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Jamie Macleod is an Assistant Professor of Law at Brooklyn Law School, where he joined the faculty in the fall of 2019. He teaches courses in criminal law, evidence, and torts. His current research focuses on statutory interpretation. Much of Jamie's research is in the field of experimental jurisprudence, which draws on methods associated with psychology and cognitive science to help address problems in legal theory and philosophy.

“Because of Sex”: Text, Objectivity, and the Search for Public Meaning

New Textualist scholars and judges focus on the ordinary, plain, public meaning of statutory language. To find it, they ask a simple empirical question: How would an ordinary reader have understood the relevant language at the time of its enactment? The question lies at the heart of the Title VII LGBT cases now pending before the Supreme Court: How would the ordinary reader have understood the statute’s language—prohibiting discrimination “because of” an employee’s “sex,” and prohibiting the employee’s “sex” from being a “motivating factor” in an adverse employment decision—in cases of sexual-orientation and transgender discrimination? Judges, lawyers, and commentators have all stipulated to the same narrow enactment-era definition of “sex,” yet as to the application of the statute’s causal language (the phrases “because of” and “motivating factor”), they’ve reached diametrically opposed conclusions. To some, “because of sex” obviously encompasses LGBT discrimination; to others, it obviously doesn’t.

Part of the new “experimental jurisprudence” movement in legal scholarship, this Article uses a novel empirical approach to answer the New Textualists’ empirical question. To reveal how ordinary readers would understand Title VII’s language, it observes ordinary readers applying that language in context, using a set of nationally representative survey experiments. The results strongly favor the employees’ claim that the statute’s original public meaning prohibits anti-LGBT workplace discrimination. Most ordinary readers say that an employer who fires an employee because of that employee’s sexual orientation or transgender status also thereby fires the employee “because of” the employee’s “sex”—even using a narrow enactment-era definition of “sex.” The results are even more stark using the statute’s “motivating factor” standard for causation. And under both statutory causation phrases, sexual-orientation discrimination claims appear no less clearly covered by Title VII than are traditional gender-stereotype discrimination claims long recognized as covered by Title VII; indeed, transgender discrimination is more clearly prohibited by the plain meaning of the statute. In short, the experimental approach provides important evidence confirming one side’s claims about public meaning and disconfirming the other side’s contrary claims.

The results also raise a broader question: what explains judges’ persistent disagreement—in the Title VII LGBT cases as in many others—over the answer to a supposedly commonsense question about ordinary language? The Article’s experimental approach suggests two answers. First, judges (and lawyers and scholars exhibiting similar disagreement) simply lack the relevant data. Traditional methods of finding public meaning—intuition, dictionaries, even corpus linguistics approaches—fail to provide the sort of information that could move interpreters toward consensus. Second, judges and scholars have overlooked implicit differences in the way they apply New Textualism’s “ordinary reader” test, which in turn reflect corresponding differences in their conceptions of “public meaning.” The Article surfaces two crucial but often overlooked axes of difference: the first concerns the type of question that one imagines the ordinary reader answering; the second concerns the extra-textual information that one imagines

the ordinary reader drawing upon to answer it. Judges' implicit resolution of each ambiguity on a case-by-case basis provides a way to avoid unwanted results, but only by sacrificing values New Textualists tout. Both ambiguities are surprisingly pervasive in New Textualist (and New Originalist) judging and scholarship, and it's unclear how New Textualists could resolve either of them in a principled manner.