of this article, but definitely warrants deeper examination by transgender advocates.

¹⁴² 635 N.W.2d 717, 720 (Minn. 2001).

¹⁴³ Gender identity is included within the definition of "sexual orientation" in the Minnesota non-discrimination law. MINN. STAT. ANN. § 363A.03(44) (West 2009) ("'Sexual orientation' means having 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."). Advocates working to expand nondiscrimination protections to include gender identity and expression generally prefer to have it delineated as a separate category, rather than have it included as part of the definition of sexual orientation, based on their view that (1) delineating gender identity and expression separately from sexual orientation serves an educational function because the concepts are, in fact, distinct, and (2) having the items delineated separately will provide greater notice to employers that discrimination on the basis of gender identity and expression is prohibited, and will increase the likelihood that employers will take conscious

to allow a transgender woman to use the gender-identity appropriate restroom did not violate the state's prohibition on discrimination due to gender identity. The court found nothing wrong with an employer's designation of restrooms based on "biological sex," and ruled that, unless a transgender woman could prove that she was a member of that "biological sex," it was not discrimination for an employer to deny her access to the women's restroom.¹⁴⁴

Similarly, in an ACLU case from New York, the court first distorted and then dismissed an AIDS service provider's claim that it suffered illegal discrimination due to its association with transgender clients by framing the question as whether the landlord could restrict access to the women's restrooms in its building to individuals with a female "biological sex."¹⁴⁵ The action arose when the defendant landlord refused to renew the service provider's lease, citing complaints regarding the use of the building's restrooms by the organization's transgender clients.¹⁴⁶ Other tenants allegedly objected to "'men who think they're women . . . using the women's bathroom.'" ¹⁴⁷ The court assumed for purposes of argument that the state and city laws prohibiting sex and gender discrimination included gender identity, but nevertheless dismissed the claims, holding that the landlord's exclusion of certain clientele "on the same basis as all biological males and/or females are excluded from certain bathrooms—their biological sexual assignment" did not constitute discrimination at all.¹⁴⁸

If advocates had a definitive legal ruling making clear that gender identity is part of what constitutes a person's biological sex, it seems like it would—or at least should—be much more difficult to restrict the access of transgender people to gender-identity appropriate facilities simply by characterizing access restrictions as neutral rules reflecting an irrefutable biological truth about sex. I am not naïve enough to believe that a ruling in our case that gender identity is part of one's biological sex would be a panacea for discrimination against transgender people in terms of their access to sex-segregated facilities. I suspect, however, that such a ruling would have been a powerful tool in our arsenal for combating the kinds of discrimination that most regularly interfere with transgender people's ability to participate meaningfully in society.

steps to bring their workplaces into compliance with this aspect of the law. Other advocates believe that getting the substantive protections for transgender people in whatever way will appeal to legislators is more important than having the category of "gender identity and expression" spelled out as a separate and distinct protected class within a nondiscrimination law. Discussion of the advantages and drawbacks of these various approaches is a valuable exercise but beyond the scope of this article.

¹⁴⁴ *Goins*, 635 N.W.2d at 725-26.

¹⁴⁵ *Hispanic AIDS Forum v. Estate of Bruno*, 792 N.Y.S. 2d 43, 44 (N.Y. App. Div. 2005).

¹⁴⁶ *Id.* at 45.

¹⁴⁷ *Id.* at 46 (quoting Complaint).

¹⁴⁸ *Id.* at 47. The case also involved disability discrimination claims under the city and state law, which were not before the appellate court.

I recognize, of course, the limitations of relying on biological arguments to advance claims to equality, liberty, and basic human dignity. As discussed in the context of the debate over whether there is a biological or genetic explanation for a same-sex sexual orientation, framing the discussion about the source of one's gender identity in biological terms can create the impression that the claim to equality derives from a person's "innocence" with respect to the underlying condition that is triggering discrimination by third parties. Furthermore, there are many people for whom the question of gender identity is more complicated than whether they "feel like a man" or "feel like a woman" "on the inside." For them, their identity is more complicated than our current binary structure can accommodate. Until our society recognizes that its division of the world into a male-female binary simply does not reflect the range of experiences in the world, we will need to find ways to affirm the dignity and humanity of people for whom the options of male and female are neither descriptively accurate nor normatively affirming. Nevertheless, I believe that there can, and should, be a way to debunk the primacy given to certain biological manifestations of sex and gender, particularly chromosomes and genitalia, and legal advocacy regarding this issue must continue to be one option that we explore in order to achieve that goal.

B. *Should We Have Dropped Our Due Process Claim?*

After omitting any discussion of our due process claim from its ruling on the government's first motion to dismiss, the court dismissed the claim in its ruling on the government's renewed motion to dismiss. In considering our contention that Ms. Schroer had a liberty interest in making medical decisions about transition free from government penalty, the court began by noting that the constitutional right to privacy does not "'protect[] all choices made by patients and their physicians or subject[] to 'strict scrutiny' all government interference with choice of medical treatment.'" ¹⁴⁹ Rather than adopting our framework, the court applied the substantive due process analysis articulated by the Supreme Court in *Washington v. Glucksberg*, ¹⁵⁰ and found that the right to undertake a gender transition was not "'objectively, deeply rooted in . . . history and tradition,'" and therefore was not entitled to constitutional protection. ¹⁵¹ Consequently, the court ruled, Ms. Schroer had no claim that the Library had infringed upon liberty protected by the Due Process Clause. ¹⁵²

¹⁴⁹ *Schroer v. Billington*, 525 F. Supp. 2d 58, 64-65 (D.D.C. 2007) (quoting *N.Y. State Ophthalmological Soc'y v. Bowen*, 854 F.2d 1379, 1389 (D.C. Cir. 1988)).

¹⁵⁰ *Id.* at 64 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)).

¹⁵¹ *Id.* at 65.

¹⁵² *Id.* The court also noted that Ms. Schroer did not have a protected property interest in continued employment, and therefore could not bring a due process claim on those grounds.

Although we had remained hopeful that the court would accept our due process analysis, we were not completely taken by surprise when the court dismissed the claim. Between the time that we filed our complaint and when the court addressed our claim on the merits, the D.C. Circuit considered en banc, and rejected, a substantive due process claim regarding medical decision-making in a case called *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*.¹⁵³ In reaching its result, the en banc court overruled a panel decision that had approved the due process analysis that we had adopted in framing our due process claim. Specifically, the original panel considering the *Abigail Alliance* case found that the Supreme Court had approved “two distinct approaches when faced with a claim to a fundamental right,” one of which was the “personal dignity and autonomy” approach articulated in *Casey*, which was our framework for presenting our due process claim.¹⁵⁴ We had not relied on the panel decision in *Abigail Alliance* in our briefs, and the en banc court did not specifically address the panel’s assertion that the Supreme Court had approved two alternative approaches to assessing due process claims. Nevertheless, we suspected that the en banc court’s reversal of the panel’s primary holding that the plaintiff’s medical decision-making claim was cognizable using the “history and tradition” framework of *Glucksberg* would doom our due process claim.

Since the court’s dismissal of our due process claim, there have been at least two appellate level decisions that have recognized that the government must be able to justify adequately burdens on exercises of liberty that may not rise to the level of fundamental rights.¹⁵⁵ These decisions reassure me about our chances of convincing courts to adopt our framing of the due process analysis in future cases. Although the *Abigail Alliance* decision greatly handicapped our chances of prevailing on this due process claim in courts within the D.C. Circuit, I continue to believe that it added an important dimension to the case by opening up an avenue for talking about highly personal decisions like undertaking a gender transition in a manner that affords the decision the constitutional respect that such decisions are due. With that said, I worry about how the due process ruling in our case will present an obstacle that we will need to overcome when litigating transgender cases down the road. Nevertheless, I am glad that we decided not to drop the claim, and hope that, in the future, other litigants will be able to develop these arguments further to produce a positive outcome for their clients.

Id. As noted previously, we never alleged that Ms. Schroer had a property interest in the position protected by the Due Process Clause.

¹⁵³ 495 F.3d 695 (D.C. Cir. 2007) (en banc).

¹⁵⁴ *Abigail Alliance for Better Access to Dev’l Drugs v. Eschenbach*, 445 F.3d 470, 476 (D.C. Cir. 2006) (“In some cases, the Court has discerned the existence of fundamental rights by probing what ‘personal dignity and autonomy’ demand.”). See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citations omitted).

¹⁵⁵ *Cook v. Gates*, 528 F.3d 42 (1st Cir. 2008), cert. denied 129 S. Ct. 2763 (2009); *Witt v. Dep’t of the Air Force*, 527 F.3d 806 (9th Cir. 2008), rehearing en banc denied 548 F.3d 1264 (9th Cir. 2008).

CONCLUSION

Many lawyers go through an entire career without having the opportunity to represent a client like Diane Schroer. Even fewer are lucky enough to have an amazing client with a compelling story at a time when society and the law (in that order) are prepared to revisit an injustice that has been left unaddressed for many years. In our case, we attempted to breathe life into old claims that had been left for dead, and tried to think about transgender civil rights issues in new ways that would promote the equality, liberty, and dignity of a group of people whom society has all but stripped of their humanity and their hope. Overall, I believe that we succeeded, but not without experiencing a few bumps along the way. By describing the challenges that we encountered and by sharing our experience in grappling with these challenges, I hope that future advocates for transgender clients will be able to learn from and either avoid or successfully navigate the pitfalls that we encountered along the way.

The challenges that we experienced, however, are in no way unique to working with transgender clients, and I hope that this article will assist advocates both in terms of developing their client relationships and choosing litigation strategy, and preferably in that order. In terms of specific strategic decisions that we made, the risks we took in terms of framing our client's gender and in presenting a novel claim about the constitutional interests implicated by our client's decision to transition were, in my view, risks worth taking. Although we do not yet know what the fallout will be from our negative due process ruling, I continue to believe that presenting the arguments had a positive influence on the case overall in terms of affirming the autonomy and integrity of our client, and highlighting the important values at stake in the case.

Although all lawyers have a duty of care to their clients, this case reaffirmed to me that lawyers have a special duty of care to their transgender clients to preserve, as much as possible, their privacy and dignity, especially around personal transition-related decisions. Yet this case demonstrated to me just how difficult it can be to police that line between public and private. This is especially true where part of your litigation strategy involves providing information to the court in an effort to explain that embarking upon a gender transition, or making other decisions with the goal of bringing one's outward presentation into conformity with an inner truth, are decisions that implicate the most fundamental constitutional values of autonomy, self-definition, and liberty, and that transgender people should be able to make such decisions without undue government interference.

I will continue to search for opportunities to make the argument that gender identity should be considered just as much a part of a person's biological sex as one's chromosomes or genitals, although I recognize that there are both litigation and societal risks associated with relying on biological truths as a basis for asserting claims of equality, liberty, and autonomy. For

this reason, I equally look forward to more conversations with my colleagues about how we, as litigators, can find ways to convince courts that employers and businesses should not be given license to restrict the access of transgender people to important social structures like restrooms simply by couching their rules in the language of “biological sex.”

Finally and most importantly, my hope is that all lawyers, and particularly those who work with transgender people, will agree about the need to explore the kinds of issues described in this article to ensure that both lawyer and client have the same vision of what it means “to win” the case.

